



THE REFUGEE IN INTERNATIONAL LAW

FOURTH
EDITION

Guy S. Goodwin-Gill and Jane McAdam
with EMMA DUNLOP

OXFORD

The Refugee in International Law

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Fourth Edition

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Preface

International refugee law and organization are now over 100 years old, and the League of Nations first High Commissioner for Refugees, Fridtjof Nansen, had to deal with causes of displacement not so dissimilar to those facing the international community today—war and conflict, social restructuring and State building, famine and epidemic. Inspired by the League’s recognition of the principle, no less than his own humanity, he put into practice the rule of no compulsory return a decade before the word *non-refoulement* entered the vocabulary of protection.

The 1951 Convention relating to the Status of Refugees, together with the Statute of the United Nations High Commissioner for Refugees (UNHCR), is itself now 70 years old, and together they form the bedrock of today’s international protection regime. Yet all the years of experience since then seems to have bred complexity, with the Convention now the most litigated treaty in the world. The drafters would surely be surprised at the close scrutiny to which its terms are subject, but it is truly an evolving instrument with the capacity to respond to the changing needs of those in search of protection. In addition, international refugee law today is often where other disciplines converge, pause, and then move on, opening up new lines of inquiry or configuring new, much-needed perspectives.

The reasons for the extended coverage in this fourth edition are self-evident—States seem especially keen to keep those in search of refuge away from their borders, and because such measures often take place or have effect in ‘disputed’ areas, the extraterritorial dimension is contested, resulting in litigation. Civil society is also concerned, for the most part, to ensure that the recognized reasons for persecution now include gender, sexuality, and disability, and courts tend to accept that they can be factored into the refugee definition by way of interpretation. At the same time, governments incline to challenge what they consider to be unjustifiable claims to refugee status and key findings of fact, or dispute that they should provide protection at all.

Within the UN and its refugee protection agency, UNHCR, there is also an apparent disconnect between the ‘new’ tasks of protection that States want, for example, on statelessness, the internally displaced, and the impacts of climate

change; and the mechanisms, the funding for solutions, and the ever-present question of obligation. Since 2003, UNHCR's existence has been confirmed 'until the refugee problem is solved', but nothing much else has changed. Like the 1951 Convention, the UNHCR Statute and the High Commissioner's protection mandate move ahead, with precedent building slowly on precedent, even as the numbers of displaced people continue to rise, together with the budgets needed to provide protection and some assistance. States, meanwhile, are still unable to agree on which of them should take responsibility for protection, apart from limited agreements, or to engage in long-term, more equitable approaches to the movement of people. They continue to return asylum seekers to places where they are not safe, to ignore those in distress at sea, to detain people indefinitely, and to deny them any chance of a solution, of employment, or of education.

At the time of the third edition in 2007, we said that we would have to wait and see whether the European Union's harmonization efforts were indeed producing an overall positive effect. The results are mixed; today, those efforts are under review, and already there are political differences on Europe's response, and legal divergences between the ideal of universal, international protection under the Convention and the Protocol, and the effects of a 'European refugee status'. By contrast, in the Americas and in Africa, regional treaty supervisory mechanisms are beginning to have a substantial impact on the development of effective protection principles, although too often State implementation leaves much to be desired. In Asia and the Pacific, progress is less sure, but some positive markers were put down before COVID-19 interrupted.

Needless to say, the pandemic has had a negative impact on all aspects of the refugee experience, from closed borders preventing access, to restrictions on internal movement, health care and vaccination, and to discrimination in general, and the denial of resettlement and other solutions. In many cases, COVID-19 was just an excuse, and many of the limitations on protection allegedly justified by the pandemic will be challenged, using the principles of international refugee law and international human rights law. There is no good reason why those in search of refuge should be targeted, but as we know, 'no good reason' is often excuse enough for those anxious to divert attention away from dealing with fundamental issues.

In this fourth edition, we have tried to capture at least some of this complexity, to set out the law at 31 May 2021, and to encourage discussion and debate. We have considerably revised the text, while keeping to our initial thesis and focus

on three general themes, namely, the refugees themselves, asylum for refugees, and protection of refugees. After a short introduction in [Chapter 1](#) situating the issues in today's international legal and political context, [Chapter 2](#) looks at how refugees have been and are described in the law. [Chapter 3](#) then takes article 1 of the 1951 Convention as the basis for a thorough examination of the meaning of the elements of the refugee definition, while [Chapter 4](#) considers how refugee status can cease, be denied, or be lost.

In [Part 2](#), the principle of *non-refoulement* is considered across two chapters ([Chapters 5](#) and [6](#)), and two further chapters then look at protection under human rights and general international law, and at the concept of asylum ([Chapters 7](#) and [8](#), respectively). [Part 3](#) takes up 'Protection' in more detail, with [Chapter 9](#) focusing on the relevant international institutions. [Chapter 10](#) looks at the particular challenges raised by the principle of cooperation and solutions, while [Chapter 11](#) examines the implementation of international standards in national law, with particular reference to the determination of refugee status. Finally, we end with two completely new chapters: [Chapter 12](#) considers the legal implications of displacement related to the impacts of disasters and climate change, and [Chapter 13](#) considers the developing law on nationality and statelessness.

For reasons of space, regrettably we have had to forego the annexes, although a limited number can still be found in the online version. We have included a 'List of States', indicating which are party to the relevant international instruments, and which are members of UNHCR's Executive Committee (107, at the time of writing ...) or Member States of the European Union (back to 27 ...).

We hope once again to have provided a timely reminder of the inherent dignity of everyone in search of refuge, and of the fact that it is not criminal for anyone to seek asylum from persecution or other serious harm. We have tried, once again, to stress the importance of the international protection regime and its resilience and capacity to evolve. We have aimed to provide an authoritative statement of the refugee in international law, offering pointers to present and upcoming debates, and, indeed, looking towards a future in which the necessity for flight may be reduced.

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We are especially appreciative of the continued efforts of Andrew and Renata Kaldor, who had the wisdom to establish the Kaldor Centre for International Refugee Law at a crucial time in Australia's history; and to the Faculty of Law & Justice at the University of New South Wales (UNSW) which, under successive Deans, David Dixon, George Williams, and Andrew Lynch, provided the support that allowed the coming together of such an imaginative and productive team; thanks to Joyce Chia, Madeline Gleeson, Claire Higgins, Lauren Martin, Kelly Newell, Frances Nolan, Sangeetha Pillai, and Frances Voon, in particular. We are also pleased to recognize the Kaldor Centre's affiliates, including the members of its advisory and steering committees, as well as the many doctoral students (at UNSW and Oxford) with whom we have worked. Emma Dunlop gratefully acknowledges the Australian Government Research Training Program Scholarship, while Jane McAdam acknowledges the Australian Research Council which has supported a number of projects whose findings are reflected in this volume. In particular, we would like to thank the research associates who have worked on aspects of the book over the years: Fiona Chong, Sophie Duxson, Naomi Hart, and Regina Jefferies.

The study of international refugee law necessarily involves coming together and exchanging views and papers with colleagues around the world (now more often virtually, than in person). The Refugee Studies Centre in Oxford, the Refugee Law Initiative in London, and the Center for Gender and Refugee Studies at the University of California Hastings College of the Law in San

Francisco, have all been ready and willing collaborators. In addition, the following friends and colleagues responded to queries for the book or otherwise provided assistance and support through collaborative research projects with the authors: Bruce Burson, David Cantor, Cathryn Costello, Ben Doherty, Michelle Foster, Matthew Gibney, María-Teresa Gil-Bazo, Geoff Gilbert, Agnès Hurwitz, Kate Jastram, Walter Kälin, Hélène Lambert, Audrey Macklin, Violeta Moreno-Lax, Stephen Sedley, Matthew Scott, and Tamara Wood.

UNHCR is and has long been a valued partner. The Regional Office in Canberra, and representatives Thomas Albrecht and Louise Aubin, in particular, have proven to be notable and inspiring interlocutors, seeking regularly to represent the international aspects of refugee rights and State obligations to governments in a frequently difficult environment. UNHCR in Geneva, through Madeline Garlick, Volker Türk, and Kees Wouters, has likewise continued to provide encouragement and challenge our thinking.

The list could and should go on. Over the past 14 years, there have many collaborators, colleagues, friends, and doctoral students, all of whom, in one way or another, have become part of this book—we thank you for your support, robust discussion, and inspiration. We look forward to continuing the dialogue with you and with an emerging generation of scholars who, we are sure, will energize and enrich the field.

We are grateful once again to have worked with Oxford University Press, especially with Merel Alstein, Jack McNichol, and John Louth, and we extend our warm thanks as well to Arokia Anthuvan Rani and the production team at Newgen Knowledge Works.

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(correct at 30 April 2021)

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Text: 189 UNTS 150 (Convention); 606 UNTS 267 (Protocol)

Date of entry into force: 22 April 1954 (Convention); 4 October 1967 (Protocol).

Total Number of States Parties to the 1951 Convention: 146

Total Number of States Parties to the 1967 Protocol: 147

States Parties to both the Convention and Protocol: 144

States Parties to one or both of these instruments: 149

States Parties to the 1951 Convention only [C]: Madagascar, St. Kitts and Nevis

States Parties to the 1967 Protocol only [P]: Cape Verde, USA and Venezuela

States Parties which maintain the geographical limitation [G]: Congo, Madagascar, Monaco, Turkey.

Afghanistan

Albania

Algeria

Angola

Antigua & Barbuda

Argentina

Armenia

Australia

Austria

Azerbaijan

Bahamas

Belarus

Belgium

Belize

Benin

Bolivia

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Zimbabwe

2. THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS

Text: 360 UNTS 117

Entry into force: 6 June 1960

Number of States Parties: 95

Albania

Algeria

Angola

Antigua and Barbuda

Argentina

Armenia

Australia

Austria

Azerbaijan

Barbados

Belgium

Belize

Benin

Bolivia

Bosnia and Herzegovina

Botswana

Brazil

Bulgaria

Burkina Faso

Chad

Chile

Colombia

Costa Rica

Côte d'Ivoire

Croatia

Czech Republic

Denmark

Ecuador

El Salvador

Eswatini

Fiji

Finland

France

Gambia

Georgia

Germany

Greece

Guatemala

Guinea

Guinea-Bissau

Haiti

Honduras

Hungary

Iceland

Ireland

Israel

Italy

Kiribati

Korea, Republic of Latvia

Lesotho

Liberia

Libya
Liechtenstein
Lithuania
Luxembourg
Malawi
Mali
Malta
Mexico
Moldova, Republic of Montenegro
Mozambique
Netherlands
Nicaragua
Niger
Nigeria
North Macedonia
Norway
Panama
Paraguay
Peru
Philippines
Portugal
Romania
Rwanda
Senegal
Serbia
Sierra Leone
Slovakia
Slovenia
Spain
St. Vincent and the Grenadines
Sweden
Switzerland
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Uganda

Ukraine
United Kingdom
Uruguay
Zambia
Zimbabwe

3. THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS

Text: 989 UNTS 175

Entry into force: 13 December 1975

Number of States Parties: 76

Albania
Angola
Argentina
Armenia
Australia
Austria
Azerbaijan
Belgium
Belize
Benin
Bolivia
Bosnia and Herzegovina
Brazil
Bulgaria
Burkina Faso
Canada
Chad
Chile
Colombia
Costa Rica
Côte d'Ivoire
Croatia
Czech Republic
Denmark
Ecuador
Eswatini

Finland
Gambia
Georgia
Germany
Guatemala
Guinea
Guinea-Bissau
Haiti
Honduras
Hungary
Iceland
Ireland
Italy
Jamaica
Kiribati
Latvia
Lesotho
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg
Mali
Montenegro
Mozambique
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
North Macedonia
Norway
Panama
Paraguay
Peru
Portugal
Republic of Moldova

Romania
Rwanda
Senegal
Serbia
Sierra Leone
Slovakia
Spain
Sweden
Tunisia
Turkmenistan
Ukraine
United Kingdom
Uruguay

4. THE 1969 OAU CONVENTION ON THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

Text: 1000 UNTS 46

Date of entry into force: 20 June 1974

Number of States Parties: 46*

The Organization of African Unity was established in 1963, and replaced in 2002 by the African Union

Algeria
Angola
Benin
Botswana
Burundi
Burkina Faso
Cameroon
Cape Verde
Central African Republic
Chad
Congo
Congo, Democratic
Republic of
Côte d'Ivoire
Comoros

Egypt
Equatorial Guinea
Eswatini
Ethiopia
Gabon
Gambia
Ghana
Guinea
Guinea Bissau
Kenya
Lesotho
Liberia
Libya
Malawi
Mali
Mauritania
Mozambique
Niger
Nigeria
Rwanda
Senegal
Seychelles
Sierra Leone
South Africa
South Sudan
Sudan
Tanzania, United
Republic of
Togo
Tunisia
Uganda
Zambia
Zimbabwe

* Morocco, formerly a party, withdrew from the OAU in 1984, following admission of the Sahrawi Arab Democratic Republic; it joined the African Union on 31 January 2017.

5. GOVERNMENT DELEGATIONS PARTICIPATING IN THE 1984 CARTAGENA DECLARATION

Text: <http://www.unhcr.org/en-au/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>

Adopted 22 November 1984

Number of Governments participating: 10

Belize

Colombia

Costa Rica

El Salvador

Guatemala

Honduras

Mexico

Nicaragua

Panama

Venezuela

6. STATES MEMBERS OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME

Number of member States: 107

Afghanistan

Algeria

Argentina

Armenia

Australia

Austria

Azerbaijan

Bangladesh

Belarus

Belgium

Benin

Brazil

Bulgaria

Burkina Faso

Cameroon

Canada

Chad
Chile
China
Colombia
Congo
Congo, Democratic Republic of
Costa Rica
Côte d'Ivoire
Croatia
Cyprus
Czech Republic
Denmark
Djibouti
Ecuador
Egypt
Estonia
Ethiopia
Fiji
Finland
France
Georgia
Germany
Ghana
Greece
Guinea
Holy See
Hungary
Iceland
India
Iran, Islamic Republic of
Ireland
Israel
Italy
Japan
Jordan
Kenya

Korea, Republic of
Latvia
Lebanon
Lesotho
Lithuania
Luxembourg
Madagascar
Malawi
Mali
Malta
Mexico
Moldova, Republic of
Montenegro
Morocco
Mozambique
Namibia
Netherlands
New Zealand
Nicaragua
Nigeria
North Macedonia
Norway
Pakistan
Paraguay
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
Rwanda
Senegal
Serbia
Slovakia
Slovenia
Somalia
South Africa

Spain
Sudan
Sweden
Switzerland
Tanzania, United Republic of
Thailand
Togo
Tunisia
Turkey
Turkmenistan
Uganda
United Kingdom
United States of America
Uruguay
Venezuela
Yemen
Zambia
Zimbabwe

7. STATES MEMBERS OF THE EUROPEAN UNION

Number of Member States: 27

The United Kingdom left the European Union in 2020.

Austria
Belgium
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Ireland

Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden

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Selected Abbreviations

ACHR 69	American Convention on Human Rights 1969
ACHPR 81	African Charter of Human and Peoples' Rights 1981
AJIL	<i>American Journal of International Law</i>
ALR	Australian Law Reports
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
ArabCHR	Arab Charter of Human Rights 2004
ASEAN	Association of South East Asian States
Asyl	<i>Schweizerische Zeitschrift für Asylrecht und -praxis/Revue suisse pour la pratique et le droit d'asile</i>
AsylVfG	<i>Asylverfahrensgesetz</i> (Asylum Procedure Law—Germany)
AU	African Union (formerly OAU—Organization of African Unity)
AuslG	<i>Ausländergesetz</i> (Aliens Law—Germany)
AustYBIL	<i>Australian Yearbook of International Law</i>
BDIL	<i>British Digest of International Law</i> , vols. 2b–7 (1965, 1967 (C. Parry, ed.))
BGBI	<i>Bundesgesetzblatt</i> (published laws of Germany and/or Austria)
BHRC	Butterworths Human Rights Cases
BIA	Board of Immigration Appeals (US)
BverfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> (decisions of the German Federal Constitutional Court)
BverwGE	<i>Entscheidungen des Bundesverwaltungsgerichts</i> (decisions of the German Federal Administrative Court)
BYIL	<i>British Yearbook of International Law</i>
CanYIL	<i>Canadian Yearbook of International Law</i>
CAT 84	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CDR	Centre for Documentation on Refugees (UNHCR)
CE Conseil d'EtatCEAS	Common European Asylum System
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (version consolidée au 22 mars 2020)
CETS	Council of Europe Treaty Series (formerly ETS)
CFR	Code of Federal Regulations (USA)
CIREA	Centre for Information, Discussion and Exchange on Asylum
CIREFCA	International Conference on Refugees in Central America
CLR	Commonwealth Law Reports (Australia)
CNDA	Cour national du droit d'asile

CPA	Comprehensive Plan of Action for Indo-Chinese Refugees
CPRR	Commission Permanente de Recours des Réfugiés (Belgium)
CRC 89	Convention on the Rights of the Child 1989
CRDD	Convention Refugee Determination Division (Immigration and Refugee Board, Canada; now Refugee Protection Division—RPD)
CRR	Commission des recours des réfugiés (France)
CSCE	Conference on Security and Co-operation in Europe (later the OSCE—Organization for Security and Co-operation in Europe)
CSR 51	Convention relating to the Status of Refugees 1951
CTD	Convention Travel Document
Cth	Commonwealth (Australia)
DHA	Department of Humanitarian Affairs (United Nations; now OCHA—Office for the Coordination of Humanitarian Affairs)
DIP	Division of International Protection (UNHCR)
DISERO	Disembarkation Resettlement Offers
<i>Doc. réf.</i>	<i>Documentation réfugiés</i>
DORS Committee	Determination of Refugee Status Committee (Australia; see now Refugee Review Tribunal)
EC	European Community
ECHR 50	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECOSOC	Economic and Social Council of the United Nations
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEA	European Economic Area
<i>EHRLR</i>	<i>European Human Rights Law Review</i>
EHRR	European Human Rights Reports
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>EJML</i>	<i>European Journal of Migration and Law</i>
ELENA	European Legal Network on Asylum
ETS	European Treaty Series (now CETS)
EU	European Union
EWCA	England and Wales Court of Appeal
FAO	Food and Agriculture Organization
FC	Federal Court (Canada)
FC-TD	Federal Court—Trial Division (Canada)
FCA	Federal Court of Australia or Federal Court of Appeal (Canada)
FCA FC	Federal Court of Australia Full Court
FCJ	Judgments of the Federal Court of Canada (Court of Appeal and Trial Division)
FCR	Federal Court Reports (Canada)
<i>FMR</i>	<i>Forced Migration Review</i>
GCII	Second Geneva Convention for the Amelioration of the Condition of the Wounded and

	Sick and Shipwrecked Members of Armed Forces at Sea 1949
GCIII	Third Geneva Convention relative to the Treatment of Prisoners of War 1949
GCIV	Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949
Hackworth, <i>Digest</i>	Hackworth, G. H., <i>Digest of International Law</i> , 8 vols (1940–44)
Hague <i>Recueil</i>	<i>Hague Recueil des cours/Collected Courses of the Hague Academy of International Law</i>
HarvILJ	<i>Harvard International Law Journal</i>
HC	House of Commons
HC Deb.	Parliamentary Debates, House of Commons, 5th series
HCA	High Court of Australia
HL Deb.	Parliamentary Debates, House of Lords, 5th series
HRC	Human Rights Committee
HRLJ	<i>Human Rights Law Journal</i>
HRQ	<i>Human Rights Quarterly</i>
I&N Dec.	Immigration and Nationality Decisions (USA)
IARLJ	International Association of Refugee Law Judges (now International Association of Refugee and Migration Judges)
ICCPR 66	International Covenant on Civil and Political Rights 1966
ICERD 66	International Convention on the Elimination of All Forms of Racial Discrimination 1966
ICESCR 66	International Covenant on Economic, Social and Cultural Rights 1966
ICJ	International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally displaced persons
IFA	Internal flight alternative
IGCR	Inter-governmental Committee on Refugees
IJRL	<i>International Journal of Refugee Law</i>
ILA	International Law Association
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILO	International Labour Organization
ILPA	Immigration Law Practitioners' Association
ILR	International Law Reports
IMCO	Inter-governmental Maritime Consultative Organization (renamed in 1982 as the International Maritime Organization—IMO)
Imm AR	Immigration Appeals Reports
IMO	See IMCO
IMT	International Military Tribunal
INA	Immigration and Nationality Act 1952 (USA)

INLR	Immigration and Nationality Law Reports
INS	Immigration and Naturalization Service (USA; now Citizenship and Immigration Services)
IMR	<i>International Migration Review</i>
IOM	International Organization for Migration
IRB	Immigration and Refugee Board (Canada)
IRO	International Refugee Organization
JRS	<i>Journal of Refugee Studies</i>
LN	League of Nations
LNTS	League of Nations Treaty Series
MEI	Minister of Employment and Immigration (Canada)
MIMA	Minister for Immigration and Multicultural Affairs (Australia)
MIMIA	Minister for Immigration, Multicultural and Indigenous Affairs (Australia)
Moore, <i>Digest</i>	Moore, J. B., <i>Digest of International Law</i> , 8 vols. (1906).
Moore, <i>Arbitrations</i>	Moore, J. B., <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> , Washington, 1898.
NATO	North Atlantic Treaty Organization
NethQHR	<i>Netherlands Quarterly of Human Rights</i>
NGO	Non-governmental organization
NZAR	New Zealand Administrative Reports
NZLR	New Zealand Law Reports
NZSC	New Zealand Supreme Court
OAS	Organization of American States
OAU	Organization of African Unity (now AU—African Union)
OAU 69	OAU Convention on the Specific Aspects of Refugee Problems in Africa 1969
OCHA	Office for the Coordination of Humanitarian Affairs (United Nations)
OFPRA	<i>Office français de protection des réfugiés et apatrides</i>
OJ	Official Journal
OJLS	<i>Oxford Journal of Legal Studies</i>
OMCT	World Organization against Torture
OSCE	See CSCE
PCIJ	Permanent Court of International Justice
RASRO	Rescue at Sea Resettlement Offers
RDDE	<i>Revue du droit des étrangers</i>
Recueil 20**	<i>Recueils annuels de la jurisprudence de la CNDA</i>
Rome Statute	Statute of the International Criminal Court 1998
RPD	Refugee Protection Division (Immigration and Refugee Board, Canada)
RRT	Refugee Review Tribunal (Australia)
RSAC	Refugee Status Advisory Committee (Canada—see now Immigration and Refugee Board)
RSQ	<i>Refugee Survey Quarterly</i>
SAR	International Convention on Maritime Search and Rescue

Convention	
SC res.	Security Council resolution
SCJ	Judgments of the Supreme Court of Canada
SOLAS Convention	International Convention on the Safety of Life at Sea
<i>SydLR</i>	<i>Sydney Law Review</i>
TPS	Temporary Protected Status (USA)
TPV	Temporary Protection Visa (Australia)
UDHR 48	Universal Declaration of Human Rights 1948
UKHL	United Kingdom House of Lords
UKIAT	United Kingdom Immigration Appeals Tribunal (later Asylum and Immigration Tribunal, now Upper Tribunal Immigration and Asylum Chamber)
UKSC	United Kingdom Supreme Court
UN	United Nations
UNCCP	United Nations Conciliation Commission for Palestine
UNCLOS 82	UN Convention on the Law of the Sea 1982
UNDP	United Nations Development Programme
UNDRO	Office of the United Nations Disaster Relief Co-ordinator
UNGA	United Nations General Assembly
UNGA res.	United Nations General Assembly resolution
UNGAOR	United Nations General Assembly Official Records
UNHCR	Office of the United Nations High Commissioner for Refugees
UNHCR <i>Handbook</i>	<i>UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status</i> Geneva (1979, re-edited 2019)
UNICEF	United Nations Children's Fund
UNKRA	United Nations Korean Reconstruction Agency
UNPROFOR	United Nations Protection Force in Former Yugoslavia
UNRIAA	Reports of International Arbitral Awards
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
USC	United States Code
USCRI	United States Committee for Refugees and Immigrants
VG	<i>Verwaltungsgericht</i> (Administrative Court, Germany)
<i>VirgJIL</i>	<i>Virginia Journal of International Law</i>
WFP	World Food Programme
Whiteman, <i>Digest</i>	Whiteman, M. M., <i>Digest of International Law</i> , 15 vols. (1963–73)
WHO	World Health Organization
YB ILC	Yearbook of the International Law Commission
ZaöRV	<i>Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht</i>

Note to the Reader

The annexes to this volume are not included in the print edition, but can be found in the online edition:
opil.ouplaw.com/view/10.1093/law/9780198808565.001.0001/law-9780198808565.

The annexes are as follows:

1. 1950 Statute of the Office of the United Nations High Commissioner for Refugees.
2. 1951 Convention relating to the Status of Refugees.
3. 1967 Protocol relating to the Status of Refugees.
4. 1954 Convention relating to the Status of Stateless Persons.
5. 1961 Convention on the Reduction of Statelessness.
6. 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa.
7. 1984 Cartagena Declaration on Refugees.
8. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

The Refugee in International Law

1. Introduction

The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty. Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It goes some way to alleviate the plight of those affected by breaches of human rights standards or by the collapse of an existing social order in the wake of revolution, civil strife, aggression, or disaster; but it is incomplete so far as refugees and asylum seekers may still be denied even temporary protection, safe return to their homes, or compensation.¹

The international legal status of the refugee necessarily imports certain legal consequences, the most important of which is the obligation of States to respect the principle of *non-refoulement* through time. In practice, the (legal) obligation to respect this principle, independent and compelling as it is, may be difficult to isolate from the (political) options which govern the availability of solutions. The latter necessarily depend upon political factors, including whether anything can be done about the conditions which gave rise to the refugee's flight. For any solution to be ultimately satisfactory, however, the wishes of the individual cannot be entirely disregarded, for example the connections which he or she may have with one or another State.

The existence of the class of refugees in international law not only entails legal consequences for States, but also the entitlement and the responsibility to exercise protection on behalf of refugees. The Office of the United Nations High Commissioner for Refugees (UNHCR) is the agency entrusted with this function, as the representative of the international community, but States also have a protecting role, even though their material interests are not engaged, and notwithstanding their common reluctance to take up the cause. Moreover, the 'interest' of the international community is expanding, and this is raising new

legal and institutional questions on issues such as internal displacement, complex humanitarian emergencies, displacement in the context of climate change and disasters, mixed migration movements, and the ‘responsibility to protect’.

The study of refugee law, understood in the broadest sense, invites a look not only at States’ obligations with regard to the admission and treatment of refugees after entry, but also at the potential responsibility in international law of the State whose conduct or omissions cause people to leave. It is easy enough to prescribe a principle of responsibility for ‘creating’ refugees, but considerably harder to offer a more precise formulation of the underlying rights and duties. Writing over 80 years ago, Jennings posited liability on the repercussions which a refugee exodus has on the material interests of third States. In his view, conduct resulting in ‘the flooding of other States with refugee populations’ was illegal, ‘[a *fortiori*] where the refugees are compelled to enter the country of refuge in a destitute condition’.²

With developments since 1939, the bases for the liability of source countries now lie not so much in the doctrine of abuse of rights, as Jennings then suggested, as in the breach of original obligations regarding human rights and fundamental freedoms. Legal theory nevertheless remains imperfect, given the absence of clearly correlative rights in favour of a subject of international law competent to exercise protection, and the uncertain legal consequences which follow where breach of obligations leads to a refugee exodus.³ States are under a duty to cooperate with one another in accordance with the UN Charter, but the method of application of this principle in a given refugee case requires care. The promotion of orderly departure programmes, ‘managed migration’, or safe and legal pathways to protection as examples of cooperation, supposes a degree of recognition of the right to leave one’s country *and* to enter another, which is not generally and currently justified by State practice.

The practice of States certainly appears to permit the conclusion that they are bound by a general principle not to create refugee outflows and to cooperate with other States in the resolution of such problems as emerge. First, by analogy with the rule enunciated in the *Corfu Channel* case, responsibility may be attributed whenever a State, within whose territory substantial transboundary harm is generated, has knowledge or means of knowledge of the harm and the opportunity to act.⁴ Secondly, even if at a somewhat high level of generality, States now owe to the international community the duty to accord to their nationals a certain standard of treatment in the matter of human rights. Thirdly, a

State owes to other States at large (and to particular States after entry), the duty to re-admit its nationals. Fourthly, where a State acts to prevent movement, as in intercepting boats carrying asylum seekers, the established and developing principles in the context of rescue and safety of life at sea indicate clear limits to what can be done. Fifthly, every State is bound by the principle of international cooperation.⁵

A *rule* to the effect that ‘States shall not create refugees’ is too general and incomplete. An ambulatory principle nevertheless operates, obliging States to exercise care in their domestic affairs in the light of other States’ legal interests, and to cooperate in the solution of refugee problems. Such cooperation might include, as appropriate, assisting in the removal or mitigation of the causes of flight, contributing to the voluntary return of nationals abroad, and facilitating, in agreement with other States, the processes of orderly departure and family reunion. Where internal conflict or non-State actors are the primary cause of flight, the theoretical application of rules and principles may be as difficult to achieve as practical and political solutions.

Given the uncertain (and perhaps unpromising) legal situation that follows flight, increasing attention now focuses on the ways and means to *prevent* refugee outflows.⁶ The enjoyment of human rights and fundamental freedoms is conditioned, in part at least, upon the opportunity of individuals and groups to participate in and benefit from the nation and body politic, and from the sensible premise that the authority to govern derives from the will of the people as expressed in periodic and genuine elections. The responsibility of States, in turn, springs from the fact of control over territory and inhabitants. A priori, individuals and groups ought to be free to enjoy human rights in the territory with which they are connected by the internationally relevant social fact of attachment; and it is probably self-evident that this is most likely to be attained, not by imposition from outside, but where democratic and representative government, civil society, and the rule of law flourish locally.

Essential as it is to the preservation of life and liberty, the right to seek asylum from persecution and the threat of torture or other serious harm is no substitute for the fullest protection of human rights at home. Population pressure is not just a matter of numbers, but also of rural–urban migration, military and social conflict, under-development, competition over resources, deficient or faltering democratization, and people’s perception that they are not, or no longer, able to influence their own life-plans. Equally clearly, however, the responses of the

more developed world seem frequently limited to measures at their own front or back door; hence, the concentration on adding locks and bolts, on building higher walls and stronger fences, on palliatives and not remedies.

This all adds up to a less than healthy background against which to portray the panorama of rules and principles that do comprise the international legal regime of refugee protection. The sceptic may consider the ambition entirely quixotic, finding the field of displacement dominated by narrow national ideologies and the play of market forces. The preface to the first edition of this book in 1983 looked forward to a time when human rights and basic freedoms might be attainable, ‘on behalf of every man, woman, and child who has not yet chosen flight from their homeland’. Three editions and nearly 40 years later, this implicit optimism, premised on a profound belief in the human capacity to resolve problems, is certainly harder to sustain. No international lawyer, however, can help but be impressed by the extent to which human rights and individual welfare are now higher on the political and legal agenda, and by the commitment, particularly among non-governmental organizations and in regional supervisory mechanisms, to ensure that rules are followed and standards maintained. The legal and institutional challenges to fundamental principles should not be underestimated, however, and there is a continuing need to show both the continuing relevance of the rules and their necessity, in face of the social realities of displacement, of securitization, and of the generally inhibiting nature of pandemics.

The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugees. This special mandate was entrusted to UNHCR in relatively unambiguous terms in 1950, and as an actor on the international plane, its practice has contributed greatly to the formation of legal structures and the development and consolidation of rules and standards.⁷ At times, however, UNHCR has often given the impression of an agency in search of a purpose, anxious to be seen to be active and to claim turf in the ‘humanitarian space’, particularly in relation to other international organizations. This is a part of the ongoing dynamic, influenced by States’ perception of national interests and desire to take advantage of short-term gains. It has led at times to a loss of priority for its special responsibility for the protection of refugees, although some of the ground was made up initially through the Global Consultations process and other promotional work in the early 2000s, and more recently through the development of the Global Compact on Refugees, including the Comprehensive Refugee Response Framework. The

backing of key players, both donors and members generally of the UNHCR Executive Committee, will be essential if protection is once again to remain of primary importance, although there is always a danger it may be overcome by concerns of the moment or longer, including security, migration, globalization, and, most recently, a global pandemic that has closed borders in a manner unprecedented in modern times. The UN's capacity to respond effectively to complex and other humanitarian emergencies, including both internal and external displacement, remains under review, and both UNHCR and other bodies, such as the Office of the United Nations High Commissioner for Human Rights and the International Organization for Migration, will need to ensure that protection principles are effectively integrated into policy planning and implementation.

2. The refugee in the law and practice of the United Nations Security Council

Cross-border movements of refugees trigger legal principles like protection and *non-refoulement*, or activate the institutional responsibilities of organizations such as UNHCR. Increasingly, however, such facts are acquiring another juridical relevance in the practice of the United Nations, and may come to influence the conduct of States and the development of the law. For example, the Security Council is now regularly faced with issues of internal and inter-State conflict, genocide, massive violations of human rights, terrorist acts, crimes against humanity, and climate change, any of which may call for the exercise of its responsibilities, generally and under Chapter VII of the UN Charter. In addition, the actual displacement of populations may also be perceived as a threat to international peace and security, or as contributing to such a threat.

Leaving aside for the moment the perennial problem of the veto, the involvement of the Security Council in forced migration, refugee flows, and population displacement—as well as in the frequently related issues of genocide, war crimes, and crimes against humanity—invites attention to the nature of its role, and to whether it ought to be an actor in the field, and whether it can indeed exercise a ‘responsibility to protect’. In addition, States need to consider the legal implications for themselves, both as Members of the United Nations and as directly affected by decisions and developments in these areas. It is not always clear to what extent law plays a part in Security Council deliberations and

practice, and whether principles such as *non-refoulement* and asylum are given any weight when set alongside the overall goal of restoring or maintaining international peace and security. Nevertheless, a review of practice confirms certain elements in an emerging international community interest.

First, the right of refugees and the displaced to return to their homes has been clearly and emphatically affirmed, together with the responsibility of the State of origin to ensure conditions which will allow such return in freedom and dignity.⁸ Secondly, the responsibility of individuals who have contributed to or caused flight by their involvement in genocide, war crimes, or crimes against humanity, has been progressively and substantially developed in principle and in the practical application of international criminal law. Thirdly, the right of access to refugees and civilian populations at risk, including the internally displaced, is now regularly insisted upon, most notably in the elaboration of the International Law Commission's draft articles on the protection of persons in the event of disasters;⁹ this has obvious implications for both refugee-receiving and refugee-producing countries.

3. The refugee in national and international law

Refugee protection is not only about the rules governing the relations between States, but also about how States themselves treat those in search of asylum. The substantial growth and elaboration of refugee status determination procedures, and the equally substantial body of jurisprudence that accompanies it at various levels of appeal, have exposed the words of the 1951 Convention relating to the Status of Refugees to close scrutiny, often apparently at one or more removes from its protection objectives. Besides questions of evidence and proof, national determination bodies have also considered the questions of attribution and causation—whether a claimant, for example, in fact fears persecution for reasons of, or on account of, his or her political opinion, given the motives of the persecutor, if any; whether prosecution and punishment under a law of general application can amount to persecution, in the absence of evidence of discriminatory application; whether a single act of an otherwise non-political claimant should be characterized as (sufficiently) political to qualify the resulting treatment or punishment as persecution within the meaning of the Convention; whether the refugee definition implies and requires ‘good faith’ conduct on the part of the claimant; whether conscientious objection to military service can form

a sufficient basis for a refugee claim, and if so, in what circumstances; whether ‘political offenders’ are refugees; whether the notion of ‘particular social group’ is flexible enough to encompass any number of groups and categories in search of protection; and whether and to what extent human rights law contributes to, or complements, protection in refugee and analogous claims.

No treaty is self-applying and the meaning of words, such as ‘well-founded’, ‘persecution’, ‘expel’, ‘return’, or ‘*refouler*’, is by no means self-evident.¹⁰ The Vienna Convention on the Law of Treaties confirms that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.¹¹ For the Refugee Convention, this means interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to ‘refugees the widest possible exercise of ... fundamental rights and freedoms’.¹²

Article 31(3) of the Vienna Convention provides further that account shall also be taken of any subsequent agreement between the parties, or any subsequent practice bearing on the interpretation of the treaty, as well as ‘any relevant rules of international law applicable in the relations between the parties’. This subsequent agreement and practice can be derived or inferred, amongst others, from the actions of the States parties at the diplomatic level, including the adoption or promulgation of unilateral interpretative declarations; and at the national level, in the promulgation of laws and the implementation of policies and practices. The rules of treaty interpretation permit recourse to ‘supplementary means of interpretation’ (including the preparatory work, or *travaux préparatoires*) only where the meaning of the treaty language is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.¹³ If the meaning of the treaty is clear from its text when viewed in light of its context, object, and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged.¹⁴

During the Conference leading up to the Vienna Convention on the Law of Treaties, the United States and the United Kingdom adopted opposing positions on resort to preparatory works, the former favouring their use and the latter, together with France, arguing against the practice. The United Kingdom objected that:

[p]reparation work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiations, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation.¹⁵

Or, as the French put it, ‘It was much less hazardous and much more equitable when ascertaining the intention of the parties to rely on what they had agreed in writing, rather than to seek outside the text elements of intent which were far more unreliable, scattered as they were through incomplete or unilateral documents.’¹⁶

International courts occasionally resort to the preparatory works, but within fairly well-defined limits which make it clear that the ‘natural and ordinary meaning’ ought generally to prevail.¹⁷ For better or worse, refugee status decision-makers (and commentators ...) make frequent use of the *travaux préparatoires* to the 1951 Convention. Many key terms are vague, undefined, and open to interpretation, but the results of inquiry into the background can be rather mixed. On the one hand, clear statements of drafting intentions are rare; yet, on the other hand, the debates in the General Assembly, the Third Committee, the Economic and Social Council and, to a lesser extent, at the 1951 Conference itself, provide a fascinating insight into the politics of a highly sensitive and emotive issue. If some sentiments and statements seem frozen in time, others show the continuity of concern and, perhaps too rarely, confirmation of a pervasive humanitarianism.¹⁸

What is looked for in the interpretative context then is a common jurisprudence, a melding of national and international law. This may come about with or without the assistance of the *travaux préparatoires*, and if not actually in direct pursuit of the ‘one true meaning’, then by way of harmonious application of terms consistently with their natural and ordinary meaning and the fundamental goal of protection.

4. Protection

Indeed, the jurisprudence that has developed around the 1951 Convention has

often taken the drafting history into account, and has also contributed to a theoretical appreciation of the rationale for refugee law. Whether the influence is always actually or potentially positive (for refugees) certainly deserves further inquiry, as the example of ‘surrogacy’ or ‘surrogate protection’ may show.

Like many glosses on the meaning of words, the notion of ‘surrogacy’ can serve as a useful introduction to the system of international protection. It describes, succinctly, what happens when an international organization or a State steps in to provide the protection which the refugee’s own State, by definition, cannot or will not provide. However, ‘surrogacy’ can also be misleading. While it owes its origins, in descriptive use, to the surrogate as someone who acts for or takes the place of another, in practice in the refugee context it has tended to displace the individual and his or her well-founded fear of persecution. In a leading ‘social group’ case, *Ward*, the Federal Court of Canada identified as a ‘fundamental principle’, that international protection is to serve as ‘surrogate protection’ when national protection cannot be secured.¹⁹ On appeal, the Supreme Court of Canada also noted:

Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant ... reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant.²⁰

‘Assumptions’ are seductive excuses. They rely on absolutes (‘no alternative’) which may resonate rhetorically but are too far removed from personal circumstances and the elusive nature of security, stability, and protection. Instead of protection being driven, as it might be, by a focus on the individual at risk, the shift is to the State of origin and its capacity, actual or supposed, to provide protection; and then, in a corollary move, to the State of refuge and the extent of its obligations, if any, to provide protection instead.²¹ The object and purpose of the 1951 Convention/1967 Protocol, as that also of the regime of complementary protection, are thus one step further removed from the individual human being, considered in social and political context.

The Convention definition as the emblematic paradigm of protection begins with the refugee as someone with a well-founded fear of being persecuted, and only secondly, as someone who is unable or unwilling, by reason of such fear, to use or take advantage of the protection of their government. In our view, the

Convention's first point of reference is the individual, particularly as a rights-holder, rather than the system of government and its efficacy or intent in relation to protection, relevant as these elements are to the well-founded dimension. Historically, the references to protection in article 1 were seen primarily as references to diplomatic and consular protection, rather than to the effectiveness of a State and its system of government to ensure rights at home. With the progressive evolution of refugee law and doctrine comes authority for the view today that such local or territorial protection has become an integral part of the refugee definition and the determination that a well-founded fear of persecution exists.²²

Under the influence of the notion of surrogacy, however, the balance of emphasis has shifted, and the major premise is substituted by the minor.²³ The words of article 1A(2) show that the fundamental question is that of risk of relevant harm, and in this context surrogacy is an unnecessarily distracting and complicating factor, adding yet one more burden to the applicant in an already complex process. Reading 'surrogacy' back into the refugee definition tends, as elements in the jurisprudence show, to downplay and even to trump the individual's fear of persecution, while giving preference to the State and its efforts to provide a reasonably effective and competent police and judicial system which operates compatibly with minimum international standards.²⁴

In his study of the human rights obligations of non-State actors, Clapham is rightly critical of another UK House of Lords' judgment, *Bagdanavicius*. The Court there held (on what was argued finally as an article 3 of the European Convention on Human Rights appeal) that to avoid expulsion the applicant needed to establish not only that he or she would be at real risk of suffering serious harm from non-State agents, but also that the country of origin did not provide 'a reasonable level of protection against such harm' for those within its territory.²⁵ Clapham calls attention to the following 'conceptual point' in the judgment of Lord Brown, which has also been employed in the determination of persecution in the refugee context:

'Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them; what, however, would transform such violent treatment into article 3 treatment would be the state's failure to provide reasonable protection against it.'²⁶

As Clapham points out, this is not how human rights treaty bodies approach the

issue, even if it dominates refugee law.

The whole ethos of humanitarian protection argues against such a judgmental approach with regard to the receiving state ... [T]he only criterion under human rights treaty law is whether the person will be subject to a substantial risk of harm from the non-state actor. If there is such a risk, the human rights treaty obligation on the sending state should prevent such a state from sending individuals into harm's way.²⁷

5. A future circumscribed, or free?

All of the above offers a basis for reconsidering protection in a world which appears irrevocably altered by Covid-19, but which is nonetheless substantially configured by a century of relevant practice—100 years since the League of Nations appointed its first High Commissioner for Refugees in 1921, and 70 years since the adoption of the Refugee Convention in 1951. Ironically, in 1921 the world was also facing a health crisis. The Spanish flu was winding down, but in Poland an epidemic of typhus and related diseases had struck, while in Russia, the Volga region, and the Ukraine, a major famine was at the root of disease and a desperate movement in search of food.²⁸

In 2021, some of the effects of Covid-19 are clear.²⁹ It knows no boundaries, but is unlike the diseases of the past, bringing about a more or less complete travel ban and rigorous control over what remains. In time of emergency, the required rule is easy to set out—control measures may be taken, but should be no more intrusive or restrictive than what is required to achieve, restore, and maintain an appropriate level of health protection. But, as in so much, border closure and travel restriction are ultimately matters for each State to determine, even if ‘with due regard’ to the impact on the interests of others and bearing in mind that measures of derogation are there to permit and to facilitate a return to ‘normality’. Clearly, the less invasive is viable, and screening and quarantine will allow the State to deal with Covid-19 and to uphold basic principles of protection. But even denials of entry for citizens have been enforced, while refugees and asylum seekers have faced yet another obstacle to flight, one which is harder to surmount and harder still to justify; ‘zero-risk’ is difficult to oppose, and many States make no provision and no exception for those who might have good reason to flee.

Asylum seekers continue to cross the Mediterranean and other seas and land routes in search of safety, or a better life, and they may well find that, whether

intercepted or rescued at sea or simply arriving, their first stop will be a reception or processing centre, on an island, likely as not, but on the fringes of safety and security. Generally overcrowded, unsanitary, with basic services and a modicum of health or legal advice, these centres may become the first and last port of call for those seeking refuge. Characterized by removals and returns from time to time, with the occasional grant of asylum or third country resettlement, these reception facilities may be where the new dynamic evolves, through unending struggle. Meanwhile, on the outside, for those who manage to leap-frog or skirt the centres, there will remain a life on the margin, in legal and administrative limbo.

An alternative is there, nevertheless, but it supposes a degree of cooperation and collaboration across a common agenda which ‘populist’ politics are believed to oppose; namely, the protection of everyone on the move; asylum for those who need it; employment and education where there is room and need; return to countries of origin in safety and dignity and with an eye on development.

All that is simple, and ought to be well-understood. But the foreigner, the migrant, the refugee, the other, is too easily distinguished and exploited for political ends—seen and portrayed, not as a human being, but as a threat to security, whether economic, health, social, political, religious. People have always moved and they always will. People have resisted movement, tried to control it, to manage it, to call it temporary. The danger is that processing and reception ‘facilities’ will become the preferred option, and that States will be encouraged to think their sovereign competence to decide migration and community membership issues means that whatever they decide to do will hold up, no matter its basic inhumanity.

States, it has been said, tend to think about helping refugees as a duty of rescue, and ignore the harm done, and they have set up a protection system that fundamentally denies refugees the ability to access the minimum conditions of material support, autonomy, and security.³⁰ But there are other ways to construct policy, by thinking *first* about protection, and seeing what can be done in the light of that principle, rather than despite it. Instead of reception centres at borders, without access to a fair procedure or any procedure and at risk of *refoulement*, think about compliance with international law, about solidarity and cooperation with other States and with civil society, about inclusion not exclusion, about safe and legal pathways—about what the refugee and the migrant can and will do for us. Of course, check for health as for everything else, but above all, think about treating the refugee, the migrant, the asylum seeker, as

another one of us—about non-discrimination in the common interest.

We have argued this before, but it is time, too, to think beyond the temporary, and to recognize that refugees remain refugees longer now than might be imagined. This has implications for development, education, and infrastructure. But it is also about leaving no one behind en route to the sustainable development goals, about disaster risk reduction, about climate change adaptation, and, central to the lives of refugees, about ensuring that they are allowed to work and to contribute to the society which now helps them.

The status of the refugee in international law, and of every other person who is entitled to protection, has always been precarious, not least in times of polemicized debate. In this work, we have aimed to indicate with some precision the fundamental interests which must be protected as a matter of law, if the inherent worth and dignity of the individual in flight or otherwise on the move are to be upheld, and if solutions commensurate with human needs are to be found.

¹ To what extent one should seek to fill every gap is a moot point, and indeed may compromise another objective, namely, the right of everyone ‘to belong—or alternatively to move in an orderly fashion to seek work, decent living conditions and freedom from strife’: Sadruddin Aga Khan, *Study on Human Rights and Mass Exodus*: UN doc. E/CN.4/1503 (31 Dec. 1981) para. 9.

² Jennings, R. Y., ‘Some International Law Aspects of the Refugee Question’ (1939) 20 *BYIL* 98, 111; see also at 112–13: ‘Domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas*. And for a State to employ these rights with the avowed purpose of saddling other States with unwanted sections of its population is as clear an abuse of right as can be imagined.’ See also Ferstman, C., *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2018) 118–21; Klabbers, J., ‘The Accountability of International Organizations in Refugee and Migration Law’, in Costello, C., Foster, M., & McAdam J., eds., *The Oxford Handbook of International Refugee Law* (2021); and Mann, I., ‘Border Crimes as Crimes against Humanity’, in Costello, C., Foster, M., & McAdam J., eds., *The Oxford Handbook of International Refugee Law* (2021).

³ The extent to which ‘traditional’ rules of State responsibility are, or can be made, relevant to refugee issues, particularly flight, is open to debate. Even with regard to the protection of those who have already left their country, theoretical and practical problems remain, as the discussion throughout this book will show.

⁴ *Corfu Channel case* [1949] ICJ Rep. 4. To compare the flow of refugees with the flow of, for example, noxious fumes may appear invidious; the basic issue, however, is the

responsibility which derives from the fact of control over territory, a point clearly made by the International Court of Justice in its Advisory Opinion in the *Namibia case* [1971] ICJ Rep. 16, at 54 (para. 118).

⁵ Wall, P., ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 29 *IJRL* 201; Dowd, R. & McAdam, J., ‘International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?’ (2017) 66 *ICLQ* 863; Inder, C., ‘The Origins of “Burden Sharing” in the Contemporary Refugee Protection Regime’ (2017) 29 *IJRL* 523; Türk, V. & Garlick, M., ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28 *IJRL* 656.

⁶ A number of attempts have been made to devise more ‘equitable’ systems for dealing with the effects of refugee movements, for example, by the allocation of refugees to States in light of their relative well-being, space, and capacity; see, for example, European Commission, Press release, ‘Refugee Crisis: European Commission takes decisive action’ (9 Sep. 2015); European Commission, Communication to the European Parliament, the European Council, and the Council, ‘Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration’, Brussels (29 September 2015) COM(2015) 490 final; Grahl-Madsen, A., *Territorial Asylum* (1980) 102–14; Hathaway, J. C., ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *HarvILJ* 129; Hilpold, P., ‘Quotas as an instrument of burden-sharing in international refugee law: The many facets of an instrument still in the making’ (2017) 15 *International Journal of Constitutional Law* 1188.

⁷ See Goodwin-Gill, G. S., ‘The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law’ (2020) 69 *ICLQ* 1.

⁸ See, for example, SC res. 2514 (2020) on Sudan and South Sudan; SC res. 2502 (2019) on the Democratic Republic of the Congo; SC res. 836 (1993) on Bosnia and Herzegovina; SC res. 1239 (1999) on Kosovo and the Federal Republic of Yugoslavia; SC res. 1244 (1999) on Kosovo.

⁹ See UNGA res. 73/209, ‘Protection of persons in the event of disasters’ (20 Dec. 2018); *Report of the ILC*, 68th Sess., UN doc. A/71/10, Ch. IV. See, in particular, art. 11, ‘Duty of the affected State to seek external assistance’; art. 13, ‘Consent of the affected State to external assistance’—while consent is required, it shall not be withheld arbitrarily.

¹⁰ See Goodwin-Gill, G. S., ‘The Search for the One, True Meaning ...’, in Goodwin-Gill, G. S. & Lambert, H., eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010) 204.

¹¹ Art. 31(1), 1969 Vienna Convention on the Law of Treaties: 1155 UNTS 331.

¹² Preamble, 1951 Convention relating to the Status of Refugees: 189 UNTS 150. For States party, see ‘List of States’, xix.

¹³ Art. 32 of the 1969 Vienna Convention (ⁿ 11) provides: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the

circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

¹⁴ This principle has long been established in international law; see, for example, *Interpretation of Article 3(2) of the Treaty of Lausanne* (1925) PCIJ (Ser. B) No. 12, at 22; *The Lotus* case, 1927 PCIJ (Ser. A) No. 10, at 16; *Admission to the United Nations* case [1950] ICJ Rep. 8. See, generally, American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987) vol. 1, § 325; Lord McNair, *The Law of Treaties* (1961) Ch. XXIII.

¹⁵ Vienna Conference Records: UN doc. A/CONF.39/11 (1968) 178.

¹⁶ Ibid., 176.

¹⁷ *Interpretation of Article 3(2) of the Treaty of Lausanne* (ⁿ 14) 22. See also *The Lotus* case (ⁿ 14) 16: '[t]here is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself'; *Admission to the United Nations* case (ⁿ 14).

¹⁸ More to the point, fewer than 30 States were involved in drafting the 1951 Convention, to which nearly 150 States are now party; subsequently ratifying States may have come to the text with very specific ideas about meaning.

¹⁹ *Attorney General v Ward* [1990] 2 FC 667, 67 DLR (4th) 1.

²⁰ *Attorney General v Ward* [1993] 2 SCR 689.

²¹ In the words of La Forest J in *Ward*: 'Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already': ibid., 726.

²² See Lord Carswell in *Januzi and Others v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 WLR 297, para. 66, citing Fortin, A., 'The Meaning of "Protection" in the Refugee Definition' (2001) 12 *IJRL* 548, but finding a shift in meaning. See also McAdam, J., 'Rethinking the Origins of "Persecution" in Refugee Law' (2013) 25 *IJRL* 667. On the 'accountability' and 'protection' approaches, see Kälin, W., 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415.

²³ See Lord Hope's comment in *Horvath v Secretary of State for the Home Department* on the analysis (by Lord Lloyd in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 304) of the refugee definition in terms of two tests, namely, the fear test and the protection test. In Lord Hope's view, 'the two tests are nevertheless linked to each other by the concepts which are to be found by looking to the purposes of the Convention. The surrogacy principle which underlies the issue of state protection is *at the root of the whole matter*': *Horvath* [2001] 1 AC 489, 497 (emphasis supplied). The refugee definition has been approached sequentially, whereas it ought to be approached disjunctively: a refugee is someone outside their country of origin because of a well-founded fear of persecution. It is a characteristic of the refugee's condition that he or she is unable or unwilling to avail

themselves of the protection of their country of origin, but that is only a condition of recognition of status so far as the facts may show that the fear is not well-founded.

²⁴ The surrogacy approach also fits well within traditional perceptions of the nation-State/citizen relationship, where the individual is still today with difficulty conceived of as a human rights holder, let alone as a subject of international law.

²⁵ *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 WLR 1359, [2005] UKHL 38, para. 30 (Lord Brown).

²⁶ Ibid., para. 24.

²⁷ Clapham, A., *Human Rights Obligations of Non-State Actors* (2006) 335–41, 340 ff. Applied to the asylum context, the ‘receiving State’ here is the State of origin, nationality, or transit, to which the ‘sending State’ proposes to remove the individual.

²⁸ See, for example, League of Nations, ‘The Epidemic of Typhus in Central Europe’ (1920) 1 *LNOJ* 255; ‘Minutes of the Meeting of the Advisory Board of the League of Nations Epidemic Commission, held in Warsaw, 15 April 1921’: LoN doc. C.91.M.50.1921.IV (6 Jun. 1921); ‘Epidemic Commission of the League, Second Annual Report of the Commission, 1 Aug. 1922’: LoN doc. C.563.M.421.1922.III (24 Aug. 1922); ‘Report on the Health Situation in Eastern Europe in January 1922’: LoN doc. C.99.M.54.1922.III; ‘Report on Economic Conditions in Russia with Special Reference to the Famine of 1921-1922 and the State of Agriculture’: LoN doc. C.705.M.451.1922.II.

²⁹ United Nations, ‘Policy Brief: COVID-19 and People on the Move’ (Jun. 2020).

³⁰ Parekh, S., ‘Justice for migrants and refugees: A discussion of Gillian Brock’s *Justice for People on the Move* by the author of *No Refuge*’ (2020) 16 *Journal of Global Ethics* 139: <https://doi.org/10.1080/17449626.2020.1799058>. The two books reviewed are Brock, G., *Justice for People on the Move: Migration in Challenging Times* (2020) and Parekh, S., *No Refuge: Ethics and the Global Refugee Crisis* (2020).

PART 1

REFUGEES

Refugees Defined and Described

1. Refugees

The term ‘refugee’ is a term of art, that is, a term with a content verifiable according to principles of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety. Likewise, the reasons for flight may be many; flight from oppression, from a threat to life or liberty; flight from prosecution; flight from deprivation, from grinding poverty; flight from war or civil strife; flight from disasters, whether earthquake, flood, drought, famine. Implicit in the ordinary meaning of the word ‘refugee’ lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight. The ‘fugitive’ from justice, the person fleeing criminal prosecution for breach of the law in its ordinary and non-political aspect, is therefore often excepted from this category of refugees.¹

For the purposes of international law, States have further limited the concept of the refugee. For example, ‘economic refugees’ and ‘climate refugees’—the terms have long been disfavoured, but are increasingly common—are not included. The solution to their problem, if any, lies more within the provinces of managed migration and of international aid and development, rather than in the institution of asylum, considered as protection of whatever duration on the territory of another State.

Defining refugees may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress. On the one hand, States have nevertheless insisted on fairly restrictive criteria for identifying those who benefit from refugee status and asylum or local protection. For the victims of natural calamities,² the very fact of need may be the sufficient indicator, but for the victims of conditions or disasters with a human origin, additional factors are required. The purpose of any definition or description of the class of refugees will vary, depending on its function in any particular organizational or State context. On the other hand, the definition or description

may facilitate and justify aid and protection, while satisfying the relevant criteria ought in practice to indicate entitlement to the pertinent rights or benefits. In determining the content in international law of the class of refugees, therefore, the traditional sources—treaties and the practice of States—must be examined, with account taken also of the normative impact of the practice and procedures of the various bodies established by the international community to deal with the problems of refugees.

2. Refugees defined in international instruments 1922–46

Treaties and arrangements concluded under the auspices of the League of Nations began with a focus on particular national groups. That someone was (a) outside their country of origin and (b) without the protection of the government of that or any other State, were sufficient and necessary conditions. A Russian refugee, for example, was defined in 1926 to include ‘any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality’.³ In this instance, presence outside the country of origin was not explicitly required, but was implicit in the objectives of the arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement.⁴ Later definitions applied this standard formula to other categories of refugees, often but not always defined by national group. Even when social and political upheaval was accepted as giving content and meaning to refugee definitions, these remained circumscribed by particular crises and linked to ethnic or national origin.

A similar approach was employed in 1936 arrangements for those fleeing Germany,⁵ which were later developed by article 1 of the 1938 Convention, to cover:

- (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or 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.⁶

Article 1(2) excluded from the definition persons who left Germany for reasons of purely personal convenience.

Nevertheless, in the practice of the League, determining whom to protect was a selective, political process.⁷ In a 1926 report, the High Commissioner identified over 150,000 people from eight national categories in analogous circumstances to Russian and Armenian refugees: 150 Assyrians and a small number of Montenegrin in France; 19,000 Assyro-Chaldeans in the Caucasus and Greece; 9,000 Ruthenes in Austria and Czechoslovakia; 100,000 refugees in Central Europe (including 10,000 former Hungarians in Austria, France, and Romania); 16,000 Jews in Romania; and 150 Turks in Greece.⁸ In choosing to extend legal protection to only a fraction,⁹ the space and the necessity for ‘complementary protection’ were created.¹⁰ Protection gaps necessarily result when refugee definitions become divorced from events—the social and political reality—which actually produces refugees.¹¹

The *ad hoc* expansion of protection during the time of the League of Nations was partly the result of concern not to arouse the hostility of certain member or potential member States. Sjöberg argues that this attitude largely explains opposition to the incorporation of Italian and Spanish refugees within the League’s mandate.¹² The Italian government had strenuously opposed their inclusion, ‘and most of the member states of the League Council were not willing to provoke Mussolini on such a comparatively minor issue’.¹³

Throughout the 1930s, one of the most contentious issues was the continuing and increasing exodus from Hitler’s Germany. At a meeting in Evian in 1938, participating States resolved to establish an Inter-governmental Committee on Refugees with, as its primary objective, ‘facilitating involuntary emigration from Germany (including Austria)’.¹⁴ Included within the scope of the committee’s activities were those who had yet to emigrate on account of their political opinions, religious beliefs, or racial origin, as well as those who had already left for these reasons and had not established themselves elsewhere.¹⁵ A major review at the Bermuda Conference in April 1943 expanded the mandate to include ‘all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs’.¹⁶

Commenting on definitions, Simpson observed already in 1938 that they each had certain inherent deficiencies. He stressed the importance of keeping in view

the ‘essential quality’ of the refugee as one ‘who has sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in his former territory impossible or intolerable’.¹⁷ This description is in turn something of an abstraction from what was known then about the ‘political events’ producing refugees. While the notion of the impossibility or intolerability of continued residence illustrates the problem of the refugee in broad strokes, after the Second World War more precise criteria emerged. This is evident first in the Constitution of the International Refugee Organization (IRO), then in the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), and finally in the provisions of the 1951 Convention relating to the Status of Refugees. In a little less than five years, the preferred approach to refugee definition moved from a basis in flexible or open groups and categories, to an apparently more closed and legalistic one.

The Constitution of the IRO continued the practice of earlier instruments, and specified certain categories to be assisted.¹⁸ ‘Refugees’ thus included victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, as well as persons considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality, or political opinion. The IRO was also competent to assist ‘displaced persons’, including those deported or expelled from their own countries, some of whom had been sent to undertake forced labour.¹⁹ In addition, the IRO Constitution included as refugees those unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence. It expressly recognized that individuals might have ‘valid objections’ to returning to their country of origin, including ‘persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions,’ and objections ‘of a political nature judged by the [IRO] to be valid’.²⁰

In 1949, the UN began to look forward to a post-IRO period. Several States were opposed to the adoption of a broad approach, considering it essential clearly to identify refugees who were in need of international protection. The United States favoured a narrow definition of those who would fall within the competence of a new, temporary agency, a de-emphasis of resettlement, and concentration on ‘legal protection’ pending integration in countries of refuge, as opposed to assistance or similar activities; the main purpose was to prevent

refugees becoming a liability to the international community. Other refugee categories, such as those created by population transfers, were mostly entitled to rights afforded by their countries of residence, and thus in no need of international protection.²¹ Apart from those countries actually having to deal with large populations of ‘national refugees’,²² a consensus emerged that such refugees were not ‘an international problem’, and did not require international protection.

3. Refugees for the purposes of the United Nations

The Office of the United Nations High Commissioner for Refugees (UNHCR) succeeded the IRO as the principal UN agency concerned with refugees; the scope and extent of its competence are considered more fully below, taking account of the impact of developments within the UN, including article 14(1) of the Universal Declaration of Human Rights,²³ the relation of ‘asylum’²⁴ to persecution, the adoption of the 1967 Declaration on Territorial Asylum, and the emergence and consolidation of a human rights base for protection. The foundations for an international legal concept of the refugee are thus securely fixed in treaties, State and United Nations practice, and in the Statute of the UNHCR.²⁵

3.1 Statute of the United Nations High Commissioner for Refugees (UNHCR)

UNHCR was established by the General Assembly to provide ‘international protection’ and to seek ‘permanent solutions for the problem of refugees’. According to its Statute, the work of the Office shall be of an entirely non-political character—it is to be ‘humanitarian’ and ‘social’ and to relate, as a rule, to groups and categories of refugees.²⁶

The Statute first brings within UNHCR’s competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from events occurring before 1 January 1951, who are outside their country of origin²⁷ and unable or unwilling to avail themselves of its protection, ‘owing to well-founded fear of being persecuted’ or ‘for reasons other than personal convenience’.²⁸ Finally, the Statute extends to:

Any other 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 nationality, or, if he has no nationality, to return to the country of his former habitual residence.

This description is of universal application, containing neither temporal nor geographical limitations. The substantive or ideological criteria are nevertheless a significant restriction on the scope of refugees ‘strictly so-called’, who must establish a well-founded fear of persecution on one or more of the stated grounds. Whether they must also *prove* a lack of protection is debatable.²⁹

UNHCR’s statutory definition remains a critical point of departure in determining who is entitled to the protection and assistance of the United Nations, for it is the lack of *protection* by their own government which has traditionally distinguished refugees from ordinary foreigners. In its influential 1949 Report, *A Study of Statelessness*, the United Nations treated refugees as more or less equivalent to ‘stateless persons *de facto*’, whom it identified as:

[p]ersons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.³⁰

What distinguished such a person from another foreigner with a nationality was precisely the *assistance* of his or her government which the latter enjoyed, and the benefits of its ‘collaboration’ with the authorities of the foreign country. In this sense, protection by the national government only rarely takes the form of ‘representations’, but more often manifests itself, for example, in efforts to improve the status of citizens abroad, particularly through treaties; oversight of such conventions and action to ensure that the rights granted to citizens are actually respected; consular services, including recommending citizens to the authorities of the country concerned; the provision of passports enabling citizens to travel abroad; the provision and certification of the various documents essential to regular life; and the provision of emergency relief and repatriation. Seen from this perspective of diplomatic and consular protection and assistance, the stateless person is clearly at a disadvantage, and will likely also be viewed with distrust and suspicion.³¹ In the face of this lacuna, ‘international protection’

was therefore seen primarily as something to be provided to refugees and stateless persons.³² The UN Study also emphasized that:

The conferment of a status is not sufficient in itself to regularize the standing of stateless persons and to bring them into the orbit of the law; they must also be linked to an independent organ which would to some extent make up for the absence of national protection and render them certain services which the authorities of a country of origin render to their nationals resident abroad.³³

In its view, moreover, that ‘independent organ’ would need to work in close collaboration with the governments of reception countries, and as its functions would be of an official nature, so it should be inter-governmental in character.

In attempting to make good the deficiency of national protection, the international protection agency should therefore aim to protect the refugee’s basic human rights, including the right to life, liberty, and security of the person.³⁴ Simultaneously, ‘protection activities’ will need to focus on specific issues peculiar to the refugee: for example, ensuring that no refugee is returned to a country in which he or she will be in danger; ensuring that asylum seekers have access to an informed procedure and that every refugee is recognized as such, that asylum is granted, that expulsion is prevented, that travel and identity documents are issued. It follows that any intervention with governments must have a sound jurisdictional base, especially when made in a political context that is hostile to asylum, or in which laws, regulations, and practice may be oriented to summary dismissal.

3.2 Development of the statutory definition and extension of the mandate

The UNHCR Statute nevertheless contains an apparent contradiction.³⁵ On the one hand, it affirms that the work of the Office shall relate, as a rule, to groups and categories of refugees. On the other hand, it proposes a definition of the refugee which is essentially individualistic, seeming to require a case-by-case examination of subjective and objective elements. The frequency of large-scale refugee crises since 1951, together with a variety of political and humanitarian considerations, has necessitated flexibility in the administration of UNHCR’s mandate. In consequence, there has been a significant broadening of what may be termed the concept of ‘refugees of concern to the international community’.

A major role in these developments has been played by the UN General Assembly and the Economic and Social Council, whose policy directions the

High Commissioner is required to follow,³⁶ and similar influence has been exercised by the Executive Committee of the High Commissioner's Programme. Established in 1957,³⁷ the Executive Committee's terms of reference include advising the High Commissioner, on request, in the exercise of the statutory functions; and advising on the appropriateness of providing international assistance through UNHCR in order to solve such specific refugee problems as may arise.³⁸ With its now considerably expanded membership, the Executive Committee has come to play a much closer role in budgetary and management issues.

It was also in 1957 that the General Assembly first authorized the High Commissioner to assist refugees who did not come fully within the statutory definition, but whose situation was 'such as to be of concern to the international community'.³⁹ The case involved large numbers of mainland Chinese in Hong Kong whose status as 'refugees' was complicated by the existence of two Chinas, each of which might have been called upon to exercise protection. Given the need for assistance, express authorization to the High Commissioner 'to use his good offices to encourage arrangements for contributions' was an effective, pragmatic solution.⁴⁰ Assistance to other specific groups was authorized in the years that followed.⁴¹ Concurrently, the General Assembly developed the notion of the High Commissioner's 'good offices' as an umbrella idea under which to bring refugees who did not come within the competence, or 'immediate competence',⁴² of the United Nations. The type of assistance which might be given was initially limited, often to the transmission of financial contributions, but that restriction was soon dropped.⁴³

In 1959, in anticipation of World Refugee Year, the General Assembly called for special attention to be given 'to the problems of refugees coming within the competence' of UNHCR, while simultaneously authorizing the High Commissioner to use his good offices in the transmission of contributions for the assistance of refugees 'who do not come within the competence of the United Nations'.⁴⁴ On the same day, the General Assembly had no hesitation in recommending that the High Commissioner continue his efforts on behalf of refugees from Algeria in Morocco and Tunisia, pending their return to their homes.⁴⁵ As more than the mere transmission of contributions was involved, these refugees, who had fled a particularly violent national liberation struggle,⁴⁶ were clearly considered to fall within the competence of the United Nations. Indeed, there is little to distinguish the resolution in question from that adopted

three years earlier on refugees from Hungary.⁴⁷ After the reference to ‘good offices refugees’ in the General Assembly’s 1963 resolution on the report of UNHCR,⁴⁸ the term does not recur again until its final appearance in 1973.⁴⁹ The 1965 resolution referred generically to the protection of refugees and to solutions for the ‘various groups of refugees within (UNHCR) competence’.⁵⁰ Thereafter the language changed, became more composite and began to reflect the notion of refugees ‘of concern’ to UNHCR.⁵¹

General Assembly resolutions are rarely consistent in their language, and their rationale, too, is often hidden. The nature of the activities in which UNHCR was involved, however, suggests that the class of refugees assisted were either clearly not within the Statute or else had not been specifically determined to be within the Statute, perhaps for political or logistical reasons.⁵² At the same time, the situations in question shared certain factors in common: the people in need (a) had crossed an international frontier, (b) as a result of conflicts, or radical political, social, or economic changes in their countries of origin. The very size of refugee problems in Africa in the 1960s made individual assessment of refugee status impractical, as did the absence of appropriate machinery. Moreover, the pragmatic, rather than doctrinal, approach to the new problems was almost certainly influenced by factors such as the desire to avoid the imputation carried by every determination that a well-founded fear of persecution exists;⁵³ and the feeling, not always made manifest, that while ‘political conditions’ had compelled the flight of the entire group in question, it might not be possible to establish a well-founded fear on an individual case-by-case basis. The ‘group approach’, by concentrating on the fact that those concerned are effectively without the protection of their own government, thus avoids the restrictions of the legal definition.⁵⁴

From the mid-1970s, the General Assembly has spoken of and unanimously commended the High Commissioner’s activities on behalf of ‘refugees and displaced persons of concern’ to the Office. The reference to ‘displaced persons’ dates at least from 1972, when the Economic and Social Council acted both to promote the voluntary repatriation of refugees to the Sudan, including measures of rehabilitation and assistance, and also to extend the benefit of such measures to ‘persons displaced within the country’.⁵⁵ The ECOSOC lead was followed by the General Assembly⁵⁶ in the first of references to displaced persons which were soon to acquire a regularity and substance of their own. In 1974 and 1975 the General Assembly reiterated its recognition of refugees of concern to UNHCR,

and acknowledged an additional category of ‘special humanitarian tasks’ undertaken by the High Commissioner.⁵⁷ ECOSOC took another consolidating step forward in 1976 when it recognized the importance of UNHCR’s activities in ‘the context of man-made disasters, in addition to its original functions’. The High Commissioner was commended for his efforts ‘on behalf of refugees and displaced persons, victims of man-made disasters’, and requested to continue his activities ‘for alleviating the suffering of all those of concern to his Office’.⁵⁸ In November 1976 the General Assembly formally endorsed the ECOSOC resolution and recognized the need to strengthen further the international protection of refugees.⁵⁹

In 1975, in a short resolution, the General Assembly approved continued humanitarian assistance to ‘Indo-Chinese displaced persons’.⁶⁰ Originally intended as after the fact approval for UNHCR activities *inside* Laos and Vietnam,⁶¹ it has come to be seen as contributing an international dimension to the notion of displaced persons by its apparent recognition of the fact of *external* displacement. If the term was intended to cover groups, besides refugees, who had crossed international frontiers, then at the time it may have been something of a misnomer. ‘Displaced persons’ had a special meaning in the Constitution of the IRO, but had otherwise been commonly employed to describe those displaced within their own country, for example, by the effects of civil strife or natural disasters.⁶²

Whatever its current dimensions, the ‘displaced persons’ category was initially introduced to deal with two problematic but related areas of activity. First, it was addressed to the situation of countries divided in fact, if not in law; this included countries split by civil war, such as the Sudan,⁶³ or Vietnam and, to a lesser extent, Laos prior to 1975. In the case of Vietnam, the legal situation was complicated by the respective constitutions and laws of the divided parts, each of which purported to acknowledge the existence of only one legitimate, truly representative entity. Again in the case of Vietnam, necessity required that UNHCR, as occasion demanded, deal with three different parties—the north Vietnamese, the south Vietnamese and the Provisional Revolutionary Government. The ‘displaced persons’ category, with its foundations in humanitarian necessity, was the natural successor to the ‘good offices’ approach; in its time, ‘good offices’ had accommodated the need for *prima facie* eligibility, while ‘displaced persons’ came in to describe UNHCR action on the ground—providing humanitarian assistance to those displaced within divided countries, by

the effects of civil war or insurgency. In this practical context, protection was of secondary or incidental concern; there is indeed no necessary or inextricable link between protection and assistance, even if these notions have come to run together with the refugee and displaced persons categories in the General Assembly resolutions which succeeded and consolidated these developments.

The refugee crises in the period 1975–95 illustrate both the development in the refugee definition and the problems that arise in applying it consistently to large numbers of asylum seekers. Over one-and-a-half million people left Kampuchea, Laos, and Vietnam, beginning in April 1975.⁶⁴ Already involved in the region, with the turn of events in the spring of 1975, UNHCR was called upon to assist many who had left their countries of origin, in particular by securing asylum, providing care and maintenance, and promoting resettlement; the Provisional Revolutionary Government in South Vietnam also requested UNHCR to promote voluntary repatriation.

Official documentation of the period reveals a reluctance to apply the term ‘refugee’ to those assisted by UNHCR. Instead, the papers refer, for example, to ‘displaced persons from Indo-China outside their country of origin’,⁶⁵ and to ‘persons leaving the Indo-China peninsula in small boats’.⁶⁶ UNHCR’s operations were never challenged on the basis that the persons concerned might not fall within the mandate of the Office, and assistance and protection continued to be extended on the basis of that somewhat ambiguous resolution adopted by the General Assembly in December 1975.⁶⁷ The Executive Committee, however, began to employ more specific language in its annual conclusions. In 1976, it spoke of ‘asylum seekers’ who had left their country in small boats,⁶⁸ and in 1977 referred expressly to the problems of refugees from Indo-China.⁶⁹

In that year, the High Commissioner for Refugees also requested the Executive Committee to clarify the distinction between refugees and displaced persons. No formal advice was tendered, although there was considerable support for the view that refugees had crossed an international frontier, whereas displaced persons had not.⁷⁰ Notwithstanding the focus on *internally displaced persons* which began in the 1990s, and which has since been accompanied by the search for a solid jurisdictional base, a competent protecting and assisting agency, and an applicable body of rules and standards,⁷¹ by 1977 UNHCR responsibilities for refugees and displaced persons had clearly established their place in the language of the General Assembly.⁷² They have remained ever since, with the incremental recognition of others requiring protection, including returnees, women and

children, asylum seekers, those in need of complementary protection, and even for the safe return of those determined not to be in need of international protection.⁷³

The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. Briefly, the movement has been from the Statute through good offices and assistance, to protection and solutions. The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on a good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refugees, displaced and other persons of concern to UNHCR.⁷⁴

Apart from purely humanitarian considerations,⁷⁵ this tendency shows awareness of the difficulty of determining in the case of a large movement that each and everyone has a well-founded fear of persecution in the sense of the UNHCR Statute. It also suggests that something more general, such as lack of protection, should serve as the criterion for identifying persons ‘of concern’ to the High Commissioner.⁷⁶ This is not immediately obvious from the resolutions themselves, but appears to be confirmed by UNHCR and international agency practice, for example, in Rwanda and Zaire, Northern Iraq, Somalia, and former Yugoslavia.

The lack of protection may occur as a matter of law, for example, in the case of stateless persons; or it may be evident from the facts, for example, where it is clear or may be inferred that individuals or groups are unable or unwilling to avail themselves of the protection of the government of their country. This may be due to a well-founded fear of persecution for reasons of race, religion, nationality or political opinion; or to some man-made disaster, such as conflict or violence resulting from a variety of sources. For example, in establishing a Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees in 1981, the General Assembly reaffirmed its strong condemnation of ‘policies and practices of oppressive and racist regimes, as well as aggression, colonialism, *apartheid*, alien domination, foreign intervention and occupation’, which it identified among the root causes of refugee movements.⁷⁷ In its 1986 Report,⁷⁸ this Group avoided definitional problems, concentrating instead on ‘coerced movements’, where the element of compulsion ‘was to be understood in a wide sense covering a variety of natural, political and socio-economic factors which directly or indirectly force people to flee ... in fear for

life, liberty and security'. Wars and armed conflicts were cited as a major cause of refugee flows, for flight was often the only way to escape danger to life or extensive restrictions of human rights.⁷⁹

Lack of protection by the government of the country of origin is already an element in the statutory definition of the refugee. Given the impracticability of individual determinations in the case of large-scale movements of asylum seekers, that element acquires great significance. 'Protection' here implies both 'internal protection', in the sense of effective guarantees in matters such as life, liberty, and security of the person; and 'external protection', in the sense of diplomatic protection, including documentation of nationals abroad and recognition of the right of nationals to return. The 'right to return', in particular, is accepted as a normal incident of nationality. In the case of those leaving Vietnam, however, that right was initially subject to significant qualification. Although in 1975 the Provisional Revolutionary Government of South Vietnam requested UNHCR to promote voluntary repatriation, it stressed at the time that authorization to return fell within its sovereign rights and that each case would need to be examined separately.⁸⁰ Many of those who left Chile following the 1973 coup were also 'listed' as prohibited from returning, although they retained their citizenship.⁸¹ These factors alone may justify protection and assistance by UNHCR, particularly where, in individual cases, further evidence is available of measures seriously affecting certain racial, social, or political groups.⁸²

Although no objection was raised to UNHCR's activities on behalf of persons leaving Indo-China, challenges to the Office's competence have arisen with respect to the status of other groups. For example, in 1979 and 1984, the Afghan representative objected to assistance and protection being given to Afghan refugees,⁸³ while further interventions have focused on, among others, the status of Bulgarians of Turkish origin, Romanians of Hungarian origin, Sahrawis, Iraqis, and Palestinians.⁸⁴

Despite the protests of individual governments, the international community at large has not hitherto demurred when UNHCR has exercised its protection and assistance functions in cases of large-scale movements of asylum seekers. This, together with other developments, permits the conclusion that the class of persons within the mandate of, or of concern to, UNHCR includes: (1) those who, having left their country, can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain specified grounds; and (2) those often large groups or categories or persons who, likewise having crossed an

international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.⁸⁵ This is the broad meaning of the term ‘refugee’ for the purposes of the United Nations, and this is the class for which UNHCR will in principle seek the immediate protection of temporary refuge or *non-refoulement* through time, treatment in accordance with minimum standards, and appropriate long-term solutions. The preceding *functional* description of the scope of UNHCR’s responsibilities towards refugees and the displaced begs a number of key questions relating, in particular, to the international obligations of States; these are dealt with more fully below. For the present, it is sufficient to note that both the activities of UNHCR and the responses of States with regard to refugees in the broad sense may be limited, in what will often be a dynamic and changing environment, to the provision of refuge and material assistance, and the pursuit of a durable solution through voluntary repatriation. Only the refugee who has been determined to have a well-founded fear of persecution, perhaps, enjoys the full spectrum of protection and the expectation of a lasting solution in a country of asylum or resettlement,⁸⁶ although even that presumption may be questioned today in the light of recent State practice.⁸⁷

3.3 Internally displaced persons

3.3.1 The problem in context

Internally displaced persons (IDPs) now constitute the largest number of displaced people globally, far exceeding refugees.⁸⁸ Increasingly, they live in situations of protracted displacement, in part due to intractable conflicts and the absence of political will to resolve them.⁸⁹

From an international law perspective, primary responsibility for the protection of and assistance to internally displaced persons rests with the territorial State, by virtue of its sovereignty and the principle of non-intervention.⁹⁰ In practice, internal displacement often occurs as a result of civil conflict, in situations where the authority of the central government is itself in dispute, and its capacity or willingness to provide protection and assistance are equally in doubt. At this point, sovereignty and non-intervention stand in opposition to other governing principles of international organization, including the commitment to human rights and to cooperation in the resolution of humanitarian problems.

Internally displaced persons are by no means a new item on the international agenda. In the late 1940s, for example, Greece suggested that international help also be extended to those displaced internally by civil war. They might not need ‘legal protection’, but their material needs exceeded the resources of a country such as itself, ravaged by domestic conflict and foreign occupation.⁹¹ Both Pakistan and India emphasized that the United Nations should take a universal approach, not excluding refugees merely by reason of the fact that they possessed the nationality of the country in which they now found themselves. The Pakistani representative noted that there were between 6 and 7 million refugees in his country, in a far worse plight than those covered by the IRO, and statelessness was the least of their misfortunes.⁹² Eleanor Roosevelt, for the United States, nevertheless stressed that the UN’s responsibility should be to provide for a specific category of refugees, namely, those who required *legal* protection. Refugees within their own countries, who still enjoyed the protection of their governments, did not come within the scope of the discussion, though they might be in great need of material assistance.⁹³

3.3.2 UN and UNHCR responsibilities

UNHCR’s relief and rehabilitation programmes for refugees and returnees have included those ‘displaced within the country’ since at least 1972, when ECOSOC and the General Assembly endorsed operations in the Sudan.⁹⁴ The same year the General Assembly kept the mandate door open by asking the High Commissioner to continue to participate, at the Secretary-General’s request, in ‘those humanitarian endeavours of the United Nations for which his Office has particular expertise and experience’.⁹⁵ Resolutions in later years contained frequent references to ‘displaced persons’, though generally without qualification as internal or external. So far as the context remained assistance activities to refugees, returnees and displaced persons,⁹⁶ it is reasonable to infer an expectation that such programmes might usefully benefit the internally displaced; this is also in line with the then growing recognition of the necessity to link assistance for refugees and returnees to the general question of development.

Historically, UNHCR’s involvement with the internally displaced was practical and non-controversial, involving the provision of assistance simultaneously to both returning refugees and the internally displaced ‘neighbours’, very much in a general, development-oriented approach. In the period 1988–91, the General Assembly, under pressure from major donors, began

to emphasize the necessity for better *co-ordination* of relief programmes for the internally displaced,⁹⁷ a task initially entrusted to UNDP Resident Representatives.⁹⁸ In 1990, ECOSOC requested a system-wide review to assess the experience and capacity of UN organizations involved in assistance to all refugees, displaced persons, and returnees,⁹⁹ which was duly followed by the Commission on Human Rights focusing on the need of internally displaced persons (IDPs) for relief assistance *and* protection.¹⁰⁰ The Commission requested the Secretary-General to appoint a representative on IDPs, a role entrusted to Francis Deng in July 1992 and assumed by Walter Kälin in 2004.¹⁰¹ The Representative presented the first of several reports the following year,¹⁰² and identified his goal as the development of ‘a doctrine of protection specifically tailored to the needs of the internally displaced’.¹⁰³

In 1996, Deng presented his final report,¹⁰⁴ identifying a number of gaps relating to the applicability and application of existing international legal norms to the special circumstances of IDPs. In addition to normative gaps, where the law simply did not cover particular protection needs of IDPs,¹⁰⁵ there were ‘consensus gaps’, relating to a lack of agreement about how general norms in humanitarian or human rights law might be applied to the specific needs of the internally displaced,¹⁰⁶ and ‘applicability gaps’, concerning the non-applicability of legal principles to particular displacement contexts. For example, displacement occurring in a situation of generalized violence rather than armed conflict would mean that humanitarian law, which might otherwise provide protection, would not be triggered. Even in cases where humanitarian law clearly applied, there remained questions about whether the protection attaching to special categories of persons would also encompass the internally displaced.¹⁰⁷ Furthermore, humanitarian and human rights law can only formally bind States, not non-State actors.¹⁰⁸

In direct response to the report, the 1998 Guiding Principles on Internal Displacement sought to address these lacunae by identifying ‘the rights and guarantees relevant to protection of the internally displaced in all phases of displacement’. They provide guidance to States as well as ‘authorities, groups and persons irrespective of their legal status’¹⁰⁹ and apply to all internal displacement contexts. The Guiding Principles do not purport to create a new legal category *per se*, but rather seek to elucidate, clarify and refine existing protection norms under international law. For this reason, they provide only a ‘descriptive identification’,¹¹⁰ rather than a formal legal definition, of ‘internally

displaced persons’: ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.¹¹¹ In the view of Francis Deng and Roberta Cohen (Co-Founder and former Co-Director of the Brookings–LSE Project on Internal Displacement), this ‘description’ has been sufficiently flexible to respond to a range of IDP contexts, particularly in relation to displacement linked to disasters, which now greatly exceeds displacement linked to conflict.¹¹²

The Guiding Principles are not binding as such,¹¹³ but ‘reflect and are consistent with international human rights and humanitarian law and analogous refugee law’.¹¹⁴ While States and other actors cannot be held liable for their violation, except to the extent that they reiterate binding treaty or customary international law obligations, they are perhaps more comprehensive and wide-ranging than a binding instrument might have been.¹¹⁵ Though the drafters took care to ensure that all principles had a solid foundation in existing international law, they also endeavoured ‘to progressively develop certain general principles of human rights law where the existing treaties and conventions may contain some gaps’.¹¹⁶ According to Phuong, the distinction is at times blurred, and certain provisions do amount to new law.¹¹⁷ An example is the Guiding Principles’ acknowledgement of IDPs’ ‘right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk’.¹¹⁸ Though persons who have crossed an international border are protected by the principle of *non-refoulement* in refugee and human rights law, there is no comparable right in general international law for those who have been displaced within their own State. However, the proscription of torture, inhuman, or degrading treatment or punishment in human rights law implies a right not to be removed to, or exposed to the risk of such treatment, wherever it occurs. Furthermore, other human rights, such as freedom of movement, may also be invoked in support of a principle of non-return, within the framework established by the overarching duty of protection.

The Guiding Principles are a welcome standard-setting step, but they are not self-applying and will not alone resolve the problems of mandates and coordination which have frequently hindered international responses to IDPs.¹¹⁹ Indeed, as discussed in Chapter 12, the key challenge lies in strengthening their

implementation and enforcement. Many States do not have national frameworks in place to address internal displacement,¹²⁰ and most international actors have focused on the humanitarian response to internal displacement, rather than root causes or ‘a multidisciplinary and holistic approach to prevention and solutions’.¹²¹ Programmes and policies have been fragmented and inadequate to manage, much less reduce, the scale of internal displacement globally.¹²² Reducing the barriers to IDPs returning home, especially in the context of protracted displacement, remains a particularly pressing challenge.¹²³ Nevertheless, the Guiding Principles have helped to focus attention on the specific humanitarian, protection, and programming needs of IDPs, both in the development of targeted interventions as well as in highlighting enduring gaps. African treaty law now reflects and builds upon the Guiding Principles to provide the most comprehensive, binding legal protection for IDPs,¹²⁴ imposing ‘innovative IDP-related obligations’ on States parties.¹²⁵

Faced with increasing calls to get involved with the problems of internal displacement, UNHCR published internal guidelines in April 1993,¹²⁶ and subsequently adopted the Guiding Principles as a normative means of addressing the issue.¹²⁷ Initially, its involvement was not uncontroversial,¹²⁸ and recognizing its lack of general legal competence for IDPs,¹²⁹ the Office set out to explore the rationale for its engagement. Taking its lead from paragraph 14 of UN General Assembly resolution 47/105, it identified these as a *specific request* from the Secretary-General or other competent authority, and the *consent of the State* concerned.¹³⁰

The Executive Committee endorsed this generally cautious approach, stressing also that UNHCR’s involvement should focus only on situations that ‘call for the Office’s particular expertise’, and pay ‘due regard to the complementary mandates and specific expertise of other relevant organizations as well as the availability of sufficient resources’.¹³¹ An Executive Committee Conclusion in 1994 emphasized that ‘activities on behalf of internally displaced persons must not undermine the institution of asylum, including the right to seek and enjoy in other countries asylum from persecution’.¹³² It also laid great stress on the necessity for inter-agency cooperation,¹³³ but neither UNHCR nor States suggested that UNHCR should be granted a general competence for IDPs.

UNHCR’s 1993 guidelines were an attempt to refine the criteria for its engagement with IDPs, rather than an excursus on how it should protect them. The revised guidelines in 2000 were somewhat more to the point, stipulating as

additional preconditions for intervention that UNHCR must have access to the population, adequate security for its staff, adequate resources, and ‘clear lines of responsibility and accountability with the ability to intervene directly with all parties concerned, particularly on protection matters’.¹³⁴ These have a strong operational rather than legal dimension, characteristic of a functional rather than protection-based approach to IDPs. The frequently political nature of such situations is underscored by UNHCR’s discretion to decline to become involved, for example, if its expertise and experience do not appear to be relevant, if in fact it is not able to improve protection and find solutions, or if the situation is likely to have an impact on its non-political and humanitarian mandate, or on refugee protection and the institution of asylum.¹³⁵

However, in 2005, the Executive Committee supported an expanded role for UNHCR’s engagement with IDPs, encouraging it ‘to continue to explore the feasibility of taking on coordination responsibilities for clusters related to internally displaced persons’ protection, camp management and shelter in conflict situations as part of a broader United Nations coordination effort in support of United Nations humanitarian coordinators, with a view towards ensuring a more effective, predictable, and timely response to humanitarian crises, including a system of accountability’.¹³⁶ In 2008, the Executive Committee ‘reiterate[d] the relevance of the Guiding Principles on Internal Displacement and reaffirm[ed] its support for UNHCR’s role with internally displaced persons on the basis of criteria specified by the General Assembly, which includes not undermining the mandate of the Office for refugees and the institution of asylum’.¹³⁷

Neither UNHCR nor any other UN agency has any legal authority to ‘protect’ those displaced within their own country. No treaty or rule of customary international law establishes legal standing, even if the standards according to which IDPs ought to be treated have been substantially clarified by the Guiding Principles. After considerable hesitation among many States,¹³⁸ the General Assembly came eventually to see IDP protection as having been ‘strengthened by identifying, reaffirming and consolidating specific standards …’, in particular through the Guiding Principles,¹³⁹ and it has recognized those principles as ‘an important international framework for the protection of internally displaced persons’.¹⁴⁰

UNHCR’s operational role in IDP situations is now well-established, especially through its cluster leadership roles. From a legal perspective, UNHCR

seeks to enhance protection by assisting governments to develop national laws and policies to identify IDPs, promote their non-discriminatory treatment, protect their rights, and find durable solutions.¹⁴¹ Globally, it is responsible for developing standards and policies for IDP protection, enhancing capacity among relevant agencies, and coordinating operational support for emergencies.¹⁴²

UNHCR has also stressed the benefits that its IDP operations yield for refugees: collaboration with government authorities can improve access to a wide range of stakeholders, including at the highest levels of government, which can, in turn, have a positive effect on asylum and protection in the country concerned. Furthermore, if the host country is also a refugee-producing country, then UNHCR may acquire much better knowledge of the factors causing external displacement and be better able to devise strategies for solutions, including voluntary repatriation.¹⁴³

Following the UN's Humanitarian Reform in 2005, the creation of the cluster approach,¹⁴⁴ and the Inter-Agency Standing Committee's Transformative Agenda in 2011,¹⁴⁵ UNHCR's engagement on IDP issues has become 'more robust'.¹⁴⁶ Since September 2005, it has had responsibility for the clusters of protection, emergency shelter, and camp coordination and management for conflict-induced IDPs. In 2007, UNHCR developed a comprehensive policy on IDPs,¹⁴⁷ supplemented by Operational Guidelines in 2016; these, in turn, were updated and superseded in 2019.¹⁴⁸

UNHCR's Strategic Directions 2017–21 incorporate IDPs as a core element of UNHCR's protection response, in particular by committing to more consistent, predictable, decisive and sustainable engagement in IDP situations, as well as concerted operational, advocacy and strategic efforts to achieve better protection outcomes for IDPs.¹⁴⁹ An extensive review of UNHCR's IDP operations in 2016–17 recommended that protection considerations drive all decision-making; that stronger and more systematic linkages must be created between UNHCR's refugee and IDP responses when it comes to preventing, preparing for, responding to and finding solutions to displacement; and that UNHCR must strengthen its role as a reliable and predictable actor in IDP settings and enhance its automaticity in such contexts.¹⁵⁰

An on-going criticism of UNHCR's approach to IDPs has been its functional, rather than protection, focus.¹⁵¹ The agency's prominent field presence is not mirrored at the normative/policy level, where refugee protection continues to dominate. Additionally, the shift from a Representative of the Secretary-General

on the Human Rights of IDPs to a Special Rapporteur (in 2010) has reduced the institutional importance of the subject matter within the UN, as well as the capacity for action by the mandate holder.

Besides the UN agencies regularly working with the internally displaced, such as UNICEF, WHO, and WFP, other organizations likely to be involved in assistance and related activities include IOM and the ICRC. Although its constitution does not specifically authorize it to provide migration services to the ‘displaced’, IOM has approached internal displacement largely as an aspect of internal migration and, at the request of particular States, has developed projects for IDPs accordingly.¹⁵² The ICRC, by contrast, has a clear legal interest, deriving from the fact that many IDPs move as a consequence of armed conflict, and its mandate is to ensure the application of international humanitarian law. The ICRC’s paramount consideration in any operation remains the interest of the victims, rather than attention to categories, or to ulterior objectives, such as the avoidance of transfrontier flight.¹⁵³

Kälin has argued for continuing efforts to persuade governments to adopt IDP-specific legislation incorporating the Guiding Principles; to ensure the accountability of those responsible for arbitrary displacement; to ‘overcome the politics of protracted displacement’; and to find durable solutions.¹⁵⁴ Increasing international attention to the problems of IDPs,¹⁵⁵ their functional needs and institutional requirements, will likely continue to confront the traditional requirement of consent as a pre-condition to the provision of relief. The classical model of the sovereign State is hardly redundant, and although it may repay re-evaluation in light of the implications of membership in the United Nations, a number of States remain concerned at the extension of the UN’s sphere of interest.¹⁵⁶ Nevertheless, it is increasingly difficult for States to resist criticism of internal policies and practices that result in displacement.¹⁵⁷ International ‘findings’ on these issues could conceivably become part of a process leading to the provision of international relief, even including protection, that is *not* contingent on request or consent,¹⁵⁸ and not limited to the relatively rare instances in which State authority has effectively disappeared. At this point, definitions will have a role to play, either in an operational sense, as triggers to action; or jurisdictionally, by delimiting the competence of different organizations. It is here, perhaps, that the criterion of size (‘large numbers’) may be an appropriate pre-condition to launching international assistance, while not having crossed a frontier may determine which UN agency should assume

overall responsibility.¹⁵⁹

4. Refugees in the sense of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

The States which acceded to or ratified the 1951 Convention agreed that the term ‘refugee’ should apply, first to any person considered a refugee under earlier international arrangements; and, secondly, to any person who, broadly speaking, qualifies as a refugee under the UNHCR Statute.¹⁶⁰ In discussions leading up to agreement on the definition in the *Ad hoc* Committee on refugees and stateless persons, the United States remained concerned that ‘too vague a definition’ would entail unknowable (and excessive) responsibilities, and provoke disagreements between governments with respect to its interpretation and application.¹⁶¹ However, the definition should not be narrow or the field of application of the Convention excessively restricted. The United States therefore proposed four categories of refugees outside their country ‘because of persecution or fear of persecution’,¹⁶² which were intended also to include those who had fled since the beginning of the Second World War or ‘who might be obliged to flee from their countries for similar reasons in the future’.¹⁶³ The United Kingdom proposed an alternative, general definition,¹⁶⁴ and a working group was set up within the *Ad hoc* Committee to resolve differences. Its provisional draft identified a number of categories, such as the victims of the Nazi or Falangist regimes and by reference to previous international agreements, but also adopted the criterion of well-founded fear and lack of protection.¹⁶⁵ The drafters thus used the IRO Constitution as a model for the formulation of certain categories of existing refugees,¹⁶⁶ while the general criterion of persecution or fear of persecution, neither narrow nor excessively restricted, according to the US delegate, was considered broad enough for post-Second World War and future refugees.

Originally, the definition, like the first part of that in the Statute, limited application of the Convention to the refugee who acquired such status ‘as a result of events occurring before 1 January 1951’. An optional geographical limitation also permitted States, on ratification, to limit their obligations to refugees resulting from ‘events occurring in Europe’ prior to the critical date.¹⁶⁷ Finally, the substantive or ideological basis for the essential ‘well-founded fear of persecution’ differs slightly from that in the UNHCR Statute, by including

‘membership of a particular social group’ among the reasons for persecution, in addition to race, religion, nationality, or political opinion. The differences between the two definitions are due to amendments accepted by the Conference of Plenipotentiaries which adopted the final draft of the Convention.¹⁶⁸ The reference to ‘membership of a particular social group’ is analysed more fully below;¹⁶⁹ it makes little practical difference in the respective areas of competence of UNHCR and States parties to the Convention.

From the outset, it was recognized that, given its various limitations, the Convention definition would not cover every refugee. The Conference of Plenipotentiaries therefore recommended in the Final Act that States should apply the Convention beyond its strictly contractual scope, to other refugees within their territory.¹⁷⁰ Many States relied upon this recommendation in the case of refugee crises precipitated by events after 1 January 1951, until the 1967 Protocol expressly removed that limitation. It may still be invoked to support extension of the Convention to groups or individuals who do not fully satisfy the definitional requirements.¹⁷¹

Convention refugees are thus identifiable by reference to four elemental characteristics: (1) they are outside their country of origin;¹⁷² (2) they are unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹⁷³

5. Regional approaches to refugee definition

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for article I of the 1969 AU/OAU Convention on Refugee Problems in Africa,¹⁷⁴ although it has there been realistically extended to cover those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order.¹⁷⁵

Latin America has long been familiar with the practice of diplomatic asylum¹⁷⁶ and with the concept of *asilado*. The Montevideo Treaty of 1889 acknowledged

that ‘political refugees shall be accorded an inviolable asylum’,¹⁷⁷ while other agreements have dealt expressly with asylum granted in diplomatic premises or other protected areas.¹⁷⁸ The beneficiaries are usually described as being sought ‘for political reasons’ or ‘for political offences’, although the 1954 Caracas Convention on Territorial Asylum expressly refers to persons coming from a State ‘in which they are persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offences’.¹⁷⁹

The refugee crisis in Central America during the 1980s led in due course to one of the most encompassing approaches to the refugee question, and the 1984 Cartagena Declaration proposed a significant broadening, analogous to that of the OAU Convention.¹⁸⁰ This Declaration emerged not from within a regional organization, however, but out of an *ad hoc* group of experts and representatives from governments in Central America, meeting together in a colloquium in Colombia.¹⁸¹ It is not a formally binding treaty, but represents endorsement by the States concerned of appropriate and applicable standards of protection and assistance.¹⁸² Moreover, it recommends that the definition of a refugee to be used in the region include, in addition to the elements of the 1951 Convention and the Protocol, 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 seriously disturbing public order. At the same time, the Inter-American system of human rights protection has helped to entrench the basic principles of asylum, recognizing ‘the fundamental right of the individual to seek asylum from persecution and to be heard in making that presentation’.¹⁸³

There are no corresponding treaties or declarations applicable in the Asia region, although the Bangkok Principles, which describe themselves as ‘declaratory and non-binding’, include the broader terms of the AU/OAU Convention in the revised text adopted in June 2001 at the 40th Session of the Asian-African Legal Consultative Organization in New Delhi.¹⁸⁴

Over the years, many European States developed national asylum practices going beyond the strict requirements of the 1951 Convention/1967 Protocol, and the developing jurisprudence of the European Court of Human Rights also ensured a measure of ‘human rights protection’ for those whose removal might lead to treatment contrary to article 3 ECHR 50 or to other violations of European Convention rights. Although the Court confirmed that Contracting States have a responsibility to safeguard an individual against treatment contrary

to article 3 in the event of expulsion,¹⁸⁵ a regional commitment to provide complementary protection was nevertheless lacking.

For the Member States of the European Union, that situation has now changed. The 1997 Treaty of Amsterdam moved asylum and immigration out of the inter-governmental decision-making process, and into the area where legally binding instruments of harmonization can be adopted and a measure of judicial control exercised by the Court of Justice of the European Union.¹⁸⁶ A new treaty Title IV, ‘Visas, asylum, immigration and other policies related to freedom of movement of persons’, established a number of objectives; in particular, within five years of the Treaty’s entry into force, the Council was required ‘to adopt measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and *other relevant treaties*’.¹⁸⁷

Article 63 of the Treaty establishing the European Community set out the framework for the development of EU minimum standards in regard to, among others, entitlement to protection (referred to as ‘qualification’), and temporary protection for displaced persons and others in need of international protection (‘who cannot return to their country of origin and for persons who otherwise need international protection’).¹⁸⁸

The 2001 ‘Temporary Protection’ Directive¹⁸⁹ draws on European experience with large-scale movements of refugees out of Bosnia and Herzegovina and Kosovo during the 1990s. It establishes a mechanism to be triggered by a Council Decision adopted by a qualified majority on a proposal from the Commission, and lays down minimum standards for dealing with a mass influx; it is an exceptional procedure which does not prejudge any individual’s entitlement to Convention refugee status. The intended beneficiaries, ‘displaced persons’, are defined as:

[t]hird-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.¹⁹⁰

For its part, the EU Qualification Directive, as originally adopted in 2004 and as recast in 2011,¹⁹¹ incorporates and interprets the 1951 Convention/1967 Protocol refugee definition,¹⁹² and makes provision for subsidiary protection. A person entitled to such protection is defined as:

[a] third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.¹⁹³

Article 15, in turn, defines serious harm as ‘(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.’ This is clearly narrower than the approach adopted in Africa and Central America,¹⁹⁴ and also does not include all those who may be entitled to protection against removal under the European Convention on Human Rights.¹⁹⁵ On the one hand, the Qualification Directive can certainly be seen as the most important instrument in the European asylum regime, and ‘the most ambitious attempt to combine refugee law and human rights law ... to date’,¹⁹⁶ but on the other hand, the complementary protection scheme adheres to a traditional, individualistic approach, requiring the claimant for protection to show that he or she is personally at risk.¹⁹⁷ One advantage of the EU scheme is that it provides a *status* for those granted subsidiary protection, which is now closely approximating that accorded to Convention refugees.¹⁹⁸

6. Refugees in municipal law: some examples

The practice of non-extradition of political offenders is one antecedent to the modern body of principles protecting refugees from return to a State in which they may face persecution. Apart from this rather narrow context, many States have nevertheless recognized in their legislation that the refugee is someone worthy of protection. Some countries expressly acknowledge the principle of asylum in their constitution;¹⁹⁹ in others, ratification of the 1951 Convention and

the 1967 Protocol has direct effect in local law; and in yet other cases, ratifying States may follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedures.

The Federal Republic of Germany, for example, has both constitutional and enacted law provisions benefitting refugees. The 1949 Constitution prescribes that the politically persecuted enjoy the right of asylum,²⁰⁰ and the Asylum Law provides that those recognized shall enjoy the status provided for by the 1951 Convention, as a minimum standard.²⁰¹ Amendments adopted in the early 1990s, however, prescribed a geographical limitation, and the right to asylum may not be invoked by one who enters from a European Union State or from a third country where application of the 1951 Convention and of the 1950 European Convention on Human Rights is guaranteed.²⁰²

Under Australian law, only those who arrive on a valid visa are entitled to apply for refugees status; this provision excludes those who arrive by boat, and takes the form of an application for the grant of a ‘protection visa’ under the Migration Act 1958. Section 36 lays down the criteria and provides that the applicant must be a non-citizen in Australia to whom the Minister is satisfied that Australia has ‘protection obligations’, that is, they are a refugee in the sense of the 1951 Convention/1967 Protocol. The concept of ‘protection obligations’ does not appear in the 1951 Convention, but subject to certain exceptions, section 36(3) excludes anyone ‘who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national’.²⁰³

The Preamble to the 1946 Constitution of France, confirmed in the Constitution of 1958, declares that, ‘Tout homme persécuté en raison de son action en faveur de la liberté a droit d’asile sur les territoires de la République’.²⁰⁴ In 1952, the *Office français de protection des réfugiés et apatrides/French Office for the Protection of Refugees and Stateless Persons* (OFPRA) was established, which makes it the oldest continually operating national refugee office. Its legislative basis is now the *Code de l’entrée et du séjour des étrangers et du droit d’asile* (CESEDA),²⁰⁵ and article L711-1 provides that the Office, ‘exerce la protection juridique et administrative des réfugiés ainsi que celle des bénéficiaires de la protection subsidiaire’.²⁰⁶ Article L711-1 CESEDA provides that:

La qualité de réfugié est reconnue à toute personne persécutée en raison de son action en faveur de la liberté ainsi qu'à toute personne sur laquelle le Haut-Commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut tel qu'adopté par l'Assemblée générale des Nations unies le 14 décembre 1950 ou qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés. Ces personnes sont régies par les dispositions applicables aux réfugiés en vertu de la convention de Genève susmentionnée.

Article L712-1 provides for the grant of subsidiary protection in terms drawn from the EU Qualification Directive.

The United States Refugee Act 1980 moved away from the earlier ideologically and geographically based definition of refugees²⁰⁷ in favour of that offered by the Convention and Protocol.²⁰⁸ At the same time, it went beyond international instruments by offering ‘resettlement’ opportunities to those who might qualify as Convention refugees, save for the fact that they have not yet left their country of origin.²⁰⁹ Canada also adopted the Convention definition in 1976,²¹⁰ where it served both as a criterion for selection under admission programmes and as the basis for formal recognition of refugee status and the grant of residence to those already in Canada.²¹¹ Section 2(1) of the 2001 Immigration and Refugee Protection Act (IRPA) now contains express references, not only to the 1951 Convention and 1967 Protocol, but also to the 1984 Convention against Torture. Section 3(2) of IRPA includes the following objectives, among several related to refugee matters:

- (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment
- (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

In addition, Canadian law makes provision for others who may be admitted to Canada, ‘taking into account Canada’s humanitarian tradition with respect to the displaced and the persecuted’.²¹²

Although the Convention and Protocol have not been expressly incorporated in the United Kingdom, the effect of successive legislative references and the content of the rules adopted for implementation of immigration and asylum law

have led the courts to conclude that, to all intents and purposes, they are indeed now part of domestic law.²¹³ Section 2 of the Asylum and Immigration Appeals Act 1993, for example, is entitled ‘Primacy of the Convention’; it provides that, ‘Nothing in the immigration rules … shall lay down any practice which would be contrary to the Convention.’ Section 18(3) of the Nationality, Immigration and Asylum Act 2002 provides in turn that:

- (3) A claim for asylum is a claim by a person that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom’s obligations under—
 - (a) the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, or
 - (b) Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950.²¹⁴

Article 25 of the Swiss Constitution provides that: ‘Les réfugiés ne peuvent être refoulés sur le territoire d’un Etat dans lequel ils sont persécutés ni remis aux autorités d’un tel Etat … Nul ne peut être refoulé sur le territoire d’un Etat dans lequel il risque la torture ou tout autre traitement ou peine cruels et inhumains.’²¹⁵ Article 3 of the 1998 Swiss law on asylum elaborates slightly on the Convention refugee definition:

1. Sont des réfugiés les personnes qui, dans leur Etat d’origine ou dans le pays de leur dernière résidence, sont exposées à de sérieux préjudices ou craignent à juste titre de l’être en raison de leur race, de leur religion, de leur nationalité, de leur appartenance à un groupe social déterminé ou de leurs opinions politiques.
2. Sont notamment considérées comme de sérieux préjudices la mise en danger de la vie, de l’intégrité corporelle ou de la liberté, de même que les mesures qui entraînent une pression psychique insupportable. Il y a lieu de tenir compte des motifs de fuite spécifiques aux femmes.²¹⁶

Many other similar instances can be cited. Botswana’s 1968 Refugees (Recognition and Control) Act, for example, defines the refugee in Convention terms,²¹⁷ as do the laws of Japan²¹⁸ and Korea.²¹⁹ Section 3 of Lesotho’s 1983 Refugee Act adopts both 1951 Convention and 1969 OAU criteria with respect

to individuals, and likewise as to classes so declared by the Minister. The 1983 Zimbabwe Refugee Act, section 3, is very similar, containing particularly detailed provision for class determinations. Despite its Central American location, the 2000 Belize Refugees Act incorporates the 1951 Convention definition and not the Cartagena Declaration extensions, as might have been expected, but the broader terms of the 1969 OAU Convention (section 4). Article 15 of Norway's 2008 Immigration Act extends protection to refugees having a fear of persecution, as well as to foreign nationals who, 'for reasons similar to those given in the definition of a refugee are in considerable danger of losing their lives or of being made to suffer inhuman treatment'.²²⁰ Bolivian law provides also for both Convention and Cartagena extended definitions.²²¹

For the most part, EU Member States have transposed the requirements of the common European asylum system,²²² including the criteria relating to refugee status and subsidiary protection. Denmark has an 'opt-out' in this field, but the Aliens Act nevertheless provides for the issue of a residence permit to a person who falls within the terms of the 1951 Convention, or who risks torture or the death penalty in the case of return to their country of origin.²²³

This far from comprehensive selection illustrates how some States have translated their international obligations and concern for the problem of refugees into action on the municipal level. Many immigration and non-immigration countries have expressly incorporated the Convention definition, with occasional modifications, into their laws and policies. That definition may be used both as a basis for overseas selection and for the purposes of determining claims to asylum and/or refugee status raised by persons physically present or arriving in their territory. A further notable feature is the tendency of States to take account of the plight of others, who are either not recognized or not strictly refugees in the sense of the Convention, but who have valid humanitarian reasons for being offered resettlement opportunities or protection.²²⁴ The tension between obligation and discretion nevertheless contributes a measure of uncertainty to the debate, which is amplified by the inclination of some States to tinker with international texts, or to 'legislate' particular interpretative approaches that are perceived to align more closely with national policy. Within the EU, that has operated in the positive sense of ensuring incorporation of the principal features of the 1951 Convention/1967 Protocol and, drawing on regional practices and the jurisprudence of the European Court of Human Rights, to formalize subsidiary or complementary protection. New Zealand's 2009 Immigration Act roots itself

more clearly in the country's human rights obligations, providing not only for recognition as a Convention refugee, but also as a 'protected person' under the 1984 Convention against Torture or the 1966 International Covenant on Civil and Political Rights.²²⁵

By contrast, Australia's approach to the refugee definition goes beyond the formal incorporation of agreed terms, making it a condition for the grant of a protection visa that the individual concerned be someone to whom 'Australia owes protection obligations.' Insofar as it aims to identify which State should assume responsibility for obligations owed, the EU's Dublin scheme has similar objectives. As experience shows, however, achieving results consistent with international law is hard enough within a group of States committed in principle to a common system; it is harder still to achieve unilaterally.

7. Institutional responsibilities and international obligations

Notwithstanding the concerns expressed regarding the viability of the international refugee protection regime in the face of today's challenges, voting patterns in the General Assembly on UNHCR and related topics confirm that States clearly want the United Nations to assume responsibilities for a broad category of persons obliged to flee their countries for a variety of reasons. Indeed, as has been briefly shown above, the scope of those who might count on international protection is expanding to include, at least in some circumstances, the internally displaced, those compelled to move in the context of climate change-related events and disasters, stateless persons, and certain categories of migrants. In each case, however, there is still a clear gap between what may be called *functional* responsibilities and expectations, on the one hand, and the legal obligations of States, on the other hand.

That UNHCR's competence and responsibility have evolved is beyond question, and neither the Executive Committee nor the General Assembly has resiled from this position.²²⁶ States have been prepared to endorse a wider mandate for UNHCR, with some emphasizing that it was 'sufficiently flexible and adaptable to changing requirements', needing no change there or in the refugee definition.²²⁷ State concerns about the implications of widening the definition were nevertheless in tension with growing recognition nevertheless that those fleeing conflict or violence deserved protection, even if the forms of such protection were contested.²²⁸

Not many States appear to have grasped the distinction between the functional responsibilities of UNHCR, which they themselves determinedly enlarged, and the precise scope of their own legal obligations, which are to be assessed in the light of both treaty and customary international law; alternatively, they may have been only too conscious that practice over time may move into the realm of obligation. When in 1986 the High Commissioner suggested that perhaps the concept of individual persecution had been overtaken by forced mass migration, and that, while still useful, the 1951 Convention no longer fully matched realities,²²⁹ the reaction was largely negative, particularly among developed States.²³⁰ Nevertheless, UNHCR established a working group, which identified some seven categories of persons falling, in various degrees, within the Office's area of operations.²³¹ Its report was 'accepted with appreciation', rather than adopted by the Sub-Committee on International Protection, which recommended further discussions.²³² A paper on 'persons of concern' to the Office was submitted to an intersessional meeting of the Executive Committee in April 1992,²³³ which noted the disjuncture between the 'obligation' of the international community to provide protection, and the discretionary responses of States. The debate revealed general recognition of the need to deal with the protection issues, but no great willingness to move speedily in the direction of a single protection and solutions approach, that would combine criteria, burden sharing, identification of safe countries or areas, and evaluation of safe return possibilities.²³⁴

UNHCR's 1994 Note on International Protection concluded that, while there was broad consensus on the need to provide protection, States had little inclination to adopt a new Convention; instead, it proposed 'the adoption of guiding principles embodied in a global or regional declaration'.²³⁵ This idea received support from many States in the Executive Committee in 1994 and 1995,²³⁶ and in 1999 the Executive Committee expressly recognized the need to develop complementary forms of protection, alongside the 1951 Convention/1967 Protocol. Six years later, it adopted Conclusion No. 103 (LVI), precisely on the provision of international protection including through complementary forms of protection.²³⁷

Since then, a series of crises has stretched the international refugee regime—the break-up of former Yugoslavia, the conflicts in Iraq and Afghanistan, the civil war in Syria, the Rohingya in Myanmar, the collapse of government in Venezuela. Individual States have often acted unilaterally, fearing a lack of

international support or simply unwilling to cooperate; lasting solutions have not resulted, but a heavy price has been paid by those on the receiving end of arbitrary and poorly designed policy and practice. The ‘Mediterranean Crisis’ in 2015–16 and earlier long-standing attention to protracted refugee situations, to mixed migration and refugee movements, and the protection needs of migrants, nevertheless coalesced to an extent in three important institutional initiatives—the General Assembly’s unanimous adoption in 2016 of the New York Declaration on Refugees and Migrants, followed by the Global Compact on Refugees and the Global Compact on Safe, Orderly and Regular Migration.²³⁸

From one perspective, and even though they each take ‘protection’ as the fundamental point of departure, these initiatives skirt the finer details of classification. Instead, they are premised on the reality of present day displacements, in all their complexity. They aim at new forms of cooperation, at renewed commitment to support for host States and communities, and at solutions, both for ‘refugees’ and for those who must move for other reasons or who, having moved or otherwise been displaced, find themselves without protection.

8. ‘Refugees’ for the purposes of general international law

Refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called ‘statutory refugees’); but also other often large groups of persons who can be determined or presumed to be without the protection of the government of their State of origin. In principle, it is still essential that the persons in question should have crossed an international frontier and that, in the case of the latter group, the reasons for flight should be traceable to conflicts, human rights violations, breaches of international humanitarian law, or other serious harm resulting from radical political, social, or economic changes in their own country. With fundamental human rights at issue, a central feature triggering the international protection regime remains violence, or the risk or threat of violence; those who move because of pure economic motivation, pure personal convenience, or criminal intent are excluded. Somewhere in between are those compelled to move in the context of sudden-onset disasters, or because present stability and livelihoods are increasingly at

risk, owing to the impacts of climate change and environmental degradation. If, or when, they move, protection will be among their needs.²³⁹

On the basis of State and international organization practice, the above core of meaning represents the content of the term ‘refugee’ in general international law. Grey areas nevertheless remain. The class of persons ‘without the protection of the government of their State of origin’ begs many questions. Moreover, the varying content of the term ‘refugee’ may likewise import varying legal consequences, so that the obligations of States in matters such as *non-refoulement*, non-rejection at the frontier, temporary refuge or asylum, and treatment after entry will depend upon the precise status of the particular class and, in particular, the risks to which they are or may be exposed. In many situations, UNHCR’s institutional responsibilities will be complemented by the obligations of States under the 1951 Convention/1967 Protocol, or supplemented by regional arrangements. This is not a complete legal regime, however. The disjuncture between the obligations of States and the institutional responsibilities of UNHCR is broadest and most clearly apparent in regard to refugees, other than those having a well-founded fear of persecution or falling within regional arrangements. The disjuncture is compounded by differences as to the criteria determining the limits of the class, and as to the applicability of certain basic principles of human rights, including rights to refuge and protection. UNHCR has been accorded a functional role and responsibility by the international community, but it remains dependent upon the resources and the political will of States to work out the practical problems of protection, assistance and solutions. UN General Assembly resolutions may impose obligations on UNHCR, its subsidiary organ, but they do not thereby directly impose obligations on States. That said, UNHCR’s activities on State territory and in cooperation with States commonly lay the groundwork of practice that leads to the emergence and consolidation of principles and norms relevant both to protection and to solutions.²⁴⁰

As shown in more detail below, the principle of *non-refoulement* (in its generic form of ‘refuge’) is the foundation stone of international protection and applies across a broad class, even if the resulting regime of law and practice is far from adequate either for States or individuals. Certain factual elements may be necessary before the principle is triggered—for example, evidence of political, religious, or minority repression and persecution, mass movement to or across an international frontier, and relevant indicators of valid reasons for flight, such as

human rights violations—but it would not be permissible for a State to seek to avoid its obligations, either by declining to make a formal determination of refugee status or by ignoring and acting in disregard of the development of the refugee concept in State and international organization practice.

While States are conscious of the potential threat to their own security that large movements of people in search of protection can pose, none claims an absolute right to return a refugee, as such, to persecution. A State may try to assert for itself greater freedom of action, however, by avoiding any use of refugee terminology. Asylum seekers are thus classified as ‘displaced persons’, ‘illegal immigrants’, ‘economic migrants’, ‘quasi-refugees’, ‘aliens’, ‘departees’, ‘boat-people’, or ‘stowaways’. Similarly, the developed world, in particular, expends considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others. ‘Interdiction’, ‘pre-inspection’, ‘visa requirements’, ‘carrier sanctions’, ‘safe third country’ concepts, ‘security zones’, ‘international zones’, ‘pushbacks’, and the like are among the armoury of measures currently employed. The intention may be either to forestall arrivals, or to allow those arriving to be dealt with at discretion, but the clear implication is that, for States at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment.

¹ The *Oxford English Dictionary* defines a refugee as: ‘A person who has been forced to leave his or her home and seek refuge elsewhere, esp. in a foreign country, from war, religious persecution, political troubles, the effects of a natural disaster, etc.; a displaced person’, and ‘refuge’ as ‘Shelter or protection from danger or trouble ... A place of safety or security; a shelter, a sanctuary, a retreat.’

² On measures to strengthen the UN’s humanitarian response capacity, see further Ch. 9, s. 1.3, and for information on current emergencies, see <https://reliefweb.int/>.

³ 1926 Arrangement relating to the issue of identity certificates to Russian and Armenian Refugees: 89 LNTS 47 No. 2004. The definition of ‘Armenian refugee’ was to like effect: *ibid.* ‘Assyrian, Assyro-Chaldean, and assimilated refugee’ was defined in the 1928 Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees: 89 LNTS 63 No. 2006. Cf. art. 1, 1933 Convention relating to the International Status of Refugees, and reservations thereto: 159 LNTS 199 No. 3663; Beck, R. J., ‘Britain and the 1933 Refugee Convention: National or State Sovereignty?’ (1999) 11 *IJRL* 597. See also Marrus, M., *The Unwanted—European*

Refugees in the Twentieth Century (1st edn., 1985) 74–81, 119–21; Hathaway, J., ‘The Evolution of Refugee Status in International Law’ (1984) 33 *ICLQ* 348.

⁴ Certificates ceased to be valid if the bearers returned to their country of origin; see form and wording of the certificate attached to the 1922 arrangement: 13 LNTS 237 No. 355; Res. 9 of the arrangement of 30 June 1928: 89 LNTS 53 No. 2005; certificate attached to the 1938 Convention concerning the Status of Refugees coming from Germany: 192 LNTS 59 No. 4461.

⁵ Art. 1, 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany: 171 LNTS 76 No. 3952.

⁶ 1938 Convention concerning the Status of Refugees coming from Germany: 191 LNTS 59 No. 4461. The Convention was expanded the following year to include Austrian refugees after the *Anschluss*; see the 1939 Additional Protocol: 198 LNTS 141 No. 4634.

⁷ Sjöberg, T., *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees*; (*IGCR*) 1938–1947 (1991) 38.

⁸ League of Nations, ‘Russian and Armenian Refugees: Report to the Eighth Assembly’ (1927), (A.48.1927.XIII) 14, cited in Skran, C., *Refugees in Inter-War Europe: The Emergence of a Regime* (1995) 115; see also doc. XIII: Refugees (1927.XIII.3).

⁹ Minutes of the 43rd Session of the Council *LN OJ* (February 1927), cited in Skran (n 8) 115.

¹⁰ See further Ch. 6; and for a fuller account, McAdam, J., *Complementary Protection in International Law* (2007).

¹¹ As late as 1938, Switzerland observed that it daily received refugees who had lost their nationality on account of events during the First World War, but who remained unprotected by any international refugee instrument; see International Conference for the Adoption of a Convention Concerning the Status of Refugees Coming from Germany, ‘Provisional Minutes: Third Meeting (Private)’ CONF.CSRA/PV3 (8 Feb. 1938) 4.

¹² ‘All political refugees were a source of political embarrassment to the organization’: Sjöberg (n 7) 38; among others, Italian refugees fleeing Mussolini’s Fascist government after 1922 were not protected by the League machinery. Melander offers an alternative view, and queries whether political factors are sufficient to explain the protection of some groups of refugees but not others. He suggests that Italian and Spanish refugees were seen rather as ‘human rights refugees’, in a period when human rights violations were considered matters of domestic, not international concern; as a result, granting protection on such grounds, ‘was inconsistent with the principle of nonintervention in the internal affairs of sovereign states’: Melander, G., ‘Refugee Policy Options—Protection or Assistance’, in Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990) 151.

¹³ Sjöberg (n 7) 27. Although Melander acknowledges that some refugees protected by the League instruments were clearly fleeing human rights abuses, he considers this merely incidental to the humanitarian law justification for their protection, as victims of armed conflicts or communal violence: Melander (n 12) 146–7.

¹⁴ (1938) 19(8–9) *LNOJ* 676, 677. For a full account of the IGCR, see Sjöberg ([n 7](#)). Speaking in 1979 to the Geneva Conference on Refugees and Displaced Persons in Southeast Asia, US Vice-President Mondale characterized the 1938 Evian Conference as a failure: ‘The civilized world’, he said, ‘hid in a cloak of legalism’: UN Press release SG/REF/3 (21 Jul. 1979). See also Marrus ([n 3](#)) 166–70.

¹⁵ Para. 8, Resolution adopted by the Intergovernmental Meeting at Evian (14 Jul. 1938): *LNOJ*, 19, nos. 8–9: (Aug.–Sep. 1938) 676–7. See also art. 1, Agreement relating to the issue of Travel Documents to Refugees who are the Concern of the Intergovernmental Committee on Refugees (15 Oct. 1946): 11 UNTS 73; Marrus ([n 3](#)) 170–7.

¹⁶ Sjöberg ([n 7](#)) 16 and [Ch. 4](#). The functions of the organization were also rewritten: IGCR was ‘to undertake negotiations with neutral or Allied States or with organizations, and to take such steps as may be necessary to preserve, maintain and transport’ refugees within its mandate. The United Nations Relief and Rehabilitation Administration (UNRRA), established in November 1943 with 44 governments signing the constituent agreement, was principally concerned with assistance to civilian nationals of the allied nations and to displaced persons in liberated countries, and with the repatriation and return of prisoners of war. It was not authorized to resettle the displaced or to deal with or find solutions for refugees, considered as those who, ‘for any reason, definitely cannot return to their homes, or have no homes to return to, or no longer enjoy the protection of their Governments’. See para. 22, proposal concerning refugees submitted by the United Kingdom: UN doc. A/C.3/5, annexed to GAOR, Third Committee, 1st Sess., 1st Part (1946) Summary Records: UN doc. A/C.3/SR.1–11. UNRRA nevertheless increasingly faced these issues as East Europeans fled or refused to return to communism; see Salomon, K., *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (1991) 46–54 and *passim*; Woodbridge, G., *The History of the United Nations Relief and Rehabilitation Administration*, 3 vols. (1950); Marrus ([n 3](#)) 317–24.

¹⁷ Simpson, J. H., *Refugees—A Preliminary Report of a Survey* (1938) 1.

¹⁸ 1946 Constitution of the International Refugee Organization: 18 UNTS 3; UNGA res. 62/1(I-II) ‘Refugees and displaced persons’ (15 Dec. 1946) (30-5-18). See also McAdam, J., ‘Rethinking the Origins of “Persecution” in Refugee Law’ (2013) 25 *IJRL* 651.

¹⁹ On the re-emergence of the term ‘displaced persons’, see further s. 3.2.

²⁰ Generally, see Holborn, L. W., *The International Refugee Organization: A Specialized Agency of the United Nations. Its History and Work 1946–1952* (1956); Salomon ([n 16](#)). For a brief account of the politicized debates in the UN on refugee definition in the 1940s, see Goodwin-Gill, G. S., ‘Different Types of Forced Migration Movements as an International and National Problem’, in Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990) 15, 22–9.

²¹ UNGAOR, 5th Sess., Third Comm., Summary Records, 324th Mtg. (22 Nov. 1950) paras. 44–9; see also 326th Mtg. (24 Nov. 1950) para. 31ff (United States). At the 329th Mtg. (29 Nov. 1950) the US representative, Eleanor Roosevelt, criticized the UK proposal to

include refugees requiring assistance, but not protection. She noted that refugees in Germany, India, Pakistan, and Turkey had serious problems of integration, but they enjoyed the rights of nationals. Any specific relief programmes should be formulated within the overall economic framework of the countries concerned, and were beyond the competence of the High Commissioner: 329th Mtg., paras. 34–6. See further Özsu, U., *Formalizing Displacement: International Law and Population Transfers* (2015).

²² Cf. the views of India: 332nd Mtg. (1 Dec. 1950) paras. 26–7.

²³ ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’

²⁴ See Ch. 5.

²⁵ An understanding of the historical context of UNHCR’s creation is also important; see Salomon, K., *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (1991); Sjöberg ([n 7](#)) (both reviewed by Goodwin-Gill in (1994) 6 *IJRL* 311; Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990); Jaeger, G., ‘Les Nations Unies et les réfugiés’ (1989) 1 *Revue belge de droit international* 18.

²⁶ UNGA res. 428(V), ‘Statute of the Office of the United Nations High Commissioner for Refugees’ (14 Dec. 1950) (36-5-11), Annex, paras. 1, 2. For brief background, see Goodwin-Gill ([n 20](#)) 15.

²⁷ The phrase ‘country of origin’ is used for convenience here and throughout the text; it signifies, as appropriate, the refugee’s country of nationality or, if he or she has no nationality, his or her country of former habitual residence.

²⁸ This latter provision would cover the situation of a person who, by reason of persecution already suffered, remains unwilling to return even though the circumstances which gave rise to their other refugee status have ceased to exist. Cf. art. 1C(5), (6), 1951 Convention; and Ch. 4, s. 2.

²⁹ See further Ch. 3, s. 6.

³⁰ United Nations, *A Study of Statelessness* (1949) 9. See further Ch. 13.

³¹ United Nations ([n 30](#)) 11. See also Fortin, A., ‘The Meaning of “Protection” in the Refugee Definition’ (2001) 12 *IJRL* 548; while the argument for a diplomatic and ‘external’ perspective on ‘protection’ has solid historical roots, the availability or otherwise of effective ‘internal protection’ is now widely adopted as an element in defining both refugee and persecution. See the judgment of the UK House of Lords in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, where Lord Carswell was of the view that: ‘Since the temporal provision in article 1A(2) was removed in 1967 it has not been so interpreted and ... ongoing interpretation of the Convention as a living instrument and adaptation to modern conditions have brought about a shift in meaning’: para. 66. The Court found, in a case involving the so-called internal flight alternative, that while the availability of (internal) protection was relevant to determining the well-foundedness of fear of persecution, the concept did not go so far as to require the effective provision of a range of civil, political,

social, and economic rights as a precondition to ‘reasonable relocation’, at least so far as failings in this regard did not amount to persecution; see the judgment of Lord Bingham at paras. 5–19; and further Ch. 3, s. 5.6.1.

³² See, for example, the resolution adopted on 30 September 1938, by the Assembly of the League of Nations, in which it decided to establish an office of High Commissioner to deal with refugees formerly within the competence of the Nansen International Office and the Office of the High Commissioner for Refugees coming from Germany. Operative paragraph 2 provided that the High Commissioner’s duties would be: ‘(a) to provide for the political and legal protection of refugees, as entrusted to the regular organs of the League by paragraph 3 of the Assembly’s decision of 30 September 1930; (b) to superintend the entry into force and the application of the legal status of refugees, as defined more particularly in the Conventions of 28 October 1933, and 10 February 1938; (c) to facilitate the co-ordination of humanitarian assistance; and (d) to assist the Governments and private organizations in their efforts to promote emigration and permanent settlement’: Resolution adopted by the XIXth Session of the Assembly of the League of Nations on 30 September 1938, concerning international assistance to refugees: League of Nations, *Official Journal* (1938) Special Supplement No. 183, 26–8. See also the June 1948 Agreement concluded between the IRO and the Government of Brazil, which provides that ‘the rights of protection pertaining to nations with regard to their subjects abroad will be exercised in Brazil by the IRO with regard to the refugees established in Brazil so long as they are stateless or for other reasons have lost the protection of their national State and are therefore included in the jurisdiction and precepts of the IRO in accordance with its Constitution’. For references to both sources, see United Nations (n 30) 32–3, 36–7, 49–52; also, Fischel de Andrade, J. H., ‘Brazil and the International Refugee Organization (1946–1952)’ (2011) 30(1) *RSQ* 65.

³³ United Nations (n 30) 68–71.

³⁴ See further Ch. 6.

³⁵ See Jackson, I. C., *The Refugee Concept in Group Situations* (1999) 40–81; Kourula, P., *Broadening the Edges: Refugee Definition and International Protection Revisited* (1997) 157–62, 177–83, and *passim*; UNHCR, Division of International Protection, ‘Note on the Mandate of the High Commissioner for Refugees and his Office’ (Dec. 2013); Goodwin-Gill, G. S., ‘The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change’ (2016) 28 *IJRL* 679.

³⁶ UNHCR Statute, para. 3. UNHCR’s practice, in cooperation with States, has provided the foundation for the progressive development of its mandate.

³⁷ UNGA res. 1166(XII) (26 Nov. 1957). In 2020, the General Assembly decided to increase Executive Committee membership to 107 States: UNGA res. 75/162 (16 Dec. 2020). For membership, see List of States, xxi.

³⁸ On the conclusions of the Executive Committee and their role in setting protection standards, see further Ch. 8, s. 1.

³⁹ UNGA res. 1167(XII) (26 Nov. 1957). Cf. UNGA res. 1129(XI) (21 Nov. 1956)

approving UNHCR action already taken to assist Hungarian refugees. In UNGA res. 1784(XVII) (7 Dec. 1962), the General Assembly again acknowledged that the situation of Chinese refugees was of concern to the international community, recognized the continuing need for emergency and long-term assistance, and requested UNHCR to use its good offices in the provision thereof.

⁴⁰ See Hambro, E., *The Problem of Chinese Refugees in Hong Kong* (1955), for background; also, Jackson (n 35) 93–4, 210–13.

⁴¹ For example, to Algerians fleeing to Tunisia and Morocco to escape the effects of the struggle for liberation: UNGA resolutions 1286(XIII) (5 Dec. 1958); 1389(XVI) (20 Nov. 1959); 1500(XV) (5 Dec. 1960); 1672(XVI) (18 Dec. 1961); and to Angolan refugees in the Congo: UNGA res. 1671(XVI) (10 Dec. 1961). Using declassified archival material in London, Paris and Washington, as well as interviews with officials (including August Lindt, the High Commissioner of the day), Ruthström-Ruin has shown that earlier explanations attributing UNHCR's involvement with Algerian refugees to a 'good offices' basis are 'incomplete, and partly incorrect': Ruthström-Ruin, C., *Beyond Europe: The Globalization of Refugee Aid* (1993) 103f.; reviewed by Goodwin-Gill in 7 *IJRL* 168 (1995). Following an onsite investigation in Tunisia, the High Commissioner initially decided that the Algerians were indeed within his mandate as refugees with a well-founded fear of persecution, only to change tack later. UNHCR's inconsistent interpretation and application of its Statute satisfied client governments, including those who, while critical of French policy in Algeria, either did not want France accused of persecution or were themselves uncertain whether Algerians who fled were 'refugees'. See also Jackson (n 35) 120–42.

⁴² The term is employed but not defined in UNGA res. 1499(XV) (5 Dec. 1960).

⁴³ Compare UNGA resolutions 1167(XII) (26 Nov. 1957) and 1784(XVII) (7 Dec. 1962).

⁴⁴ UNGA res. 1388(XIV) (20 Nov. 1959).

⁴⁵ UNGA res. 1389(XIV) (20 Nov. 1959). See also UNGA resolutions 1286(XIII) (5 Dec. 1958); 1500(XV) (5 Dec. 1960); and 1672(XVI) (18 Dec. 1961).

⁴⁶ The details are well summarized in Ruthström-Ruin (n 41) 81–93.

⁴⁷ See UNGA resolutions 1129(XI) (21 Nov. 1956); 1499(XV) (5 Dec. 1960); res. 1673(XVI) (18 Dec. 1961); 1783(XVII) (7 Dec. 1962).

⁴⁸ UNGA res. 1959(XVIII) (12 Dec. 1963), requesting the High Commissioner to continue to afford international protection to refugees and to pursue efforts on behalf of refugees within his mandate and of those for whom he extends his good offices, by giving particular attention to new refugee groups, in conformity with relevant General Assembly resolutions and Executive Committee directives (para. 1).

⁴⁹ UNGA res. 3143(XXVIII) (14 Dec. 1973), requesting the High Commissioner to continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called up to assist in accordance with relevant resolutions of the General Assembly.

⁵⁰ UNGA res. 2039(XX) (7 Dec. 1965).

⁵¹ UNGA resolutions 2197(XXI) (16 Dec. 1966); 2294(XXII) (11 Dec. 1967) (continuing UNHCR and requesting protection, assistance and efforts towards solutions for refugees who are UNHCR's concern); 2399(XXIII) (6 Dec. 1968) (to similar effect, calling also for 'special attention to new groups of refugees, particularly in Africa', in conformity with relevant General Assembly resolutions and Executive Committee directives); 2594(XXIV) (16 Dec. 1969) (noting results obtained in regard to the international protection of refugees within the mandate, and requesting continued protection and assistance for refugees who are UNHCR's concern); 2650(XXV) (30 Nov. 1970); 2789(XXVI) (6 Dec. 1971); 2956(XXVII) (12 Dec. 1972).

⁵² Cf. Ruthström-Ruin ([n 41](#)) 96–123.

⁵³ This was certainly a factor with respect to France and refugees from Algeria: Ruthström-Ruin ([n 41](#)) 96–109.

⁵⁴ Schnyder, F., 'Les aspects juridiques actuels du problème des réfugiés' (1965-I) 114 *Hague Recueil* 339, 426–43; Aga Khan, S., 'Legal problems relating to refugees and displaced persons' (1976-I) 149 *Hague Recueil* 289, 306, 339–43. Jackson argues that, in the period 1961–75, the principal groups of refugees in Africa were dealt with, either under the Statute/Convention definition, or on the basis of a 'developed' good offices approach based on *prima facie* group determination: Jackson ([n 35](#)) 176.

⁵⁵ ECOSOC resolutions 1655(LII) (1 Jun. 1972); 1705(LII) (27 Jul. 1972); 1741(LIV) (4 May 1973); 1799(LV) (30 Jul. 1973); 1877(LVII) (16 Jul. 1974); Jackson ([n 35](#)) 229–35.

⁵⁶ UNGA res. 2958(XXVII) (12 Dec. 1972).

⁵⁷ UNGA resolutions 3271(XXIX) (10 Dec. 1974); 3454(XXX) (9 Dec. 1975). UNHCR had meanwhile served as focal point for assistance operations in India/Bangladesh, and in Cyprus.

⁵⁸ ECOSOC res. 2011(LXI) (2 Aug. 1976).

⁵⁹ UNGA res. 31/35 (30 Nov. 1976).

⁶⁰ UNGA res. 3455(XXX) (9 Dec. 1975). Fong, C., 'Some Legal Aspects of the Search for Admission into other States of Persons leaving the Indo-Chinese Peninsular in Small Boats' (1982) 52 *BYIL* 53, 80–5—discusses the meaning of 'displaced persons', with particular reference to UNGA res. 3454(XXX) and the mandate of UNHCR.

⁶¹ UNHCR had become involved in the region, at the request of the governments concerned, and was promoting assistance programmes for those displaced by the effects of war. See the High Commissioner's statement to the 25th Session of the Executive Committee (1974): UN doc. A/AC. 96/511, annex; *Report of the High Commissioner to the General Assembly* (1975): E/5688, Add. 1, paras. 34–43. Such assistance was undertaken 'within the framework of [UNHCR's] "good offices" function', and 'on a purely humanitarian basis'.

⁶² See s. 3.3. In debate on the successor to the IRO in 1950, several countries, including India, Pakistan, and Greece, argued for the inclusion of 'internal refugees', but it was the insistence on the absence of *legal* protection that prevailed; for a summary account, see Goodwin-Gill ([n 20](#)) 27.

⁶³ See n 55.

⁶⁴ A summary of the background is provided in *Report of the Secretary-General on the Meeting on Refugees and Displaced Persons in South East Asia, Geneva (20–21 July 1979), and Subsequent Developments*: UN doc. A/34/627. See also Jackson (n 35) 316–46; Osborne, M., ‘The Indochinese Refugees: Causes and Effects’ (1980) *International Affairs* 37, 37–53; Grant, B., *The Boat People* (1980); Garcia Marquez, G., ‘The Vietnam Wars’ *Rolling Stone* (May 1980); ‘Human Rights, War and Mass Exodus’ *Transnational Perspectives* (1982) 34–8.

⁶⁵ UN docs. A/AC.96/516/Add. 1; A/AC.96/INF.147. The High Commissioner’s report to the General Assembly (1976) refers to ‘special operations within the framework of the High Commissioner’s good offices function’ and to ‘displaced persons who face problems analogous to those of refugees’: E/5853, paras. 170 ff.

⁶⁶ UN doc. A/AC.96/534, para. 57 (1976). ‘Displaced persons’ and ‘boat people’ terminology prevailed through 1977 and 1978 (see UN doc. E/5987, paras. 6, 185, 207, 212, 214; UN doc. A/AC.96/553/Add. 1), with the composite ‘refugees and displaced persons’ also appearing.

⁶⁷ UNGA res. 3455(XXX) (9 Dec. 1975) on humanitarian assistance to the Indo-Chinese displaced persons.

⁶⁸ UN doc. A/AC.96/534, para. 87(f).

⁶⁹ UN doc. A/AC.96/549, para. 36(b). In 1980, the General Assembly referred to ‘boat and land cases in South East Asia’ as ‘refugees’: UNGA res. 35/41 (25 Nov. 1980) para. 8. The causes of population displacements naturally change over time; a 1985 internal UNHCR survey of motivations for departure from Vietnam looked at ethnic and religious discrimination, amongst others, but found that severe economic conditions were mentioned by practically all as a factor in the decision to leave. A review of refugee claims carried out by several officials working independently found that some 8 per cent of cases had a clear claim to refugee status; 31 per cent could qualify on basis of a ‘very liberal interpretation’; and that 61 per cent ‘clearly’ did not qualify: UNHCR, ‘Assessment of Current Arrivals in South East Asian Countries of Persons leaving the SRVN by Boat’ (Sep. 1985).

⁷⁰ See the High Commissioner’s statement to the Executive Committee in 1977: UN doc. A/AC.96/549, annex, and for summary of the views of States: ibid., paras. 21, 26. For more detailed statements, see UN docs. A/AC.96/SR.284, paras. 13, 25 bis, 46; SR.287, paras. 26, 35; SR.288, paras. 30, 57; SR.291, para. 6. See also the High Commissioner’s statement to the 31st Session of the Executive Committee (1980): UN doc. A/AC.96/588, annex 5. At that session, the representative for Turkey expressed the view that ‘the time had come to ensure that UNHCR did not, by virtue of precedents, become a body which cared for anyone compelled for whatever reason to leave his country or even to move to a different area inside his country’: UN doc. A/AC.96/SR.319, paras. 12–15.

⁷¹ See further s. 3.3.

⁷² In 1973, the General Assembly requested the High Commissioner ‘to continue his

assistance *and protection* activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions of the General Assembly': UNGA res. 3143(XXVIII) (14 Dec. 1973). UNGA res. 32/68 (8 Dec. 1977) continued UNHCR's mandate and noted 'the outstanding work ... performed ... in providing international *protection* to refugees and displaced persons'. UNGA res. 35/41 (25 Nov. 1980) refers to UNHCR's responsibilities 'for *protecting* and assisting refugees and displaced persons throughout the world'. Cf. paras. 28–32, CIREFCA Plan of Action; for text, see the second edition of this work, Annex 5, No. 2.

⁷³ See, for example, UNGA res. 60/129, 'Office of the United Nations High Commissioner for Refugees' (16 Dec. 2005); UNGA res. 74/130 (18 Dec. 2019).

⁷⁴ The incremental, 'after the event', and sometimes accidental growth in UNHCR's area of institutional responsibility might have been more efficiently organized had the General Assembly maintained the approach to 'competence' proposed in the 1949 draft statute: ' ... for the time being, refugees and displaced persons defined in [the IRO Constitution] and, thereafter, such persons as the General Assembly may from time to time determine, including any persons brought under the jurisdiction of the High Commissioner's Office under the terms of international conventions or agreements approved by the General Assembly': UNGA res. 319(IV) (3 Dec. 1949) Annex, para. 3. However, it may also be that the 'politics' in any such General Assembly determination are more easily avoided by allowing operations on the ground to lead the way.

⁷⁵ That is, a general sense that something must be done, even if those in need of protection or assistance do not fall squarely within the letter of legal regimes of competence or obligation. On the dangers of 'negative responsibility', however, see Goodwin-Gill, G. S., 'Refugee Identity and Protection's Fading Prospect', in Nicholson, F. & Twomey, P., eds., *Refugee Rights and Realities* (1999) 220, 240–1.

⁷⁶ 'Lack of protection', in this context, is intended to reflect general, though well-informed assessments of situations on the ground in countries of origin, rather than the highly individualized test which has been adopted for the purposes of determination of status in some jurisdictions. See also, Goodwin-Gill (n 35).

⁷⁷ UNGA res. 36/148 (16 Dec. 1981).

⁷⁸ UN doc. A/41/324 (May 1986).

⁷⁹ The Group separated man-made causes and factors, sub-divided into political causes and socio-economic factors, from natural causes. Within the man-made category were wars, colonialism, the treatment of minorities (for example, under *apartheid*), discrimination and internal conflict, violation of human rights and fundamental freedoms, and expulsions. Socio-economic factors relevant to these causes were those that threatened the physical integrity and survival of individuals and groups, underdevelopment, particularly the legacy of colonialism, the absence of adequate economic infrastructures, and the parlous state of the world economy. Although details in the world picture and in the politics may have changed greatly since this *Report* was published, the overall analysis still repays attention.

⁸⁰ See statement by the observer for the Democratic Republic of Vietnam at the 26th Session of the Executive Committee (1975): UN doc. A/AC.96/521, para. 105.

⁸¹ See further Ch. 4, s. 1.

⁸² The failure or unwillingness to readmit nationals, or to provide relevant documentation, can also arise outside the refugee context, strictly so called, and is a matter of continuing concern among migrant receiving States; see UNGA res. 60/129 (16 Dec. 2005), referring to ‘the obligation of all States to accept the return of their nationals ...’: para. 17, and the emphasis placed on return in more recent resolutions, including UNGA res. 73/195, ‘Global Compact on Safe, Orderly and Regular Migration’ (19 Dec. 2018) para. 37; UNGA res. 74/158, ‘Protection of migrants’ (18 Dec. 2019) para. 5(f); UNGA res. 75/163, ‘Office of the High Commissioner for Refugees’ (16 Dec. 2020) para. 56.

⁸³ In discussion of the High Commissioner’s report in the Third Committee in 1979, for example, the representative of Afghanistan referred to UNHCR’s ‘assistance to fugitive insurgents in Pakistan’ UN doc. A/C.3/34/SR.46, para. 58f. At the Executive Committee in 1984 the observer for Afghanistan claimed that Afghans in Iran and Pakistan, if not insurgents, were nomads and migrant workers; this was roundly rejected by representatives of the receiving and other countries: see UN docs. A/AC.96/SR.371, paras. 92–7, 107; SR.372, para. 60; SR.373, paras. 34, 78; similar exchanges occurred in 1987: UN doc. A/AC.96/SR.416, paras. 38–41, 82.

⁸⁴ In 1984, Morocco objected to use of the word ‘refugee’ in describing UNHCR assistance to Sahrawis in the Tindouf: UN doc. A/AC.96/SR.376, paras. 2–7, claiming that not enough was being done by Algeria to encourage their voluntary repatriation; see further *ibid.*, paras. 8–15; SR.377, paras. 55–61, 67–9; SR.378, paras. 77–81. The dispute continued in later years; see UN docs. A/AC.96/SR.394, 59–71; SR.399, paras. 46–8 (1985); SR.403, paras. 65–6; SR. 407, paras. 81–3, 91–4 (1986); SR.414, para. 29; SR.415, para. 73; SR.420, paras. 7–9, 53 (1987). In 1986, Iraq claimed that the ‘Iraqi refugees’ referred to by Iran were in fact Iranians who had been living in Iraq and who had been expelled for having committed acts of terrorism and threatening security: SR.409, paras. 34, 94–103. The following year, Iran claimed that most so-called Iranian refugees were ‘members of rival political groups, supported from outside ... attempting to infiltrate Iranian territory in order to commit subversive acts’: UN doc. A/AC.96/SR.418, para. 105. Israel objected when Palestinians began to appear in the annual Executive Committee General Conclusion on International Protection (usually expressing concern about the lack of adequate international protection); see *Report of the 39th Session of the Executive Committee*: UN doc. A/AC/96/721 (13 Oct. 1988) paras. 22, 36. When Palestinians were referred to in the 1993 General Conclusion (UN doc. A/AC.96/821 (12 Oct. 1993) para. 19(z)), Israel raised no objection, although it has commented on the Palestinian issue in general debate; see the statement during the 53rd Session of the Executive Committee on 30 Sept. 2002 by the Secretary-General of the League of Arab States in UN doc. A/AC.96/561 (20 Oct. 2002) paras. 34–7, and the Israeli response in UN doc. A/AC.96/SR.562 (9 Oct. 2002) paras. 85–6. The Executive Committee’s 2009 Conclusion on Protracted Refugee Situations No. 109 (LX) stressed that it was to be

only implemented subject to art. 1D of the Convention and in accordance with General Assembly resolutions. For discussion of Turkey/Bulgaria, see UN docs. A/AC.96/SR.438, para. 81; SR.440, paras. 93–7; SR.441, paras. 60–4, 65, 66 (1989); on Hungary/Romania, see SR.440, paras. 49–51, 112 (1989); SR.457, paras. 49–57 (1990). ‘Inclusion’ claims are also made from time to time; regarding ‘Russians living in other republics’, see SR.466, paras. 47–8 (1991); similarly, for Ukrainians, see SR.484, para. 20 (1993), touching also on the plight of Crimean Tatars, Germans, Greeks, and Bulgarians deported from the Ukraine during the Second World War.

⁸⁵ Stateless persons are also entitled to UNHCR protection, whether refugees or not; see further Ch. 13.

⁸⁶ Reservations about the implications of an expanded refugee definition were expressed at the 32nd Session of the Executive Committee in 1981: UN doc. A/AC.96/601, para. 48, and at the 35th Session in 1984: UN doc. A/AC.96/651, para. 81. See further s. 7.

⁸⁷ See Chs. 6, 7.

⁸⁸ At the end of 2019, there were 45.7 million IDPs compared to 26 million refugees: UNHCR, ‘Figures at a Glance’ (18 June 2020) <https://www.unhcr.org/en-au/figures-at-a-glance.html>.

⁸⁹ OCHA, ‘Ending protracted internal displacement’: <https://www.unocha.org/idps>; OCHA, ‘Reducing Protracted Internal Displacement: A Snapshot of Successful Humanitarian-Development Initiatives’ (2019).

⁹⁰ UNGA res. 75/163, ‘Office of the United Nations High Commissioner for Refugees’ (16 Dec. 2020) paras. 9–10.

⁹¹ UNGAOR, 4th Sess., 3rd Comm. , 257th Mtg.: UN doc. A/C.3/SR.257 (8 Nov. 1949) para. 17.

⁹² Ibid., 260th Mtg.: UN doc. A/C.3/SR.260 (11 Nov. 1949) para. 37 (Pakistan); ibid., 263rd Mtg.: UN doc. A/C.3/SR.263 (15 Nov. 1949) para. 62 (India stating that it was not convinced of the need for an international organization whose sole responsibility would be to provide legal protection, when its own refugees were dying of starvation). See also ibid., 258th Mtg.: UN doc. A/C.3/SR.258 (9 Nov. 1949) para. 13 ff (Pakistan); ibid., 259th Mtg.: UN doc. A/C.3/SR.259 (10 Nov. 1949); ibid., 264th Mtg.: UN doc. A/C.3/SR.264 (15 Nov. 1949) para. 5 ff (Pakistan).

⁹³ Ibid., 261st Mtg.: UN doc. A/C.3/SR.261 (12 Nov. 1949) para. 39 (United States). With what seems irony in retrospect, Mrs Roosevelt also commented on the need to preserve the essentially deliberative character of the United Nations, in face of the increasing tendency to drive the organization into the field of international relief: ibid., 262nd Mtg.: UN doc. A/C.3/SR.262 (14 Nov. 1949) para. 7 (United States). See also UN doc. A/PV.264 (2 Dec. 1949) paras. 73–4, and above s. 3.2. For further analysis, see Orchard, P., ‘The Contested Origins of Internal Displacement’ (2016) 28 *IJRL* 210.

⁹⁴ See ECOSOC res. 1705(LIII) (27 Jul. 1972), referring to Sudan and to ‘the assistance required for voluntary repatriation, rehabilitation and resettlement of the refugees returning

from abroad, as well as of persons displaced within the country'; also UNGA res. 2958(XXVII) (12 Dec. 1972).

⁹⁵ UNGA res. 2956(XXVII) (12 Dec. 1972). Para. 9 of the UNHCR Statute requires the High Commissioner to 'follow policy directives' from the General Assembly and ECOSOC and to 'engage in such additional activities ... as the General Assembly may determine within the limits of the resources placed at his disposal'.

⁹⁶ See, for example, UNGA resolutions 3454(XXX) (9 Dec. 1975); 31/35 (30 Nov. 1976); 34/60 (29 Nov. 1979); 35/41 (25 Nov. 1980); 40/118 (13 Dec. 1985).

⁹⁷ UNGA res. 43/116 (8 Dec. 1988). Cf. Plender, R., 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 *IJRL* 345.

⁹⁸ UNGA resolutions 44/136 (15 Dec. 1989); 45/137 (14 Dec. 1990).

⁹⁹ ECOSOC res. 1990/78 (27 Jul. 1990) para. 1.

¹⁰⁰ CHR res. 1992/73 (5 Mar. 1992); UN doc. E/CN.4/1992/L.11/Add.6; CHR res. 1991/25 (5 Mar. 1991). See also *Analytical Report* of the Secretary-General on Internally Displaced Persons: UN doc. E/CN.4/1992/23 (14 Feb. 1992).

¹⁰¹ Kälin held the role until 2010. The title was changed to the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani was appointed in November of that year, and was succeeded by Cecilia Jimenez-Damary in November 2016.

¹⁰² 'Comprehensive Study on the Human Rights Issues relating to Internally Displaced Persons': UN doc. E/CN.4/1993/35; 'Internally Displaced Persons. Report of the Representative of the Secretary-General': UN doc. E/CN.4/1994/44. See the series of addenda, 'Profiles in Displacement': Sri Lanka: UN doc. E/CN.4/1994/44/Add.1 (25 Jan. 1994); Colombia: UN doc. E/CN.4/1995/ 50/Add.1 (3 Oct. 1994); Burundi: UN doc. E/CN.4/1995/50/Add.2 (28 Nov. 1994); published in (1995) 14 *RSQ*, Nos. (1–2); also, Deng, F. M., 'The International Protection of the Internally Displaced' (1995) 7 *IJRL Special Issue* 74.

¹⁰³ UN doc. E/CN.4/1994/44, para. 28; text in (1994) 6 *IJRL* 291; also UN doc. E/CN.4/1995/50; text in (1995) 14 *RSQ*, Nos. (1–2) 192. For suggestions on the standards issue, see Petrasek, D., 'New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach' (1995) 14(1–2) *RSQ* 285.

¹⁰⁴ 'Internally Displaced Persons: Compilation and Analysis of Legal Norms': UN doc. E/CN.4/1996/52/Add.2 (5 Dec. 1995), transformed into a field handbook: UNHCR, *International Legal Standards applicable to the Protection of Internally Displaced Persons: A Reference Manual for UNHCR Staff*, Geneva (1996); 'Compilation and Analysis of Legal Norms, Part II: Legal Aspects relating to the Protection against Arbitrary Displacement': UN doc. E/CN.4/1998/53/Add.1 (11 Feb. 1998). See the Global Protection Cluster's *Handbook for the Protection of Internally Displaced Persons* (Mar. 2010), which provides operational guidance and tools to support effective protection responses in situations of internal displacement.

¹⁰⁵ 'Internally Displaced Persons: Compilation and Analysis of Legal Norms' (¹⁰⁴) para.

¹⁰⁶ Ibid., para. 415. Cohen, R. & Deng, F. M., *Masses in Flight: The Global Crisis of Internal Displacement* (1998) 123.

¹⁰⁷ The ICRC maintains that in situations of armed conflict, international humanitarian law ‘remains fully adequate to address most problems of internal displacement’: International Committee of the Red Cross ‘Internally Displaced Persons: The Mandate and Role of the International Committee of the Red Cross’ (2000) 838 *International Review of the Red Cross* 491. See also ICRC, ‘Position on Internally Displaced Persons (IDPs)’ (May 2006): https://www.icrc.org/en/doc/assets/files/other/2006_idps_en_icrcexternalposition.pdf.

¹⁰⁸ For analysis, see Phuong, C., *The International Protection of Internally Displaced Persons* (2004) 48–52; Clapham, A., *The Human Rights Obligations of Non-State Actors* (2006).

¹⁰⁹ Guiding Principles, principle 2(1). For text, see Brownlie, I. & Goodwin-Gill, G. S., *Brownlie’s Documents on Human Rights* (6th edn., 2010) 225.

¹¹⁰ Kälin, W., ‘The Guiding Principles on Internal Displacement: Introduction’ (1998) 10 *IJRL* 557, 560.

¹¹¹ Guiding Principles, para. 2. This definition responds to criticisms of the Representative’s provisional definition, which required flight ‘in large numbers’—a matter which is irrelevant to a definition premised on displacement and need. See ‘Comprehensive Study on the Human Rights Issues’ (n 102); also the similar definition proposed by the International Law Association: ILA Declaration of International Law Principles on Internally Displaced Persons (29 Jul. 2000) art. 1, and commentary in ILA Committee on Internally Displaced Persons, ‘Report and Draft Declaration for Consideration at the 2000 Conference’ (2000) 5–8. Phuong argues that the ILA Declaration is much more abstract than the Guiding Principles and offers little guidance on how it should be applied in practice: Phuong (n 108) 67. The International Committee of the Red Cross has criticized the Guiding Principles definition for operational purposes, ‘as it covers a group that is so wide and whose needs are so varied that it exceeds the capacities and expertise of any single organization’. It notes that some organizations narrow down the definition in practice: International Committee of the Red Cross (n 107).

¹¹² Cohen, R. & Deng, F. M., ‘Developing the Normative Framework for IDPs’ (2018) 30 *IJRL* 310, 312. In 2017 and 2018, 61 per cent of all new internal displacement was triggered by disasters, compared to 39 per cent by conflict and violence: Internal Displacement Monitoring Centre/Norwegian Refugee Council, *GRID 2018: Global Report on Internal Displacement*, IDMC/NRC (2018) 6; Internal Displacement Monitoring Centre (IDMC), *GRID 2020: Global Report on Internal Displacement* (IDMC 2020) 1–6: <https://www.internal-displacement.org/global-report/grid2020/>.

¹¹³ Cantor, however, points to ‘the emergence of IDP law as a distinct field of law ... albeit one that has important connections to other legal fields’, which is ‘rooted in the national law of displacement-affected countries and in African international law’: Cantor, D. J., ‘“The

IDP in International Law”? Developments, Debates, Prospects’ (2018) 30 *IJRL* 191, 192 and 196, respectively.

¹¹⁴ ‘Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons Mr Francis M. Deng’ OCHA *Guiding Principles on Internal Displacement* (2nd edn., 2004): <https://reliefweb.int/report/world/guiding-principles-internal-displacement-2004>.

¹¹⁵ Phuong (n 108) 66. On shortcomings of the Guiding Principles, see ILA Committee on Internally Displaced Persons, ‘Report and Draft Declaration for Consideration at the 2000 Conference’ (2000) para. 3.

¹¹⁶ Kälin (n 110) 561. Phuong notes that where a specific need of internally displaced persons was identified, but could not be linked to an existing authoritative legal provision, it was omitted: Phuong (n 108) 60.

¹¹⁷ Phuong (n 108) 60.

¹¹⁸ Guiding Principles, principle 15(d). See generally Phuong (n 108) 61–5. Cf. ILA Declaration of International Law Principles on Internally Displaced Persons (29 Jul. 2000) (n 111), art. 5(2), which states only that ‘[i]nternally displaced persons shall not be detained or placed in an area which exposes them to the dangers of armed conflict and/or internal strife’.

¹¹⁹ See, for example, Hovil, L. & Okello, M. P., ‘Only Peace Can Restore the Confidence of the Displaced’ Refugee Law Project, Kampala, Internal Displacement Monitoring Centre, Norwegian Refugee Council (2nd edn., Oct. 2006): <https://www.refworld.org/docid/441e6dd34.html>.

¹²⁰ See further Cardona-Fox, G., *Exile within Borders: A Global Look at Commitment to the International Regime to Protect Internally Displaced Persons* (2019); Carr, S., ‘From Theory to Practice: National and Regional Application of the Guiding Principles’ (2009) 21 *IJRL* 34.

¹²¹ Aubin, L., Eyster, E., & MacGuire, D., ‘People-Centred Principles: The Participation of IDPs and the Guiding Principles’ (2018) 30 *IJRL* 287, 288.

¹²² *GRID* 2018 (n 112) vi.

¹²³ See Cantor, D. J., *Returns of Internally Displaced Persons during Armed Conflict: International Law and Its Application in Colombia* (2018); Cantor, D. J., ‘“The IDP in International Law”? Developments, Debates, Prospects’ (2018) 30 *IJRL* 191; Bradley, M., ‘Durable Solutions and the Right of Return for IDPs: Evolving Interpretations’ (2018) 30 *IJRL* 218; Kälin, W. & Entwistle Chapuisat, H., ‘Guiding Principle 28: The Unfulfilled Promise to End Protracted Internal Displacement’ (2018) 30 *IJRL* 243; Kälin, W. & Entwistle Chapuisat, H., *Breaking the Impasse: Reducing Protracted Internal Displacement as a Collective Outcome* UN Office for the Coordination of Humanitarian Affairs (2017).

¹²⁴ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons (30 Nov. 2006); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 22 October 2009, entered into force 6 December 2012) 49 *ILM* 86. See generally

Kidane, W., ‘Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention’ (2011) 44 *Vanderbilt Journal of Transnational Law* 1; Kälin W. & Schrepfer, N., *Internal Displacement and the Kampala Convention: An Opportunity for Development Actors* (2013); Groth, L., ‘Engendering Protection: An Analysis of the 2009 Kampala Convention and Its Provisions for Internally Displaced Women’ (2011) 23 *IJRL* 221; Abebe, A. M., *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement* (2017); Adeola, R. & Viljoen, F., ‘The Right Not to Be Arbitrarily Displaced in Africa’ (2017) 25 *African Journal of International and Comparative Law* 459.

¹²⁵ Cantor, ‘The IDP in International Law’ ([n 123](#)) 195; Kälin, W., ‘Consolidating the Normative Framework for IDPs’ (2018) 30 *IJRL* 314, 316.

¹²⁶ UNHCR, ‘UNHCR’s Role with Internally Displaced Persons’ IOM/33/93–FOM/33/93 (28 Apr. 1993). Prior to this, IDPs were considered in a desultory way by the UNHCR Executive Committee Working Group on Solutions and Protection: UN doc. EC/SCP/64 (12 Aug. 1991) paras. 43–9, 54(k), 55(l), but no substantive observations or recommendations emerged.

¹²⁷ UNHCR, ‘Internally Displaced Persons: The Role of the High Commissioner for Refugees’: E/50/SC/INF.2 (20 Jun. 2000) 6.

¹²⁸ Goodwin-Gill, G. S., ‘UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield’ *World Refugee Survey 2000* (2000) 26–31.

¹²⁹ UNHCR ([n 126](#)); UNHCR ([n 127](#)) 5–6; UNHCR, ‘The Protection of Internally Displaced Persons and the Role of UNHCR’ (21 Feb. 2007) for an Informal Consultative Meeting (27 Feb. 2007) 3–4.

¹³⁰ Interestingly, the 1993 UNHCR guidelines acknowledge the possible role of other relevant entities, presumably authorities in fact, if not in law. UNGA res. 46/182 (19 Dec. 1991) on the Strengthening of the Coordination of Humanitarian Emergency Assistance, also stressed consent and respect for sovereignty, territorial integrity, and national unity: *ibid.*, Annex, para. 3, but did not exclude the possibility of negotiating the provision of emergency assistance ‘by obtaining the consent of *all parties concerned*’: *ibid.*, para. 35(d). One commentator has noted with respect to the discussions leading to Additional Protocol II of the 1949 Geneva Conventions that ‘States strongly opposed any reference to offers of relief, even emanating from neutral third parties, which might constitute an interference in their internal affairs’, and that Additional Protocol II consequently contains minimal provisions on relief (art. 18(2)): Macalister-Smith, P., *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (1985) 31, cited in Plender ([n 97](#)) 352–3. See also on disaster law, [Ch. 9](#), s.1.5.2.

¹³¹ UNHCR Executive Committee, General Conclusion on International Protection: *Report of the 44th Session* (1993): UN doc. A/AC.96/821, para. (s). The UN General Assembly affirmed this approach in subsequent resolutions: UNGA res. 48/116 (20 Dec. 1993) para. 12; UNGA res. 49/169 (23 Dec. 1994) para. 10; UNGA res. 50/152 (21 Dec. 1995) para. 10;

UNGA res. 51/75 (12 Dec. 1996) para. 13; UNGA res. 53/125 (9 Dec. 1998) para. 16. Cf. the view of the Netherlands, favouring the assignment of ‘general competence to UNHCR to provide protection to internally displaced persons and local populations under siege in refugee-like and potential refugee-generating situations’: UN doc. A/AC.96/SR.482 (1993) para. 31. See also UNGA res. 48/135 (20 Dec. 1993), in which the General Assembly welcomed ‘the decision by the Executive Committee … to extend, on a case-by-case basis and under specific circumstances, protection and assistance to the internally displaced’.

¹³² For background, see UNHCR, ‘Note on the Protection Aspects of UNHCR Activities on behalf of Internally Displaced Persons’: EC/1994/SCP/CRP.2 (4 May 1994); text in (1994) 6 *IJRL* 485. Also, *Report of the 18–19 May 1994 Meeting of the Sub-Committee of the Whole on International Protection*: UN doc. EC/SCP/89 (29 Sept. 1994) paras. 6–36. Cf. Petrasek ([n 103](#)); Norwegian Refugee Council & Refugee Policy Group, ‘Roundtable Discussion on United Nations Human Rights Protection for Internally Displaced Persons’ Nyon, Switzerland (Feb. 1993); [Refugee Policy Group, ‘Human Rights Protection for Internally Displaced Persons’](#), Report of an International Conference (24–25 Jun. 1991).

¹³³ Executive Committee Conclusion No. 75 (1994), *Report of the 45th Session*, UN doc. A/AC.96/839, para. 20(r), (s)—referring to the leadership of the Emergency Relief Coordinator.

¹³⁴ UNHCR, ‘Internally Displaced Persons: The Role of the High Commissioner for Refugees’, E/50/SC/INF.2 (20 Jun. 2000) 8.

¹³⁵ Ibid., 7–8. For an overview of UNHCR’s involvement in IDP situations worldwide to May 2000: UNHCR, ‘Internally Displaced Persons: The Role of the High Commissioner for Refugees’: E/50/SC/INF.2 (20 Jun. 2000) 12–23. For example, UNHCR declined requests for intervention in Cambodia and Zaire in 1992: Loescher, G., *The UNHCR and Global Politics: A Perilous Path* (2001) 294.

¹³⁶ Executive Committee Conclusion No. 102 (LVI) (2005) General Conclusion on International Protection, para. x; see also Executive Committee Conclusion No. 108 (LIX) (2008) Internal Displacement, para. r; UNHCR ([n 45](#)) para. 12.

¹³⁷ Executive Committee Conclusion No. 108 ([n 136](#)) para. r. At times, Executive Committee Conclusions are stated specifically to extend to IDPs, for example, Executive Committee Conclusion No. 113 (LXVII) (2016) Youth, preamble; Executive Committee Conclusion No. 112 (LXVII) (2016) International Cooperation from a Protection and Solutions Perspective, preamble.

¹³⁸ See Goodwin-Gill, G. S., ‘Note on paragraph 20 of General Assembly resolution 55/74’ (2001) 13 *IJRL* 255.

¹³⁹ UNGA res. 60/168, ‘Protection of and assistance to internally displaced persons’ (16 Dec. 2005), adopted without a vote, preambular para. 6.

¹⁴⁰ Ibid., para. 8. See now UNGA res. 74/118, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ (16 Dec. 2019) para. 70.

¹⁴¹ UNHCR, ‘Protection Aspects’ ([n 132](#)) paras. 28, 40. See also the [IASC Framework on](#)

Durable Solutions for Internally Displaced Persons (2010) 5:
<https://www.refworld.org/docid/4c5149312.html>, which states that a durable solution can be achieved through sustainable reintegration at the place of origin (described as ‘return’); sustainable local integration in areas where internally displaced persons take refuge; or sustainable integration in another part of the country.

¹⁴² UNHCR, ‘Protection Aspects’ (n 132) para. 32. On ‘meaningful participation’ of IDPs, see Aubin, Eyster, & MacGuire (n 121) 288.

¹⁴³ UNHCR, ‘Protection Aspects’ (n 132) para. 35. See Garlock, R. and others, ‘The Kosovo Refugee Crisis—An Independent Evaluation of UNHCR’s Emergency Preparedness and Response’ (2000): <https://www.alnap.org/help-library/the-kosovo-refugee-crisis-an-independent-evaluation-of-unhcrs-emergency-preparedness>; reviewed by Goodwin-Gill: <https://odihpn.org/magazine/> (5 Dec. 2012).

¹⁴⁴ See IASC, ‘Guidance Note on Using the Cluster Approach to Strengthen Humanitarian Response’ (24 Nov. 2006): <https://www.refworld.org/docid/460a8ccc2.html>. On clusters, see also Ch. 9, s. 1.4.

¹⁴⁵ The IASC is the primary mechanism for coordinating the UN’s humanitarian assistance activities, involving both UN and non-UN actors: UNGA res. 46/182, ‘Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations’ (19 Dec. 1991) Annex, para. 38.

¹⁴⁶ UNHCR, *Operational Review of UNHCR’s Engagement in Situations of Internal Displacement: Final Report* (Sep. 2017) 2: <https://www.unhcr.org/5a02d6887.pdf>; also published in (2018) 30 *IJRL* 373.

¹⁴⁷ UNHCR, ‘UNHCR’s Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy’: EC/58/SC/CRP.18 (4 Jun. 2007).

¹⁴⁸ UNHCR, ‘Policy on UNHCR’s Engagement in Situations of Internal Displacement’: UNHCR/HCP/2019/1 (Sep. 2019): <https://www.refworld.org/pdfid/5d83364a4.pdf>; Russell, S., ‘The Operational Relevance of the Guiding Principles on Internal Displacement’ (2018) 30 *IJRL* 307.

¹⁴⁹ UNHCR, *UNHCR’s Strategic Directions 2017–2021* (16 Jan. 2017) 17, 21: <https://www.unhcr.org/5894558d4.pdf>.

¹⁵⁰ UNHCR (n 146) 3–4.

¹⁵¹ Cf. Bradley, M., ‘Unintended Consequences of Adjacency Claims: The Function and Dysfunction of Analogies between Refugee Protection and IDP Protection in the Work of UNHCR’ (2019) 25 *Global Governance* 620.

¹⁵² IOM, ‘IOM Framework for Addressing Internal Displacement 2017’ (2017): <https://www.iom.int/internal-displacement>.

¹⁵³ For a brief but clear statement of ICRC’s role with IDPs, see International Committee of the Red Cross (n 107); also Kellenberger, J., ‘The ICRC’s Response to Internal Displacement: Strengths, Challenges and Constraints’ (2009) 875 *International Review of the*

¹⁵⁴ Kälin ([n 125](#)) 316, referring to UN Human Rights Council, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons: UN doc A/HRC/13/21 (5 Jan. 2010) paras 39–79.

¹⁵⁵ Cf. Council of Europe, Recommendation Rec. (2006) 6 of the Committee of Ministers to Member States on Internally Displaced Persons (5 Apr. 2006), with particular reference to the Guidelines and their authority; Council of Europe, Parliamentary Assembly, Res. 2214 (2018), Humanitarian Needs and Rights of Internally Displaced Persons in Europe; Council of Europe, Parliamentary Assembly, Rec. 2126 (2018), Humanitarian Needs and Rights of Internally Displaced Persons in Europe.

¹⁵⁶ In the Commission on Human Rights in 1992, India, Bangladesh, and a number of other developing States expressed deep reservations on the proposal for an independent expert to study human rights issues related to the internally displaced. In September 1992, China, India, and Zimbabwe also abstained on SC resolutions 770 and 776 where, amongst other things, the Security Council endorsed military protection of humanitarian assistance and convoys of released detainees in former Yugoslavia. In 2000, a number of developing States expressed concern at the increasing prominence being given to internal displacement, and thirty States abstained from voting in favour of para. 20 of UNGA res. 55/74 (2 Dec. 2000), which stressed ‘the continuing relevance of the Guiding Principles’: see Goodwin-Gill, G. S., ‘Paragraph 20 of General Assembly Resolution 55/74’ (2001) 13 *IJRL* 225; Phuong ([n 108](#)) 71–2. State resistance appears to be moderating; in 2008, India emphasized that ‘[f]ocusing on internally displaced persons should not lead to the neglect of refugees who remained the priority in terms of UNHCR’s mandate and limited resources’: UN doc. A/AC.96/SR.621, para. 27.

¹⁵⁷ See, for example, UNGA resolutions 47/142 (18 Dec. 1992), 48/147 (20 Dec. 1993), and 49/198 (23 Dec. 1994), expressing alarm at ‘the large number of internally displaced persons and victims of discrimination in the Sudan, including members of minorities who have been forcibly displaced in violation of their human rights and who are in need of relief assistance and of protection’. Concerns have been expressed in the annual UNGA conclusion on ‘Assistance to refugees, returnees and displaced persons in Africa’: see, for example, UNGA res. 74/131 (18 Dec. 2019) para. 40, which *[e]xpresses grave concern* about the plight of internally displaced persons in Africa, welcomes the efforts of African States in strengthening the regional mechanisms for the protection of and assistance to internally displaced persons, calls upon States to take concrete action to pre-empt internal displacement and to meet the protection and assistance needs of internally displaced persons, recalls in that regard the Guiding Principles on Internal Displacement, notes the current activities of the Office of the High Commissioner related to the protection of and assistance to internally displaced persons, including in the context of inter-agency arrangements in this field, emphasizes that such activities should be consistent with relevant General Assembly resolutions and should not undermine the refugee mandate of the Office and the institution of asylum, and encourages the High Commissioner to continue his dialogue with States on the

role of his Office in this regard’.

¹⁵⁸ The ILC’s 2016 Draft Articles on the Protection of Persons in the Event of Disasters include a ‘duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors’ where ‘a disaster manifestly exceeds its national response capacity’ (art. 11). Many States do not accept the notion of duty in this context, with some preferring to develop guidelines rather than a convention; see further Ch. 9, s. 1.5.2.

¹⁵⁹ See, among others, Borgen, J. and others, *Institutional Arrangements for Internally Displaced Persons: The Ground Level Experience* (Norwegian Refugee Council, 1995); Global Protection Cluster, ‘Centrality of Protection in Humanitarian Action 2018 Review’ (2019): <https://www.globalprotectioncluster.org/2019/05/13/centrality-of-protection-in-humanitarian-action-2018-review/>.

¹⁶⁰ Art. 1A(2) of the Convention.

¹⁶¹ UN doc. E/AC.32/SR.3, para. 40 (Mr Henkin).

¹⁶² See United States of America, ‘Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)’: UN doc. E/AC.32/L.4 (18 Jan. 1950). The four categories were: (1) refugees from the period of the First World War; (2) inter-war refugees; (3) ‘neo-refugees’; and (4) displaced persons and unaccompanied minors.

¹⁶³ UN doc. E/AC.32/SR.3, para. 45 (Mr Henkin).

¹⁶⁴ The UK definition would have included ‘a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country’. See UN docs. E/AC.32/L.2 (17 Jan. 1950) and E/AC.32/L.2/Rev.1 (19 Jan. 1950).

¹⁶⁵ See UN doc. E/AC.32/L.6 (23 Jan. 1950) (provisional draft of parts of the definition article). Various exclusions and limitations, including geographical, temporal and nationality factors, were also mentioned.

¹⁶⁶ For the IRO Constitution, see 18 UNTS 3.

¹⁶⁷ Art. 1B. The Convention is frequently criticized for its ‘European bias’, but another view was apparent in 1951. Mr Rochefort, the French representative, remarked that although more than 80 invitations had been sent out, the Conference gave the appearance of nothing more than a ‘slightly enlarged’ meeting of the Council of Europe. He observed that only a small fraction of the 41 governments that had voted for art. 1 in the General Assembly had been willing to come to Geneva to sign the Convention and nearly all were European. In his view, those who argued for deletion of the geographical limitation, ‘had done so without any feeling of definite responsibility’. The system of generalized protection had failed; because the non-European countries were absent and because of the attitudes of the immigration countries (they claimed to have no protection problems), there was no practical possibility of ‘giving refugees in general, and European refugees in particular, a truly international status’: UN doc. A/CONF.2/SR.3, 12. However, on participation by non-European States, see further

Ch. 11, n 7.

¹⁶⁸ Cf. Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 1 (1966) 217.

¹⁶⁹ See further Ch. 3, s. 4.2.4.

¹⁷⁰ Recommendation E of the Final Act.

¹⁷¹ However, see Jackson (n 35) 73–6, for the view that Recommendation E was only intended to apply to refugees affected by the geographical or temporal limits, and not to those who failed to meet the well-founded fear of persecution criterion but were in a ‘refugee-like’ situation. Although qualification as a Convention definition is often the sufficient condition for the grant of asylum (see further below regarding the asylum aspects of the EU Qualification Directive), States also generally claim the right to grant asylum to others, for example, for ‘humanitarian reasons’. Thus, art. 2 of the Declaration on Territorial Asylum, adopted by the Committee of Ministers of the Council of Europe on 18 November 1977, reaffirms the right to grant asylum in respect of Convention refugees ‘as well as to any other person [considered] worthy of receiving asylum for humanitarian reasons’. For text, see the 2nd edition of this work, Annex 4, No. 6.

¹⁷² Here and below and unless the context indicates otherwise, ‘country of origin’ is used as a shorthand to include the refugee with or without a nationality, and the stateless person (on whom, see further Ch. 13).

¹⁷³ For critiques of the international protection regime and the Convention/Protocol, see Fitzpatrick, J., ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal* 229; Sitaropoulos, N., ‘Refugee: A legal definition in search of a principled interpretation by domestic fora’ (1999) 52 *Revue hellénique de droit international* 151; Sztucki, J., ‘Who is a refugee? The Convention definition: universal or obsolete?’, in Nicholson & Twomey (n 75) 55; Tuit, P., ‘Rethinking the refugee concept’, in Nicholson & Twomey (n 75) 106.

¹⁷⁴ For text of the AU/OAU Convention, see 1000 UNTS 46, and for participating States, see List of States, xxi. The Organization of African Unity first met in Cairo in July 1964; for text of the OAU Charter, see <https://au.int/en/treaties/oau-charter-addis-ababa-25-may-1963>; it was succeeded by the African Union in 2000. See further <https://au.int/en/overview>.

¹⁷⁵ There is now a rich literature on African refugee law and practice; see, among others, Sharpe, M., ‘Regional Refugee Regimes: Africa’ in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021); Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018); van Garderen, J. & Ebenstein, J., ‘Regional Developments: Africa’, in Zimmermann, A., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 185; UNHCR, ‘Key Legal Considerations on the Standards of Treatment of Refugees Recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2018) 30 *IJRL* 166; Wood, T., ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *IJRL* 555; Wood, T., ‘The African War Refugee: Using IHL to Interpret the 1969 African Refugee

Convention's Expanded Refugee Definition', in Cantor, D. J. & Durieux, J.-F., eds., *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (2014); Beyani, C., *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (2013); Edwards, A., 'Refugee Status Determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204; Rankin, M. B., 'Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On' (2005) 21 *South African Journal on Human Rights* 406; Durieux, J.-F. & Hurwitz, A., 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees' (2005) 47 *German Yearbook of International Law* 105; Rutinwa, B., 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21(1–2) *RSQ* 12; Okoth-Obbo, G., 'Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *RSQ* 79; Arboleda, E., 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 *IJRL* 185; Rweleamira, M., '1989—An Anniversary Year: The 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa' (1989) 1 *IJRL* 557; OAU/UNHCR, 'The Addis Ababa Symposium 1994' (1995) 7 *IJRL Special Issue*.

¹⁷⁶ See further Ch. 7, s. 3; Pastorino, A. M. & Ippoliti, M. R., 'A propósito del Asilo Diplomático' (2019) 47 *Revista de la Facultad de Derecho* 1; Goodwin-Gill, G. S., 'Asylum (Colombia v. Peru), 1949 and Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), 1950', in Wojcikiewicz Almeida, P. & Sorel, J.-M., eds., *Latin America and the International Court of Justice: Contributions to International Law* (2017) 170.

¹⁷⁷ See art. 16, 1889 Montevideo Treaty on International Penal Law: *OAS Official Records* OEA/Ser.X/1. Treaty Series 34; revised by the 1940 Montevideo Treaty on International Penal Law: *ibid.*, art. 20 of which excludes extradition for 'political crimes'. See also Fischel de Andrade, J. H., 'Regional Policy Approaches and Harmonization: A Latin American Perspective' (1998) 10 *IJRL* 389.

¹⁷⁸ See, for example, 1954 Caracas Convention on Diplomatic Asylum.

¹⁷⁹ Art. 2. Arboleda notes that despite the appearance of a broader definition, 'virtually all Latin American scholars equate the Caracas Convention with earlier treaties'; see Arboleda, E., 'The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention—A Comparative Perspective' (1995) 7 *IJRL Special Issue* 87. See also arts. 4, 5, 6, 1981 Inter-American Convention on Extradition. Extradition is commonly the background to these regional agreements, non-extradition of political offenders being one part of the wider topic of asylum. Developments in the legal concept of the refugee have likewise had a corresponding influence on extradition arrangements. On the one hand, there has been a tendency to expand protection beyond the limitations which afflict the notion of political offence; on the other hand, international action to suppress the hijacking of aircraft, to counteract terrorism, and to protect diplomats, has imposed new limitations upon the class of those entitled to international protection. See further Ch. 4, s. 4.2.

¹⁸⁰ For participants, see List of States, xxi. For text of the Cartagena Declaration, see

<http://www.unhcr.org/en-au/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>. The Declaration was taken note of by the Assembly of the Organization of American States (OAS) in 1985; see OAS, General Assembly, Fifteenth Regular Session, Cartagena de Indias, Colombia (5–9 Dec. 1985) Proceedings, Volume I, 32: OEA/Ser.P/XV.O.2 (2 Apr. 1986); <http://www.oas.org/en/sla/docs/ag03799E01.pdf>,

¹⁸¹ The Colloquium was co-sponsored by the University of Cartagena, the Regional Center for Third World Studies and the Office of the United Nations High Commissioner for Refugees, and held under the auspices of the Colombian Government; see Fischel de Andrade, J., ‘Regional Refugee Regimes: Latin America’ in Costello ([n 175](#)); *La Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios* (1984) 42. See also Fischel de Andrade, J. H., ‘The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance’ (2019) 38 *RSQ* 341. For an overview of Latin American refugee law and practice, see, for example, Piovesan, F. & Jubilut, L. L., ‘Regional Developments: Americas’, in Zimmermann ([n 175](#)) 205; Cantor, D. J. & Rodríguez Serna, N., eds., *The New Refugees: Crime and Displacement in Latin America* (2016); Cantor, D. J., Freier, L. F. & Gauci, J.-P., eds., *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America* (2015); Barichello, S., *The Evolving System of Refugees’ Protection in Latin America* (2015); Fischel de Andrade, J. H., ‘Forced Migration in South America’, in Fiddian-Qasmiyah, E. and others, eds., *The Oxford Handbook of Refugee and Forced Migration Studies* (2014); and Bradley, M., ‘Forced Migration in Central America and the Caribbean: Cooperation and Challenges’, in Fiddian-Qasmiyah, E. and others, eds., *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 651, 664; Gros Espiell, H., Picado, S., & Valladares Lanza, L., ‘Principles and Criteria for the Protection of and Assistance to Central American Refugees and Displaced Persons in Latin America’ (1990) 2 *IJRL* 83; Cuellar, R. and others, ‘Refugee and Related Developments in Latin America: Challenges Ahead’ (1991) 3 *IJRL* 484.

¹⁸² The OAS General Assembly has consistently endorsed the Cartagena Declaration; see, for example, 1991 Legal Resolution of Situation of Refugees, Repatriated and Displaced Persons in the American Hemisphere, AG/RES.1103 (XXI-0/91) (7 Jun. 1991).

¹⁸³ Inter-American Commission on Human Rights, ‘Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System’ OEA/Ser.L/V/II.106, doc. 40 rev. (28 Feb. 2000) para. 118. The Commission noted also that the status of refugee, ‘is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it’: *ibid*.

¹⁸⁴ Asian-African Legal Consultative Organization: www.aalco.int/. For text, see <https://www.refworld.org/docid/3de5f2d52.html>.

¹⁸⁵ *Chahal v United Kingdom* (1996) 23 EHRR 413, para. 80.

¹⁸⁶ See among many others cited below, Tsourdi, E., ‘Regional Refugee Regimes: Europe’ in Costello ([n 175](#)); Moreno-Lax, V., *Accessing Asylum in Europe: Extraterritorial Border*

Controls and Refugee Rights under EU Law (2017), Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016).

¹⁸⁷ Art. 63, Treaty establishing the European Community (emphasis supplied); see also the 1999 Tampere Conclusions, which refer to ‘other relevant human rights instruments’.

¹⁸⁸ Other aspects of the harmonization project, considered further below, include the criteria and mechanisms for determining which Member State is responsible for deciding an application for asylum; the reception of asylum seekers; family reunification (generally, but with particular reference to refugees); procedures for granting or withdrawing refugee status; and promoting a balance of effort among Member States in receiving refugees and displaced persons.

¹⁸⁹ EU Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof: *Official Journal of the European Communities* (7 August 2001) [2001] OJ L212/12.

¹⁹⁰ Art. 2(c). See further Ch. 6, s. 6.2.

¹⁹¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *Official Journal of the European Union* (20 December 2011) [2011] OJ L337/9; EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: *Official Journal of the European Union* (30 September 2004) [2004] OJ L304/12. For EU Members, see List of States, xxi.

¹⁹² See further Ch. 3, s. 3.1.

¹⁹³ Art. 2(f), Qualification Directive (recast); and see further, Ch. 7.

¹⁹⁴ The European Commission had in fact proposed a broader scope for subsidiary protection; see Ch. 6, s. 4.

¹⁹⁵ See further Ch. 7.

¹⁹⁶ Lambert, H., ‘The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law’ (2006) 55 *ICLQ* 161, 162.

¹⁹⁷ Klug, A., ‘Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?’ (2004) 47 *German Yearbook of International Law* 594, 618; Durieux, J.-F. & Hurwitz, A., ‘How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees’ (2005) 47 *German Yearbook of International Law* 105, 135 ff.

¹⁹⁸ See further Ch. 6.

¹⁹⁹ See, for example, the provisions listed in preparation for the 1977 Conference on Territorial Asylum: *A Select Bibliography on Territorial Asylum* (1977): UN doc.

²⁰⁰ See Grundgesetz (Basic Law), art. 16a (formerly art. 16(2)): ‘*Politisch Verfolgte genießen Asylrecht*’.

²⁰¹ ‘Asylberchtigte genießen im Bundesgebiet die Rechtstellung nach dem Abkommen über die Rechtstellung der Flüchtlinge’, art. 2(1), Asylgesetz (Asylum Law), version of 2 September 2008 as amended in 2016: BGBL 1, 1798, BGBl 1, 394. See also the extensive description of *non-refoulement* in art. 60 of *Aufenthaltsgesetz* (Immigration Law), version of 25 Feb. 2008, BGBl 1, 162.

²⁰² Grundgesetz (Basic Law), art. 16a(2), (3). For background to the constitutional and legal changes in the early 1990s, see Federal Ministry of the Interior, ‘Recent Developments in the German Law on Asylum and Aliens’ (1994) 6 *IJRL* 265; Ablard, T. & Novak, A., ‘L’évolution du droit d’asile en Allemagne jusqu’à la réforme de 1993’ (1995) 7 *IJRL* 260; Blay, S. & Zimmermann, A., ‘Recent Changes in German Refugee Law: A Critical Assessment’ (1994) 88 *AJIL* 361.

²⁰³ Migration Act, ss. 5H, 5J, 5LA, 36(3); for exceptions, see s. 36(4), (5), (5A).

²⁰⁴ Préambule de la Constitution du 27 oct. 1946, Préambule de la Constitution du 4 oct. 1958: <https://legisfrance.gouv.fr/>. For a recent example of constitutional asylum, see Cour Nationale du Droit d’Asile, *Contentieux du droit d’asile Année 2020*, CNDA (17 février 2020) Mme A. n° 17049253 C+ (protection granted to an intellectual of Kurdish origin persecuted because of her involvement in favour of the emancipation of women). See also art. 53–1, amendment adopted in November 1993, which permits agreements between France and other countries on respective competences in the determination of asylum claims. However, the constitutional position is protected: ‘Toutefois, même si la demande n’entre pas dans leur compétence en vertu de ces accords, les autorités de la République ont toujours le droit de donner asile à tout étranger persécuté en raison de son action en faveur de la liberté ou qui sollicite la protection de la France pour un autre motif.’

²⁰⁵ *Code de l’entrée et du séjour des étrangers et du droit d’asile*, version consolidée au 22 mars 2020: <https://www.legifrance.gouv.fr/>; the Code brings together the *loi du 25 juillet 1952 relative à l’asile* and the *ordonnance du 2 novembre 1945 sur le droit commun des étrangers*.

²⁰⁶ For OFPRA’s functions with regard to stateless persons, see CESEDA, Livre VIII, arts. L812-1–L818-8.

²⁰⁷ Refugees were limited to those fleeing from the Middle East or from Communist or Communist-dominated countries.

²⁰⁸ See s. 101(a)(42), Immigration and Nationality Act, as amended: 8 USC § 1101(a)(42); also 8 CFR §§ 207.1, 208.13. For United States law (US Code and Code of Federal Regulations), see <https://www.govinfo.gov>, also collected at <http://www.law.cornell.edu/uscode>. See also Fitzpatrick, J., ‘The International Dimension of U.S. Refugee Law’ (1997) 15 *Berkeley Journal of International Law* 1; and for a comprehensive account of US law, see Anker, D., *Law of Asylum in the United States* (2020);

Legomsky, S. & Thronson, D., *Immigration and Refugee Law and Policy* (7th edn., 2019).

²⁰⁹ 8 USC §1101(a)(42)(B). This expanded category is dependent upon ‘appropriate consultations’ taking place between the President and Congress: *ibid.*, and 8 USC § 1157(e). The future of refugee protection, including resettlement, and US compliance with its international obligations, was seriously compromised on many occasions, as a result of policies and practices introduced or implemented by the Trump administration from 2017 onwards; see Schoenholtz, A., Ramji-Nogales, J., & Schrag, P., *The End of Asylum* (2021).

²¹⁰ Section 2(1), 1976 Immigration Act.

²¹¹ See now Part 2 of the 2001 Immigration and Refugee Protection Act, ss. 95–116.

²¹² IRPA, ss. 12(3). See the ‘Convention Refugee Abroad Class’ and the ‘Country of Asylum Class (Humanitarian Protected Persons Abroad)’: IMM 6000.

²¹³ See *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR intervening)* [2005] 2 AC 1, [2004] UKHL 55, paras. 6–9 (Lord Bingham).

²¹⁴ Section 18(3) is in principle due to be substituted by the Immigration Act 2016, Sch. 11 para. 31(3). Amendments, yet to be applied, would change the wording somewhat, substituting ‘protection claim’ for ‘claim to asylum’, and describing it as, ‘(a) [a] claim made by a person (“P”) that removal of P from the United Kingdom (i) would breach the United Kingdom’s obligations under the Refugee Convention, or (ii) would breach the United Kingdom’s obligations in relation to a person eligible for a grant of humanitarian protection ... (d) “humanitarian protection” is to be construed in accordance with the immigration rules; (e) “refugee” has the same meaning as in the Refugee Convention’: Nationality, Immigration and Asylum Act 2002, s. 82(2), as amended by Immigration Act 2014, s. 15(2).

²¹⁵ *Constitution fédérale de la Confédération suisse du 18 avril 1999*, art. 25, RO 1999 2556.

²¹⁶ *Loi sur l’asile du 26 juin 1998*: RO 1999 2262. Swiss asylum procedure was decentralized with effect from 1 March 2019: *Ordinance 1 sur l’asile relative à la procédure*, 142.311 (as at 1 Apr. 2020); Fundamental Rights Agency, Council of Europe, *Manuel de droit Suisse des migrations* (2015); Organisation Suisse d’aide aux réfugiés (OSAR), *Manuel de la procédure d’asile et du renvoi* (2nd edn., 2016).

²¹⁷ ‘Political refugee’ is defined in the Schedule to the 1968 Refugees (Recognition and Control) Act, Cap. 25:03.

²¹⁸ Immigration Control and Refugee Recognition Act, art. 2(iii)-2, amended 2014.

²¹⁹ Republic of Korea, Law No. 11298 of 2012; Refugee Act, Ch. 1, art. 2.

²²⁰ Norway: Act 2008-05-15-35, Ch. 4, Protection, s. 28; see also s. 34 on the possibility of ‘collective protection’ in a situation of mass influx.

²²¹ See *Ley de 20 Junio de 2012*, No. 251, *Ley de protección a personas refugiadas*, art. 15; cf. Peru, *Decreto Supremo No. 001/RE sobre la Situación Jurídica de los Refugiados y Asilados Políticos*; Ley No. 27.891 (2002), *Ley del refugiado*.

²²² See, for example, Spain: *Ley 12/2009 30 oct. 2009, reguladora del derecho de asilo y*

de la protección subsidiaria (repealing Ley 5/1984 and later amendments); see art. 3 ‘*La condición de refugiado*’; art 4, ‘*La protección subsidiaria*’.

²²³ Denmark: Aliens Act of 2003 (Aliens Consolidation Act No. 863, 25 Jun. 2013) s. 7 (a residence permit will be issued to a Convention refugee, and to a non-citizen if he or she risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his or her country of origin); see also s. 31.

²²⁴ See Weis, P., ‘The Legal Aspects of the Problems of *de facto* Refugees’, in International University Exchange Fund, *Problems of Refugees and Exiles in Europe* (1974). The notion of ‘valid reasons’ is expanded at 3–5 and would include (1) a person’s reasonable belief that he or she would be prejudiced in the exercise of human rights, would suffer discrimination, or be compelled to act against conscience; and (2) war or warlike conditions, foreign or colonial occupation, or serious disturbance of public order in part or all of the person’s country of origin. See also UNHCR, ‘Note on Consultations on the Arrivals of Asylum-seekers and Refugees in Europe’: UN doc. A/AC.96/ INF.174 (Jul. 1985) Annex V.

²²⁵ New Zealand Immigration Act 2009, ss. 129–31.

²²⁶ See s. 3.2, 3.3, on UNHCR’s current mandate with regard to the internally displaced, and on those affected by climate change, see, in particular, Ch. 12; also Goodwin-Gill, G. S. & McAdam, J., ‘UNHCR and Climate Change, Disasters, and Displacement’ UNHCR (May 2017) <http://www.refworld.org/docid/59413c7115.html>.

²²⁷ UNHCR Executive Committee, *Report of the 33rd Session*: UN doc. A/AC.96/614 (1982) para. 43(f); also UN doc. A/AC.96/SR.344, para. 11 (USA); SR.352, paras. 60–2 (UK).

²²⁸ See Summary Records, 36th Session (1985): UN doc. A/AC.96/SR.391, paras. 50–1 (Switzerland); para. 42 (Australia); para. 72 (The Netherlands). Australia suggested a possible distinction between those refugees who would enjoy the ‘full range of protection’ (UN doc. A/AC.96/SR.391, para. 42), and those for whom the priority would be ‘relief and humanitarian assistance and repatriation when ... possible in reasonably safe conditions’: Summary Records, 42nd Session (1991); UN doc. A/AC.96/SR.464, para. 14.

²²⁹ See *Report of the 37th Session*, Annex, 2–3: UN doc. A/AC.96/688 and /Corr.1.

²³⁰ For reactions at the 37th Session (1986), see UN doc. A/AC.96/SR.401, para. 70 (United Kingdom); SR.403, para. 19 (Belgium); para. 22 (Norway); UN doc. A/AC.96/SR.402, para. 32 (Germany); at the 38th Session (1987), see UN doc. A/AC.96/SR.414, para. 39 (Sweden); para. 49 (Switzerland); SR.417, para. 83 (United Kingdom); paras. 84–5 (Sweden); and at the 39th Session (1988), see UN doc. A/AC.96/SR.426, para. 81 (Norway); para. 88 (Belgium); SR.430, para. 41 (Switzerland); para. 51 (United Kingdom). For further details on the debate in this period, see the 2nd edition of this work, 26–8; and for more recent reflections, see McAdam, J., ‘The Enduring Relevance of the 1951 Refugee Convention’ (2017) 29 *IJRL* 1; Goodwin-Gill, G. S., ‘The Continuing Relevance of International Refugee Law in a Globalized World’ (2015) 10 *Intercultural Human Rights Law Review* 25.

²³¹ Convention/Protocol refugee, OAU/Cartagena refugees, refugees from man-made disasters, persons in flight from natural disasters, rejected cases, internally displaced persons, stateless persons: *Report of the Working Group on Solutions and Protection*: UN doc. EC/SCP/64 (12 Aug. 1991) paras. 8–53.

²³² *Report of the Sub-Committee*: UN doc. A/AC.96/781 (9 Oct. 1991) paras. 2–18.

²³³ ‘Protection of Persons of Concern to UNHCR who fall outside the 1951 Convention: A Discussion Note’: EC/SCP/1992/CRP.5; the African Group and the Latin America Group also submitted a paper on the scope, respectively, of the OAU Convention and the Cartagena Declaration: EC/SCP/1992/CRP.6.

²³⁴ *Report of the 13–14 April Meeting*: UN doc. EC/SCP/71 (7 Jul. 1992) paras. 31–44.

²³⁵ UNHCR, *Note on International Protection*: UN doc. A/AC.96/830 (7 Sep. 1994) paras. 19–43, 54–7; published also in (1994) 6 *IJRL* 679.

²³⁶ *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/837 (4 Oct. 1994) para. 19; Executive Committee General Conclusion on International Protection, *Report of the 45th Session*: UN doc. A/AC.96/839 (11 Oct. 1994) para. 19(k)–(q); UN doc. A/AC.96/SR.490, para. 8 (Canada); SR.491, para. 35 (Norway); SR.492, para. 16 (Switzerland); see also UNGA res. 49/169 (23 Dec. 1994) paras. 6, 7.

²³⁷ See further Ch. 7.

²³⁸ See further Ch. 10, s. 3.

²³⁹ Goodwin-Gill & McAdam ([n 226](#)) 25–8.

²⁴⁰ See Goodwin-Gill, G. S., ‘The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law’ (2020) 69 *ICLQ* 1; ‘The Language of Protection’ (1989) 1 *IJRL* 6.

Determination of Refugee Status: Analysis and Application

The legal consequences¹ that flow from the formal definition of refugee status are necessarily predicated upon determination by some or other authority that the individual or group in question satisfies the relevant legal criteria.² In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive.³ However, while the question whether an individual is a refugee may be a matter of fact, whether or not he or she is a refugee within the Convention, and benefits from refugee status, is a matter of law. Problems arise where States decline to determine refugee status, or where States and UNHCR reach different determinations.⁴

1. Respective competence of UNHCR and of States parties to the Convention and Protocol

The UNHCR Statute and the 1951 Convention contain very similar definitions of the term ‘refugee’. It is for UNHCR to determine status under the Statute and any relevant General Assembly resolutions, and for States parties to the Convention and the Protocol to determine status under those instruments.⁵ Given the differences in definition, an individual may be recognized as both a mandate,⁶ and a Convention⁷ refugee; or as a mandate refugee but not as a Convention refugee.⁸ The latter can arise, for example, where the individual is in a non-Contracting State or a State which still adheres to the temporal or geographical limitations permitted under the Convention.⁹ Divergence between mandate and Convention status can also result from differences of opinion between States and UNHCR, although a number of factors ought in principle to reduce that possibility. UNHCR, for example, has the statutory function of supervising the application of international conventions for the protection of refugees,¹⁰ and States parties to the Convention and Protocol formally undertake to facilitate this duty.¹¹ Moreover, many States accept direct or indirect participation by UNHCR in procedures for the determination of refugee status, so that the potential for harmonization of decisions is increased.¹² The problem

of divergent positions is more likely, however, where States decline to determine refugee status for any reason; or where refugees whose claims are well-founded under a regional regime move elsewhere.

2. Determination of refugee status by UNHCR

The basic elements of the refugee definition are common to States and to UNHCR and are examined more fully in [Section 3](#). UNHCR itself will be concerned to determine status (1) as a condition precedent to providing international protection (for example, intervention with a government to prevent expulsion); or (2) as a prerequisite to providing assistance to a government which requests it in respect of certain groups within its territory. Except in individual cases, formal determination of refugee status may not be necessary. Intervention to secure refuge or protection as a matter of urgency, for example, can be based on *prima facie* elements in the particular case—the fact of flight across an international frontier, evidence of valid reasons for flight from the country of origin, and the material needs of the group in question. Where assistance is expressly requested by a receiving country, that invitation alone would justify UNHCR's involvement in the absence of hard evidence that those to be helped were not refugees or displaced persons, or of any coherent, persuasive opposition by the country of origin or other members of the international community.^{[13](#)}

Formal determination of mandate status, however, is often necessary in individual cases.^{[14](#)} In States that are not party to the 1951 Convention, or which have not yet instituted procedures for assessing refugee claims, intervention by UNHCR on the basis of a positive determination of refugee status may be required to protect the individual. Occasionally, access to national refugee resettlement programmes may be conditional upon certification by the UNHCR office in the country of first admission that the individuals in question fall within the mandate of the High Commissioner.^{[15](#)} In each scenario, UNHCR's approach to the determination of status has attracted considerable criticism, particularly in matters of due process and appeal or review,^{[16](#)} and its preparation and circulation of a detailed handbook on procedural standards did not fully quell concerns; it remains to be seen whether the latest version will do so.^{[17](#)}

3. Determination of refugee status by States

The 1951 Convention defines refugees and provides for certain standards of treatment to be accorded to refugees. It says nothing about procedures for determining refugee status, and leaves to States the choice of means as to implementation at the national level.¹⁸ Given the nature of the definition, the assessment of claims to refugee status thus involves a complex of subjective and objective factors, while the context of such assessment—interpretation of an international instrument with fundamentally humanitarian objectives—implies certain ground rules.¹⁹

Clearly, the onus is on the applicant to establish his or her case, but practical considerations and the trauma which can face a person in flight, impose a corresponding duty upon whomever must ascertain and evaluate the relevant facts and the credibility of the applicant.²⁰ Given ‘protection’ of refugees as one of the Convention’s objectives, a liberal interpretation of the criteria and a strict application of the limited exceptions are called for. Moreover, a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin. Particular care needs to be exercised, therefore, in applying the correct standard of proof.

In civil and criminal cases, two ‘standards of proof’ are commonly advanced: ‘proof on a balance of probability’ for the former, and ‘proof beyond a reasonable doubt’ for the latter. In practice, there can be no absolute standard in either case, and it will vary with the subject-matter. In the United Kingdom, for example, in habeas corpus proceedings, the applicant must cast some doubt on the validity of his or her detention. But in matters of fact, it is enough that the applicant presents such evidence as raises the possibility of a favourable inference. It then falls to the respondent, the detaining authority, to rebut that inference.²¹ It might be argued that, in a refugee status case, the ‘likelihood of persecution’ must be established on a balance of probabilities. In civil cases, the typical issue is whether a close, legally relevant relation exists between past causes and past effects.²² The applicant for refugee status, however, is adducing a future speculative risk as the basis for a claim to protection. Analogous issues were considered as long ago as 1971 in the United Kingdom by the House of Lords in an extradition case, *Fernandez v Government of Singapore*.²³ Here, Lord Diplock noted that the phrase ‘balance of probability’ was ‘inappropriate when applied not to ascertaining what has happened, but to prophesying what, if it happens at all, can only happen in the future’.²⁴ He went on to note that the

relevant provision of the Fugitive Offenders Act:

[c]alls upon the court to prophesy what will happen to the fugitive in the future if he is returned ... The degree of confidence that the events specified will occur which the court should have to justify refusal to return the fugitive ... should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated on the one hand of permitting and on the other hand of refusing, the return of the fugitive if the court's expectation should be wrong. The general policy of the Act, viz. that persons against whom a *prima facie* case is established that they have committed a crime ... should be returned to stand their trial ... , is departed from if the return of a person who will not be detained or restricted for any of the reasons specified in paragraph (c) is refused. But it is departed from only in one case. On the other hand, detention or restriction in his personal liberty, the consequence which the relevant words are intended to avert, is grave indeed to the individual fugitive concerned.²⁵

One significant difference between the principle of non-extradition and that of protection of refugees lies in the risk to society if return is refused when, in fact, persecution would not have occurred.²⁶ On the one hand, a suspected or actual criminal is allowed to remain, while on the other hand, someone who is innocent and against whom no allegations are made is not allowed to remain. The attitude to the asylum seeker should be at least as benevolent as that accorded to the fugitive from justice.²⁷ Lord Diplock took account of the relative gravity of the consequences of the Court's expectations proving wrong either one way or the other, and concluded that the appellant need not show that it was more likely than not that he or she would be detained or restricted if returned. A lesser degree of likelihood sufficed such as 'a reasonable chance', 'substantial grounds for thinking', or 'a serious possibility'.²⁸ Considered in isolation, these terms lack precision. In practice, however, they are appropriate, beyond the context of municipal law, for the unique task of assessing a claim to refugee status. While the facts on which the claimant relies may be established on a balance of probability, the decision-maker must then make a reasoned guess as to the future, taking account also of the element of relativity between the degree of persecution feared (whether death, torture, imprisonment, discrimination, or prejudice, for example), and the degree of likelihood of its eventuating.²⁹

In 1984, UNHCR submitted an *amicus curiae* brief to the US Supreme Court in the *Stevic* case, arguing against the balance of probability, or clear probability, test as the criterion for the grant of asylum. The Court concluded that the well-

founded fear standard, which was incorporated into the Refugee Act 1980 as the criterion for the grant of asylum, did not apply to applications for relief from deportation under section 243(h) of the Immigration and Nationality Act (INA);³⁰ in such cases, relief was conditional on the applicant showing ‘a clear probability’ of persecution. However, the Court also emphasized that eligibility for asylum under section 208 of the Act remained an entirely separate issue.³¹

Following this ruling, courts and administrative authorities were divided. Officials insisted that well-founded fear requires applicants to show that it is more likely than not that they will be singled out for persecution, a view also followed by the Board of Immigration Appeals (BIA).³² In *Acosta*, for example, the applicant appealed against denial both of his application for asylum and for withholding of deportation to El Salvador.³³ His claim was based on active participation in a co-operative organization of taxi drivers, threatened by anti-government forces seeking to disrupt transportation; a number of taxis were burnt and drivers killed, and the applicant testified to having received a beating and various threats. The BIA found the applicant’s testimony, which was corroborated by other objective evidence in the record, to be worthy of belief; however, it considered this insufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

The Board referred to the *Stevic* case, but remarked that, ‘as a practical matter the showing contemplated by the phrase “a well-founded fear” of persecution converges with the showing described by the phrase “a clear probability” of persecution’. The asylum seeker’s fear must be *well-founded* in the sense that, ‘an individual’s fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted on his return’:

[t]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.³⁴

Subjective fears alone were not enough; they must ‘have a sound basis in personal experience or in other external facts or events’. The various competing standards of proof (likelihood of persecution, clear probability of persecution, persecution as more likely than not), did not reflect meaningful distinctions in practice.

Although the Board's reasoning is well thought-out and retains a persuasive and pervasive logic, yet it finally demands too much of the asylum seeker, as other courts and other jurisdictions have found, and pays too little attention to the essentially future-oriented and hypothetical assessment attaching to the determination that a well-founded fear of persecution exists.³⁵

In due course, the US Supreme Court was called on to rule precisely on the difference, if any, between a 'well-founded fear', and a 'clear probability' of persecution. UNHCR's *amicus curiae* brief in *INS v Cardoza-Fonseca*³⁶ examined the negotiating history of article 1 of the Convention, and demonstrated that the status of refugee had been intended for a person who has been persecuted or who has 'good reason' to fear persecution, and that the subjective fear should be based on an objective situation, which in turn made that fear plausible and reasonable in the circumstances. It concluded:

No statistical definition is ... appropriate to determine the reasonableness of an applicant's fear, given the inherently speculative nature of the exercise. The requisite degree of probability must take into account the intensity of the fear, the nature of the projected harm (death, imprisonment, torture, detention, serious discrimination, etc.), the general history of persecution in the home country, the applicant's personal experience and that of his or her family, and all other surrounding circumstances.³⁷

The Supreme Court confirmed its earlier judgment in *Stevic* but rejected the Government's argument that the clear probability standard also controlled applications for asylum. The 'ordinary and obvious meaning' of the words used in the Refugee Act, its legislative history and the provisions of the Convention and Protocol, showed that Congress intended to establish a broad class of refugees eligible for the discretionary grant of asylum, and a narrower class with the statutory right not to be deported.³⁸ Giving the judgment of the Supreme Court, Justice Stevens emphasized the role of discretion. There is no entitlement to asylum, although its benefits once granted are broader than simple relief under 'withholding of removal';³⁹ the latter is 'country-specific', and merely prohibits deportation to the country or countries in which life or freedom would be threatened. Moreover, while it constrains discretion in the matter of *non-refoulement*, 'the Protocol does not require the granting of asylum to anyone'.⁴⁰ The Court found very different meanings in the statutory language. The 'would be threatened' criterion of the withholding of removal provision (and article 33 of the Convention) contains no subjective element; objective evidence showing

persecution as more likely than not is therefore required. By contrast, the reference to fear in section 208(a), ‘obviously makes the eligibility standard turn to some extent on the subjective mental state’ of the applicant.⁴¹ The ‘well-founded’ qualifier does not entail a clear probability standard: ‘One can certainly have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place.’⁴²

The Court did not elaborate the standard of proof more precisely, being of the view that a term like ‘well-founded fear’ is ambiguous to a point, and can only be given concrete meaning through a process of case-by-case adjudication; abstract speculation on the differences between the two standards has its limits, and it remains for the responsible authorities to develop a standard whose ‘final contours are shaped by application to the facts of specific cases’.⁴³

The debate regarding the standard of proof reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction. It is no easy task to determine refugee status; decision-makers must assess credibility and will look to the demeanour of the applicant. Information on countries of origin may be lacking or deficient, so that it is tempting to demand impossible degrees of corroboration. The applicant’s testimony may seem unduly self-serving, though it could scarcely be otherwise, absent anyone else to speak on his or her behalf.⁴⁴ The onus of establishing a well-founded fear of persecution is on the applicant, and some objective evidence is called for; but documentary corroboration is frequently unavailable or too general to be conclusive in the individual case.

Credibility remains problematic, but the nature of the exercise in prediction and the objective of protection call for account to be taken of consequences, and of degrees of likelihood far short of any balance of probability.⁴⁵ This indeed seems now to have been recognized in most jurisdictions involved in individual refugee determination.⁴⁶

In *Adjei v Minister of Employment and Immigration*, for example, the Canadian Federal Court of Appeal approved ‘good grounds for fearing persecution’ as a description of what the evidence must show to support a claim to be a Convention refugee, posing the question, ‘Is there a reasonable chance that persecution would take place were the applicant returned to his country?’⁴⁷ Swiss law provides that the asylum seeker, ‘doit prouver ou du moins rendre vraisemblable qu’il est un réfugié’, although ‘vraisemblable’ appears to mean more than what is merely plausible.⁴⁸ The Australian High Court has applied the

notion of a ‘real chance’, understood to mean a less than fifty per cent possibility,⁴⁹ while the United Kingdom House of Lords has confirmed the approach initiated in *Fernandez*: The ‘well-founded’ requirement, ‘means no more than that there has to be demonstrated a reasonable degree of likelihood of ... persecution’.⁵⁰

3.1 The European Union Qualification Directive

As part of the EU’s harmonization drive and efforts to reach a common asylum policy, the Qualification Directive was adopted in 2004⁵¹ and a recast version was adopted in 2011.⁵² In 2016, the European Commission proposed a Qualification Regulation to replace the Qualification Directive, which would directly bind Member States.⁵³ In late 2020, a New Pact on Migration and Asylum was proposed by the European Commission, which seeks to maintain political progress made towards the adoption of the Qualification Regulation.⁵⁴

The recast Qualification Directive was intended to strengthen the protection offered under the original Directive.⁵⁵ The Commission’s initial proposal acknowledged reports on ‘deficiencies concerning the terms of the Directive and the manner in which it is applied in practice’, and its conclusion that the ‘vague and ambiguous’ nature of the minimum standards meant that they were ‘insufficient to secure full compatibility with ... evolving human rights and refugee standards’.⁵⁶ Although improvements have been made, the final text retains certain problematic clauses from the original Qualification Directive.⁵⁷

Article 7, on ‘actors of protection’, has been amended to provide that protection against persecution or serious harm must be ‘effective and of a non-temporary nature’, and that an actor of protection must be ‘willing and able’ to offer such protection.⁵⁸ However, non-State actors remain potential actors of protection.⁵⁹ This position has been criticized by UNHCR, amongst others.⁶⁰

Article 8 has been amended to provide that an applicant may only be deemed to have access to internal protection in his or her country of origin if it is possible to ‘safely and legally travel to and gain admittance to that part of the country’, and he or she ‘can reasonably be expected to settle there’.⁶¹ A Member State may only refuse to provide protection on the basis that an internal protection alternative is available if the applicant ‘has no well-founded fear of being persecuted or is not at real risk of suffering serious harm’ or ‘has access to protection against persecution or serious harm as defined in Article 7’.⁶² Member

States are now also required to ensure that when undertaking an assessment, ‘precise and up-to-date information’ on the prevailing general circumstances and the applicant’s personal circumstances are obtained from ‘relevant sources’, such as UNHCR and the European Asylum Support Office (EASO). These amendments were incorporated in part to better align the provision with the European Court of Human Rights’ judgment in *Salah Sheekh*.⁶³

Article 9, on ‘acts of persecution’, clarifies that an applicant may be entitled to protection where the relevant acts of persecution are not carried out for reasons of race, religion, nationality, membership of a particular social group, or political opinion, but the *absence of protection* is connected to a Convention ground.⁶⁴ In article 10, references to gender have been strengthened,⁶⁵ although the problematic cumulative approach to assessing the existence of a particular social group has been maintained.⁶⁶ The Member States’ purported right to reduce the benefits of a refugee whose status was ‘obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee’ has been deleted.⁶⁷

Significant changes were also made to the regime for subsidiary protection, improving the rights of beneficiaries and their family members⁶⁸ in relation to residence permits;⁶⁹ travel documents;⁷⁰ health care;⁷¹ and access to employment, training, and integration programmes.⁷² However, subsidiary protection holders continue to possess fewer rights than refugees in certain respects.⁷³

Additional amendments include changes to: the definition of ‘family’;⁷⁴ the cessation clauses;⁷⁵ general rules on vulnerability;⁷⁶ language requirements when providing information to beneficiaries;⁷⁷ the tracing of family members of unaccompanied minors;⁷⁸ and the recitals.⁷⁹

In its final form, the recast Qualification Directive, like the original Directive, combines disparate elements, some mandatory, others optional.⁸⁰ Differences of approach among EU Member States are likely to remain, but whether as ‘higher standards’ is questionable,⁸¹ and certain key elements are still unclear, for example, the relationship of the Directive to the 1951 Convention/1967 Protocol and perhaps also to fundamental rights.⁸² The recital’s statement of the goals to be achieved is only partially matched by the content which follows, and inconsistencies with governing, emerging or consolidating international standards are apparent.

The recast Qualification Directive has a place in an overall scheme to establish a ‘common policy on asylum’, including a Common European Asylum System.

This in turn is to be based on ‘the full and inclusive application’ of the 1951 Convention and the 1967 Protocol, which are recognized as the ‘cornerstone of the international legal regime for the protection of refugees’.⁸³ The main objective is to ensure that Member States ‘apply common criteria’ for the identification of those generally in need of protection. The recast Qualification Directive asserts its intention to go further than the original Directive, confirming its principles as well as seeking ‘to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards’.⁸⁴ The recast Directive reiterates that ‘Member States should have the power to introduce or maintain more favourable provisions’.⁸⁵

The goal of common criteria in the determination of Convention refugee status is to be realized in regard to the recognition of refugees through the introduction of ‘common concepts of protection needs’ in regard to applications *sur place*,⁸⁶ sources of harm and protection, internal protection, and persecution, including the reasons for persecution and particularly membership of a particular social group. In keeping with the times, the Directive also deals with the terrorism dimension, endorsing the Security Council view on the purposes and principles of the United Nations, and embracing a concept of *national* security and public order which encompasses *international* terrorism.⁸⁷

While making provision for subsidiary protection,⁸⁸ the Directive also seeks to draw the line against providing protection from ‘risks to which a population ... or section of the population is generally exposed’.⁸⁹ It is doubtful whether any such simple line can be drawn, for international law and the legal protection of refugees are in constant development, and evaluation at regular intervals is therefore proposed, with account to be taken ‘in particular’ of the evolution of international obligations regarding *non-refoulement*;⁹⁰ presumably, this would not exclude consideration of other protecting norms and standards.⁹¹

Alternative terminology and efforts to describe international legal concepts in other words are sometimes harmless and sometimes helpful, but they can also be confusing. For example, the variation between the words chosen to define the refugee in article 2(d) of the recast Qualification Directive and those in article 1A(2) of the 1951 Convention is mostly harmless, and in one respect correctly clarifies an occasionally recurring misunderstanding in relation to stateless refugees.⁹² The definition of ‘family members’ has been amended in article 2(j) of the Recast Qualification Directive, and while it chimes with EU law, it is not yet compatible with the international concept.⁹³

The first major point of contention to which UNHCR and others have called attention is the Directive's limitation to 'third country nationals', that is, to individuals who are not EU citizens. This is *prima facie* incompatible with the 1951 Convention, so far as article 42 of the Convention permits no reservation to the refugee definition in article 1, while article 45, which provides that 'Any Contracting State may request revision of this Convention at any time' by way of notification to the UN Secretary-General, has not been exercised.

The revision of multilateral treaties is also governed by established rules of general international law, in particular, those set out in articles 40 and 41 of the 1969 Vienna Convention on the Law of Treaties. Article 41, dealing with modification between certain parties only, confirms that an agreement to modify is permissible only where provided for by the treaty or where, such modification not being prohibited by the treaty, it 'does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations', and 'does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.⁹⁴ In its commentary, the International Law Commission stated that 'the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision'.⁹⁵

Specifically with regard to article 41, the International Law Commission recorded its doubts regarding '*inter se* agreements' for modification, which, history showed, were more likely to be incompatible with the object and purpose of the treaty.⁹⁶ Paragraph 2 of article 41 was therefore intended as a further protection for all the parties against 'illegitimate modifications';⁹⁷ no other parties to the 1951 Convention/1967 Protocol appear to have been so notified,⁹⁸ and it is also uncertain to what extent the EU modification will affect the rights of other States party or the performance of their obligations, at least so long as no EU State generates refugees. If mainly at present at the theoretical level, this raises issues of importance and interest to general international law which are worthy of further exploration at another time. In particular, the implicit logic of a single European territory without internal borders (if such is ever achieved) challenges certain basic assumptions regarding, among others, the territorial scope of international obligations accepted by the territory's constituent elements, namely, States.⁹⁹

The Directive/Convention link is unclear in other respects. Article 3, for example, accepts that Member States may introduce or retain more favourable

standards for determining who is a refugee, ‘in so far as these standards are compatible’ with the Directive. The possibility that the Directive, now or in the future, may be incompatible with or lag behind the Convention or other relevant international protection standards is not addressed.¹⁰⁰

4. Persecution: issues of interpretation

‘Persecution’ is not defined in the 1951 Convention.¹⁰¹ Although the benefits of ‘indeterminacy’¹⁰² are generally recognized, there have been some efforts to elucidate the concept.¹⁰³ Under the Hathaway and Foster approach, ‘a risk of “being persecuted” requires evidence of a sustained or systemic denial of human rights demonstrative of a failure of state protection’.¹⁰⁴ While the language of this proposed test has not changed since the first edition of Hathaway’s work, its content has been clarified. In particular, the authors now note that the risk of ‘sustained’—or ‘ongoing’—denial of a human right may be fulfilled through a ‘single harm’, including ‘death or severe torture’.¹⁰⁵ Questions of precisely which human rights are engaged remain the subject of debate.¹⁰⁶ While these efforts have provided some guidance on the notion of persecution (in particular, the conceptualization of persecution as constituting serious harm coupled with a failure of State protection),¹⁰⁷ care must always be taken not to stray too far from the words of the Convention itself. As the New Zealand Court of Appeal has noted, ‘there is considerable danger in using concepts designed to elucidate the meaning of Refugee Convention terms as substitutes for the definition of refugee in the Refugee Convention.’¹⁰⁸

Articles 31 and 33 of the Convention refer to those whose life or freedom ‘was’ or ‘would be’ threatened,¹⁰⁹ and the 1984 UN Convention against Torture defines torture as covering:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹⁰

Although discrimination may be a factor, torture, unlike Convention refugee status, need not necessarily be linked to specific indices such as race, religion, nationality, social group, or political opinion.¹¹¹ Other acts amounting to persecution on the particular facts of the case may include those covered by the prohibition of cruel, inhuman, or degrading treatment or punishment,¹¹² or

punishment, or repeated punishment for breach of the law, which is out of proportion to the offence. In other respects, a margin of appreciation is left to States in interpreting this fundamental term, and the jurisprudence, not surprisingly, is sometimes inconsistent. Specific decisions by national authorities are some evidence of the content of the concept, as understood by States, but comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights. Article 9 of the recast EU Qualification Directive, which sets out for Member States the ‘common concept’ of persecution, provides that a relevant act *must* ‘be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights’, in particular, those rights which are non-derogable under the European Convention on Human Rights; or must amount to an accumulation of measures of equivalent severity. An illustrative list of ‘acts of persecution’ follows, ranging from the general (physical or mental violence, discrimination) to the particular (‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion’).¹¹³ Acts of ‘a gender-specific or child-specific nature’ are expressly included.¹¹⁴ The recast Qualification Directive now also provides that there must be either a connection between the reason for persecution (as set out in article 10) and the relevant acts of persecution, or ‘*the absence of protection against such acts*’.¹¹⁵ This addition brings within the ambit of ‘persecution’ those cases in which the act of persecution is committed for private or criminal ends, but the State’s unwillingness to provide protection is motivated by a Convention reason.¹¹⁶

Australia’s Migration Act also seeks to ‘interpret’ the Convention refugee definition. Persecution must involve ‘serious harm’ to the applicant, and ‘systematic and discriminatory conduct’.¹¹⁷ ‘Serious harm’, in turn, is described in a non-exhaustive list as including a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood of any kind, where such hardship or denial threatens the applicant’s capacity to subsist.¹¹⁸ Persecution also implies an element of ‘motivation’ on the part of those who persecute, in the sense that people are persecuted because of something perceived about them or attributed to them. The Act provides that a Convention ground must be ‘the essential and significant reason’ for the persecution feared.¹¹⁹ Finally, the applicant must have a well-founded fear, that is, a fear

based on a ‘real chance’ of persecution.¹²⁰ The Migration Act further places a burden of proof on an applicant to show that any conduct in Australia was engaged in ‘otherwise than for the purpose of strengthening the person’s claim to be a refugee’, restricting certain applicants’ ability to make a successful *sur place* claim.¹²¹

Fear of persecution and lack of protection are themselves interrelated elements, as article 1A(2) of the 1951 Convention makes clear. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear.¹²² The core meaning of persecution readily includes the threat of deprivation of life or physical freedom.¹²³ In its broader sense, however, it remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship, or freedom of movement.¹²⁴ Whether such restrictions amount to persecution within the 1951 Convention will again turn on an assessment of a complex of factors, including (1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case.

4.1 Protected interests

The references to ‘race, religion, nationality, membership of a particular social group, or political opinion’ illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law,¹²⁵ and have contributed to the formulation of other fundamental human rights. In its oft-quoted judgment in the *Barcelona Traction Case* in 1970, the International Court of Justice referred to the outlawing of genocide, slavery, and racial discrimination as falling within the emergent notion of obligations *erga omnes*.¹²⁶ The resulting rights, so far as they are embodied in international conventions, figure generally among those from which no derogation is permitted, even in exceptional circumstances.¹²⁷ ‘Non-derogability’ is not a fixed class in international human rights law, and persecution should not be considered as contingent on an indicator such as this.

In practice, however, claims to refugee status are commonly grounded in ‘basic rights’, including the right to life, to the extent that the individual is protected against ‘arbitrary’ deprivation;¹²⁸ the right to be protected against torture, or cruel or inhuman treatment or punishment;¹²⁹ the right not to be subjected to slavery or servitude;¹³⁰ the right not to be subjected to retroactive criminal penalties;¹³¹ the right to recognition as a person before the law;¹³² and the right to freedom of thought, conscience, and religion.¹³³ Although not included within the same fundamental class, the following rights are also relevant in view of the frequent close connection between persecution and personal freedom: the right to liberty and security of the person, including freedom from arbitrary arrest and detention;¹³⁴ and the right to freedom from arbitrary interference in private, home, and family life.¹³⁵

Recognition of these rights is essential to the maintenance of the integrity and inherent human dignity of the individual. Persecution within the Convention thus comprehends measures, taken on the basis of one or more of the stated grounds, which threaten deprivation of life or liberty; torture or cruel, inhuman, or degrading treatment; subjection to slavery or servitude; non-recognition as a person (particularly where the consequences of such non-recognition impinge directly on an individual’s life, liberty, livelihood, security, or integrity); and oppression, discrimination, or harassment of a person in his or her private, home, or family life.

4.2 The ways and means of persecution

Persecution is a concept only too readily filled by the latest examples of one person’s inhumanity to another, and little purpose is served by attempting to list all its known measures. Assessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured. A straightforward threat to life or liberty is widely accepted,¹³⁶ and the repeated condemnation of a wide range of activities involving violation of international humanitarian law, genocide, crimes against humanity and related offences should also be taken into account, given the recognition of responsibility at both State and individual level.

Certain measures, such as the forcible expulsion of an ethnic minority or of an individual, will clearly show the severance of the normal relationship between citizen and State, but the relation of cause and effect may be less clear in other

cases. For example, expulsion may be encouraged indirectly, either by threats¹³⁷ or by the implementation of apparently unconnected policies. Thus, in Vietnam after 1978, State policies aimed at the restructuring of society and the abolition of the bourgeoisie¹³⁸ began to be implemented, giving rise among those affected to serious concern for their future life and security. Those in any way associated with the previous government of South Vietnam were already liable not only to ‘re-education’,¹³⁹ but thereafter also to surveillance, to denial of access to employment and the ration system, or to relocation in a ‘new economic zone’.¹⁴⁰ The situation of ethnic Chinese was exacerbated by the deterioration in relations and subsequent armed conflict with the People’s Republic of China.¹⁴¹ The net result was a massive exodus of asylum seekers by boat and land to countries in the region. By contrast, Myanmar’s ‘clearance operations’ against its Rohingya minority in 2017 were more overt, and both preceded and followed by discriminatory restrictions on economic, social, and cultural rights.¹⁴²

4.2.1 Persecution as a crime in international law

The jurisprudence of various international tribunals might provide insights, first, into the meaning of persecution and, secondly, into the present-day scope of war crimes as a basis for exclusion. Persecution was certainly acknowledged by the International Military Tribunal in a number of post-Second World War trials,¹⁴³ and article 5 of the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) authorized the prosecution of those responsible for ‘persecutions on political, racial and religious grounds’, ‘when committed in armed conflict, whether international or internal in character, and directed against any civilian population’.¹⁴⁴

While the jurisprudence of the ICTY is replete with instances of persecution, its value for the purpose of interpreting the 1951 Convention is necessarily limited by its criminal law context and by the Tribunal’s approach to persecution as a crime, rather than as protective principle in the form of well-founded fear. In *Blaškić* and other cases, for example, the Appeals Chamber has defined persecution as a crime against humanity that involves, ‘an act or omission which ... (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)’.¹⁴⁵

The Appeals Chamber has also held that acts of persecution, whether

considered separately or together, should reach a certain level of severity, and that although discriminatory intent is essential,¹⁴⁶ it is not sufficient.¹⁴⁷ Nevertheless, among the various acts that may constitute persecution, it has accepted instances of serious bodily and mental harm, including rape and sexual assault; the destruction of property, depending on its nature and extent; attacks in which civilians are targeted; and deportation, forcible transfer, and forcible displacement. In each case, the Tribunal looked to the gravity of the crimes, when compared with those set out in article 5 of the ICTY Statute.¹⁴⁸

The Statute of the International Criminal Court appears to take a more restricted approach. On the one hand, it reiterates the necessity for a deprivation of fundamental human rights, emphasizes the element of discriminatory intent, and formally extends the range of impermissible grounds of distinction; but on the other hand, it also requires that persecution be committed in connection with another crime against humanity or crime within the jurisdiction of the Court:

Article 7—Crimes against humanity

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ...
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3,¹⁴⁹ or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court ...
2. For the purpose of paragraph 1 ...
 - (g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity ...¹⁵⁰

No asylum seeker is required to show that the crime of persecution has been or is likely to be committed, and certain of the elements of the crime, for example, in relation to ‘intent’, engage evidential issues far beyond the requirements of the

well-founded fear test. The offences committed during the Yugoslavia conflict, including deportation and forcible transfer, were nevertheless frequently connected to the concept of ‘ethnic cleansing’.¹⁵¹ Here, the jurisprudence of the Tribunal may be of greater assistance, so far as it illustrates and increases understanding of the ways and means of persecution. It also may be relevant, of course, to the question of *exclusion*. In the Canadian case of *Mugesera*, for example, the Supreme Court of Canada found the applicant to be inadmissible by reason of his having committed a crime against humanity outside Canada, namely, ‘persecution by hate speech’.¹⁵² In the case of *Krnojelac*, the Appeals Chamber took account of article 49 of the Fourth Geneva Convention, article 85 of Additional Protocol I and article 17 of Additional Protocol II, and found that these instruments ‘prohibit forced movement within the context of both internal and international armed conflicts’. This prohibition is aimed at ‘safeguarding the right and aspiration of individuals to live in their communities and homes without interference’, and if forcible displacement is committed with the requisite discriminatory intent, it may constitute the crime of persecution.¹⁵³ In *Simić*, the Trial Chamber noted that displacement is only illegal when it is ‘forced’, but that this does not require physical force:

[i]t may also include ‘the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment’. The essential element is that the displacement be involuntary in nature, that ‘the relevant persons had no real choice’. In other words, a civilian is involuntarily displaced if he is ‘not faced with a genuine choice as to whether to leave or to remain in the area’.¹⁵⁴

The lack of genuine choice, in turn, may be inferred from, among others, threatening and intimidating acts, shelling of civilian objects, burning of civilian property, and the commission or threat to commit crimes ‘calculated to terrify the population and make them flee the area with no hope of return’.¹⁵⁵

4.3 Agents of persecution

Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated. Refugees, for example, have fled mob violence or the activities of so-called ‘death squads’, while governments may be unable to suppress such activities, or unwilling or reluctant to do so, or even

colluding with those responsible. In such cases, where protection is in fact unavailable, persecution within the Convention can result, for it does not follow that the concept is limited to the actions of governments or their agents.¹⁵⁶

The term, ‘agent of persecution’, is somewhat misleading. An ‘agent’ usually acts for and on behalf of another, the ‘principal’. In the law of contract, for example, an agent is empowered to represent and to conclude agreements that bind the principal. In some cases, the agent who acts beyond the bounds of specific authority may also bind the principal, and even on occasion one who, having no authority, holds him-or herself out as representing a principal may also bind the latter, unless the principal takes steps to avoid responsibility. In agency cases, therefore, the essential link is the actual or implied conferral upon another of authority to act.

Neither the 1951 Convention nor the *travaux préparatoires* say much about the source of the persecution feared by the refugee,¹⁵⁷ and no necessary linkage between persecution and government authority is formally required. However, the Convention does recognize the relation between protection and fear of persecution. A Convention refugee, by definition, must be *unable* or *unwilling* to avail himself or herself of the protection of the State or government.¹⁵⁸ This connection is echoed in the recast EU Qualification Directive, where articles 6 and 7 deal with ‘actors of persecution or serious harm’ and ‘actors of protection’, respectively. Persecutors include the State, parties or organizations controlling all or a substantial part of the State, and non-State actors, provided that the State or those parties or organizations controlling all or a substantial part of it ‘are unable or unwilling to provide protection against persecution or serious harm’.¹⁵⁹ Protection, in turn, may be provided by the State or by ‘parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State’ if certain conditions are met.¹⁶⁰ Grahl-Madsen ties persecution ‘to acts or circumstances for which the government (or, in appropriate cases, the ruling party) is responsible, that is, ... acts committed by the government (or the party) or organs at its disposal, or behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State’.¹⁶¹ The decisive factor, in his view, is the ‘place’ of the acts or atrocities in the general situation prevailing in the country of origin, for example, whether they are sporadic and rapidly terminated, or ‘continue over a protracted period without the government being able to check them effectively’, thereby amounting to a flaw in the organization of the State.¹⁶²

4.3.1 Agents of persecution and State responsibility

The purpose is not to attribute responsibility, in the sense of State responsibility,¹⁶³ for the persecution. If it were, then qualifying as a refugee would be conditional on the rules of attribution, and protection would be denied in cases where, for any reason, the actions of the persecutors were not such as to involve the responsibility of the State.¹⁶⁴ As with the putative question of persecutory intent, so the issue of State responsibility for persecution, relevant though it may be in other circumstances, is not part of the refugee definition. Analogous aspects may arise, however, in considering the availability and/or sufficiency of local protection. Here, the law of State responsibility provides some parallel illustrations; for example, if the acts of private groups or individuals are attributable to the State, then the lack of adequate local protection can be inferred. Likewise, where the State is either unable or unwilling to satisfy the standard of due diligence in the provision of protection, the circumstances may equally found an international claim, as provide a basis for fear of persecution within the meaning of the Convention. The correlation is coincidental, however, not normative. The central issue remains that of *risk of harm amounting to persecution*; the principles and practice of State responsibility can contribute to that assessment, for example, by confirming the level of protection and judicial or other guarantees that may be due under universal and regional human rights instruments.¹⁶⁵

Moreover, while the inability in fact of a State to exercise control in certain circumstances may entail an absence of responsibility vis-à-vis the rights of other States,¹⁶⁶ there is no basis in the 1951 Convention, or in general international law, for requiring the existence of effective, operating institutions of government as a pre-condition to a successful claim to refugee status. In the same way, the existence or non-existence of governmental authority is irrelevant to the issue of individual responsibility for genocide, war crimes, or other serious violations of international humanitarian law.

Whether non-State actors, including international organizations, are capable of providing ‘protection’ against persecution remains controversial. As noted above, article 7 of the recast Qualification Directive stipulates that such entities may provide protection if they control ‘the State or a substantial part of the territory of the State’; are ‘willing and able to offer protection’; and that protection is ‘effective and of a non-temporary nature’.¹⁶⁷ In *Abdulla*, the CJEU accepted that ‘international organisations controlling the State or a substantial part of the

territory of the State, including by means of the presence of a multinational force in the territory' could constitute actors of protection under article 7 of the original Qualification Directive.¹⁶⁸ UNHCR, amongst others, does not consider that a non-State actor (or organization) is generally capable of providing protection against persecution.¹⁶⁹ UNHCR's position is particularly significant given that the Common European Asylum System is 'based on the full and inclusive application' of the 1951 Convention.¹⁷⁰ In its comments on a proposed Qualification Regulation, UNHCR noted that:

It would be inappropriate to equate national protection provided by States with the activities of a certain administrative authority, which may exercise some level of de facto—but not de jure—control over territory. Such control is often temporary and without the range of functions and authority of a State. Importantly, such non-State entities and bodies are not parties to international human rights treaties, and therefore cannot be held accountable for their actions in the same way as a State. In practice, this generally means that their ability to enforce the rule of law is limited. Specifically in respect of international organisations, such as organs and agencies of the United Nations, they enjoy privileges and immunities.¹⁷¹

4.4 Fear, intent, motive, and the rationale for persecution

Applications for refugee status are sometimes denied on the ground that the claimant has failed to prove either that the law was enacted with intent to persecute, or that the authorities in his or her country of origin themselves *intended* to persecute the individual for one or other Convention reason. Proof of legislative or organizational intent is notoriously hard to establish and while evidence of such motivation may be sufficient to establish a claim to refugee status, it cannot be considered a *necessary* condition.

Nowhere in the drafting history¹⁷² of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status. The debate in the *Ad hoc* Committee regarding the 'precedent' of the IRO Constitution's approach to classification and description, considered in context, reveals itself as a debate, not about fear, intention, or motive, but one between those who, like the United Kingdom, France, and Belgium, favoured a definition in general terms; and those who, like the United States, preferred a detailed statement of the various categories of refugees who should receive international protection.

As revised, the definition which emerged on 30 January 1950 was

substantially that which was adopted in July 1951, at the Conference of Plenipotentiaries.¹⁷³ As the Israeli delegate observed at the time, ‘[A]ll the *objective* factors which would make it possible to characterize a person as a refugee were now known ... (and) ... contained in paragraph 1.’¹⁷⁴ The only *subjective* elements of relevance, for this delegate, went to the ‘horrifying memories’ of past persecution which might justify non-return to the country of origin. The (subjective) state of the *persecutor’s* mind was never mentioned. As the *Ad hoc* Committee stated to ECOSOC in its comments on the draft:

The expression ‘well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion’ means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.¹⁷⁵

Persecution for Convention reasons has sometimes been read to mean ‘the infliction of suffering *because of or on account of* the victim’s race, beliefs or nationality, etc’.¹⁷⁶ Such a seemingly innocuous change in the wording, however, distorts the natural meaning of the language and can create additional evidentiary burdens for the claimant. In particular, perhaps unwittingly, it may import a *controlling* intent on the part of the persecutor, as an element in the definition.

Of course, intent is relevant; indeed, evidence of persecutory intent may be conclusive as to the existence of well-founded fear, but its absence is not necessarily conclusive the other way. A persecutor may intend to harm an individual because of/on account of that person’s race or religion.¹⁷⁷ Similarly, a persecutor may intend to harm an individual because of an opinion expressed, or a decision or action taken, irrespective or regardless of that individual’s actual motivation or conviction. If that opinion, decision, or action falls within the category of protected interests (freedom of religion, expression, opinion, conscience, and so on), and if the harm visited or feared is in fact of a degree to amount to persecution, then a sufficient link may be inferred on which to base a well-founded fear of persecution within the meaning of the Convention. There are slight but important differences between the terms *on account of* and *for reasons of*. ‘On account of’, which is *not* the language of the Convention, implies an element of conscious, individualized direction which is often conspicuously absent in the practices of mass persecution.

The Convention definition offers a series of objective elements by which to describe the refugee. The *travaux préparatoires* suggest that the only relevant intent or motive would be that, not of the persecutor, but of the refugee or

refugee claimant: one motivated by personal convenience, rather than fear, might be denied protection;¹⁷⁸ while one with horrifying memories of past persecution might yet continue to receive protection, notwithstanding a change of circumstances in the country of origin.¹⁷⁹ Otherwise, the governing criterion remains that of a serious possibility of persecution, not proof of intent to harm on the part of the persecutor.

5. The refugee definition and the reasons for persecution

5.1 General matters

A claimant to refugee status must be ‘outside’ his or her country of origin,¹⁸⁰ and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. Certain States may provide for those who would be considered as refugees once they took flight,¹⁸¹ and a growing body of practice aims to bring some measure of protection and assistance to the internally displaced, but this in no way alters the basic international rule.¹⁸²

The Convention requires neither that the putative refugee shall have fled by reason of fear of persecution, nor that persecution should have actually occurred. The fear may derive from conditions arising during an ordinary absence abroad (for example, as student, diplomat or holiday-maker), while the element of well-foundedness looks more to the future, than to the past. Subjective and objective factors thus tend to elide, one with the other.¹⁸³ Fear, reflecting the focus of the refugee definition in part at least on factors personal to the individual, and the degree to which it is felt, are incapable of precise quantification.¹⁸⁴ Fear may be exaggerated or understated, but still be reasonable.¹⁸⁵ It is by no means clear, however, whether from the definition, jurisprudence or commentary, how much of a role the subjective element is expected to play in a determination process that is practically oriented to the assessment of *risk*. If the applicant’s statements in regard to his or her fear are consistent and credible, then little more can be required in the way of formal proof.¹⁸⁶ What seems to be intended, however, is not so much evidence of subjective fear, as evidence of the subjective aspects of an individual’s life, including beliefs and commitments. These help not only to locate the claimant in a social and political context, but also go to the double issue of personal credibility and credible, reasonable fear.¹⁸⁷ For the heart of the question is whether that ‘subjective’ fear is well-founded; whether there are

sufficient facts to permit the finding that this applicant, in his or her particular circumstances, faces a serious possibility of persecution.¹⁸⁸

Problems of assessment cannot be pursued very far in the abstract. All the circumstances of the case have to be considered, including the relation between the nature of the persecution feared and the degree of likelihood of its happening. At each stage, hard evidence is likely to be absent, so that finally the asylum seeker's own statements, their force, coherence, and credibility must be relied on, in the light of what is known generally, from a variety of sources, regarding conditions in the country of origin.¹⁸⁹

5.1.1 ‘Good faith’ and activities in the country of refuge

The UK Court of Appeal decision in *Danian*¹⁹⁰ is a fairly typical example of a case addressing the question of whether an individual who has engaged in activities in the country of refuge with a view to building a refugee case can nonetheless come within the terms of the 1951 Convention, or whether his or her claim is defeated by lack of ‘good faith’. As has been reiterated on many occasions already, the Convention’s central premise is that protection should be granted to a person with a well-founded fear of being persecuted for a Convention reason. In the determination of status, the credibility of the claimant and of information relating to his or her country of origin are of critical importance, but the Convention makes no provision as to character, and the essential question remains that of risk of relevant harm if returned.¹⁹¹ There is no doubt that a person may become a refugee after leaving their country of origin, and the *UNHCR Handbook* recognizes that,

A person may become a refugee ‘sur place’ as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.¹⁹²

In deciding that the claimant in *Danian* fell outside the 1951 Convention,¹⁹³ the United Kingdom Immigration Appeal Tribunal relied on a number of decisions by the New Zealand Refugee Status Appeals Authority (RSAA), the administrative body then responsible for hearing appeals from initial decisions

by officials.¹⁹⁴ In one case in particular, the RSAA had concluded that there was indeed a ‘good faith’ requirement imposed on asylum seekers, although no legal authority was offered in support of the proposition. Nevertheless, in its view, ‘without the good faith requirement, individuals may unilaterally determine the grant of refugee status to themselves’. This somewhat surprising statement seems to ignore both the criteria set out in article 1A(2) and the particular responsibility of decision-makers in the determination of refugee status, which requires them to assess the personal experiences and credibility of the individual claimant in context, and to assess the likely behaviour of the State of origin or other putative persecutor if the claimant were to be returned. To give primary weight to any less than creditable actions of the individual leaves half the question begging. In addition, even a ‘good faith claimant’, such as one moved by a sincere change of faith,¹⁹⁵ in effect ‘unilaterally’ determines the conditions that justify the grant of refugee status.

In fact, the RSAA’s views on good faith were unnecessary to the decision, the tribunal finding that the risk of persecution was non-existent. The UK Immigration Appeals Tribunal (IAT) also found that the claimant did not have a well-founded fear of persecution, but it took the RSAA’s views one step further:

the appellant falls within the category of person who is a refugee *sur place*, but who has acted in bad faith. As he has acted in bad faith, he falls outwith the Geneva Convention. He is not a person to whom the Convention applies; this would be our view regardless of whether his activities post 1995 may have brought him to the attention of the Nigerians and *regardless of whether his fear of persecution may be well founded*. (emphasis added)

Both the RSAA and the IAT relied heavily on Grahl-Madsen,¹⁹⁶ but also appear to have misconstrued Hathaway,¹⁹⁷ and were unable to show any more specific authority for their respective positions. Following the decision in *Re HB*, ‘good faith’ was invoked in a number of other decisions, although on each occasion the (negative) decision itself was based on the absence of a well-founded fear.¹⁹⁸ Australian decision-makers also flirted with the good faith requirement,¹⁹⁹ but in *Mohammed v Minister for Immigration and Multicultural Affairs*, the Federal Court of Australia emphasized that, ‘[A]t all times ... the determination to be made is whether there is a genuine fear of persecution and whether that fear is well-founded ... [and that] ... recognition of refugee status cannot be denied to a person whose voluntary acts have created a real risk that the person will suffer

persecution occasioning serious harm if that person is returned to the country of nationality.’²⁰⁰

In *M v Secretary of State for the Home Department*,²⁰¹ the United Kingdom Court of Appeal was concerned, not with the claimant’s self-serving actions, but with the question, whether ‘a person who puts forward a fraudulent and baseless claim for asylum ... is not ... able to bring himself within [the 1951 Convention]’. The Court was unanimously of the view that such a proposition could not be supported. Millett LJ noted that such a person,

[m]ay be guilty of an attempt to pervert the course of justice and, in theory at least, at risk not only of having his claim dismissed but of finding himself the subject of criminal proceedings. But he *is not thereby deprived of the protection of the convention* ... Express exceptions are provided for in the convention itself; they do not include the case where the applicant for asylum has made a previous claim which has been found to be fraudulent and baseless. If, therefore, despite having made such a claim and having had it rejected he can nevertheless at any time thereafter and on whatever basis satisfy the authorities that he has a well-founded fear of persecution for a convention reason if he is returned to the country of his nationality, it would be a breach of the United Kingdom’s international obligations under the convention to return him to face possible death or loss of freedom.²⁰²

In his Lordship’s view, the asylum seeker still faced the hurdle of establishing a well-founded fear: ‘Whether he can do so or not will largely turn on his credibility, and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left.’²⁰³

Some States, however, have now legislated a good faith requirement.²⁰⁴ The New Zealand Immigration Act provides that a refugee and protection officer ‘must decline to accept for consideration a claim for recognition as a refugee if the officer is satisfied that 1 or more of the circumstances relating to the claim were brought about by the claimant—(a) acting otherwise than in good faith; and (b) for a purpose of creating grounds for recognition [as a refugee].’²⁰⁵ In Australia, the Migration Act 1958 states that ‘[i]n determining whether the person has a well-founded fear of persecution ... *any conduct engaged in by the person in Australia is to be disregarded* unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee’.²⁰⁶ The recast Qualification Directive provides that the assessment of an application for international protection includes taking into account ‘whether the applicant’s activities since

leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country'.²⁰⁷ When considering a *sur place* claim, Member States may 'determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country'.²⁰⁸

5.1.2 Nationality and statelessness

Article 1A(2) of the Convention makes separate provision for refugees with a nationality and for those who are stateless.²⁰⁹ For the former, the relevant criterion is that they should be unable or unwilling to avail themselves of the protection of their State of nationality, while the latter should be unable or unwilling to return to their State of former residence.²¹⁰ In cases of dual or multiple nationality, refugee status will only arise where the individual in question is unable or unwilling, on the basis of well-founded fear, to secure the protection of any of the States of nationality. The second paragraph of Article 1A(2) provides that,

In the case of a 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.²¹¹

Although apparently straightforward, the interpretation of this provision has given rise to difficulty, particularly with regard to whether the second or other nationality must be 'effective' (and what that entails); whether it includes the individual who is not in fact a national, but may have an opportunity to claim nationality; and whether such an individual has a choice and if so, whether he or she can be expected or 'obliged' to exercise that choice and to take the steps necessary to obtain the other nationality. In principle, the alternative nationality 'exception' would appear to call for attention only once the individual has been found to have a well-founded fear of persecution in his or her country of 'primary nationality', when it would fall to the putative State of asylum to adduce evidence to show that it is not obliged to recognize refugee status and to

provide protection—to show, therefore, that the asylum seeker *is* in fact a national of another country. In practice, decisions may be run together, and account taken also of how exactly, if at all, this paragraph has been transposed into local law. Section 36(3) of Australia's Migration Act, for example, allows for the denial of protection to an asylum seeker,

who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.²¹²

The interpretation of the paragraph has also come up on appeal. In one case involving Israel's Law of Return, the Court overturned a tribunal finding on the ground that the Israeli law necessarily implied a 'genuine desire' on the part of the individual, and that the right to enter and reside in Israel was therefore not, 'an existing right but rather a conditional or contingent right'.²¹³

In earlier cases involving the status of Timorese seeking refugee status in Australia prior to independence, the Court had described its role as requiring it to consider whether putative Portuguese citizenship was a 'nationality that is effective as a source of protection and ... not merely formal'.²¹⁴ In another case, the Administrative Appeals Tribunal had noted that 'an East Timorese must apply for Portuguese citizenship before he or she can enjoy protection from the Portuguese authorities ... Applications are considered on a case by case basis. It is not an automatic process'. In the circumstances, the Tribunal was not satisfied that the applicant would receive effective protection in Portugal.²¹⁵

Canada has also adopted its own interpretation, and section 96(a) of the Immigration and Refugee Protection Act 2001, continuing the approach of earlier legislation, provides that a Convention refugee must be 'outside each of their countries of nationality and ... unable or, by reason of [well-founded] fear, unwilling to avail themselves of the protection of each of those countries.' The Federal Court of Appeal, interpreting and applying Canadian law rather than the Convention, approved denial of protection where, at the time of the hearing, it was shown that the claimant was entitled to acquire by 'mere formalities', the citizenship of a country with respect to which he or she had no well-founded fear of persecution; the question was whether acquiring such citizenship was 'within the control of the applicant'.²¹⁶ The jurisprudence is inconsistent, however, where there is no automatic entitlement to citizenship and the individual simply fails to

access possible protection.²¹⁷

The starting point is the ordinary meaning of the words in context, and the ordinary meaning of the relevant words of the second paragraph of Article 1A(2) of the 1951 Convention would seem clear: ‘the term “the country of his nationality” shall mean each of the countries of which he *is* a national’ (emphasis added). The word ‘*is*’ posits a given legal status, and contrasts with other formulations which the drafters might have chosen but did not, such as ‘may be’, ‘might be’, or ‘has the possibility to be’. The present tense, moreover, invites the application of the strictly literal meaning which that tense implies, and therefore a finding that the individual *is* a national of the State in question at the date of decision. The ‘ordinary meaning’ approach—‘a status actually and presently held’—was expressly adopted by the Full Court of the Federal Court of Australia in *FER17* in 2019,²¹⁸ when it rejected the argument that the term ‘a national’ in the Migration Act included not only someone with an existing status, but also someone possessing a present capacity to acquire that status.²¹⁹

As a matter of law, therefore, the expectation that an individual seek the protection of another country arises only in the case that he or she ‘*is* a national’; in practice, however, the situation can be less clear. The Convention does not itself require the putative refugee to exhaust all possibilities of alternative national protection before seeking its protection, but it may be argued that he or she ought to take ‘reasonable steps’ to *obtain* such other nationality, rather than simply to avail themselves of one already conferred or existing.²²⁰ It is sometimes said, for example, that the asylum seeker does not have a choice whether to accept another citizenship, but where this requires an exercise of will on his or her part, then the underlying assumptions require closer interrogation. The ‘right’ to change nationality,²²¹ whether or not recognized in customary international law, implies an exercise of will and applies equally to the right, in the case of dual or multiple nationality, to change the dominant nationality by making changes in the ‘facts of attachment’ and relocating the centre of one’s social, cultural, and economic life. There is no rule of international law which presently operates to convert the individual’s right to change nationality into a duty to embrace the nationality of a country to which he or she does not in fact feel attached.

In *MA (Ethiopia)*, however, the Court expressed a number of views in obiter which, putting the evidential cart before the definitional horse, reflect a certain misapprehension of the term ‘refugee’ and the process of refugee

determination.²²² Thus, notwithstanding the centrality of a well-founded fear of persecution to the definition of a refugee, Lord Justice Elias referred to ‘the well-established principle that, before an applicant can claim the protection of a surrogate state, he or she must first take all reasonable steps to secure protection from the home state’.²²³ To this, Lord Justice Burnton added that, ‘refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable steps to obtain recognition of her nationality.’²²⁴

Neither the incidental recognition that there ‘may be cases where it would be unreasonable’ to require a refugee applicant to approach their embassy,²²⁵ nor Burnton LJ’s use of the words ‘solely’ and ‘reasonable’, disguise the fact that, if applied generally, their approach would invert the norm and place impractical and often impossible hurdles in the way of the asylum seeker.²²⁶ It is comprehensible if, but only if, it is confined to its facts and context, including the Court’s evident *a priori* conclusion that the claimant had neither established a well-founded fear of persecution in the country which it had found to be her country of nationality, nor overcome that ‘preliminary’ finding by showing, on the evidence, that she was unwilling, owing to such fear, or unable, to avail herself of the protection of that country.

In the matter of evidence and proof, the most obvious and easiest course is to adduce one or more official acts of the putative State of second nationality, such as a passport or certificate of citizenship; in the absence of such documentation, it is open to the State to seek, through diplomatic channels, official confirmation of citizenship. Clearly, this would avoid the expense and time spent speculating on the effects of foreign law, the meaning of words in translation, and the evaluation of expert and perhaps conflicting testimony. In practice, however, that is what commonly happens and the resulting inconsistencies can be seen in the way in which different countries approach the situation of asylum seekers from North Korea.²²⁷ In brief, the South Korean Constitution identifies its territory as comprising the whole of the Korean peninsula and its adjacent islands, and the South Korean Nationality Act appears to accept that many nationals of North Korea are also nationals of South Korea.²²⁸ In one Australian case, in which it was ‘common ground that, at all material times, each of the Appellants had the right to enter and reside in South Korea’, the Court rejected their applications on the basis that they had not taken all possible steps to avail themselves of the right to enter and reside in South Korea.²²⁹ In one UK case, however, the Upper

Tribunal was of the view that if the applicant,

[i]s entitled to nationality, subject only to his making an application for it, he is also to be regarded as a national of the country concerned. But if he is not a national and may be refused nationality, he is not to be treated as being a national of the country concerned.²³⁰

Whether an individual ‘ought’ to apply is a matter of evidence, rather than principle, the question being whether the evidence shows that nationality will be acquired on application, or whether its grant is a matter of discretion.²³¹ The Upper Tribunal accepted that the North Korean applicants acquired South Korean citizenship at birth, but found on the evidence that, because they had been outside Korea for more than ten years, South Korea would treat them as having lost their South Korean nationality. ‘For that reason they have no subsisting or demonstrable entitlement to South Korean nationality documents: they would have to apply to re-acquire South Korean nationality, and we see no reason to suppose that it would be granted to them as a matter of routine.’²³² Similarly, the Dutch Council of State took the view that the ‘protection alternative’ applies only if the applicant actually has the nationality of another State; even though North Koreans may have a claim to nationality, security checks can lead to its loss and it had not been shown that the conditions for acquisition of citizenship had been met.²³³

Recent practice on deprivation of citizenship reveals a tendency among certain States, even previously staunch advocates against statelessness, to attach considerable weight to ‘possible’ citizenships, as a way of enlarging their discretion.²³⁴ Although the jurisprudence is not concordant, there are clear differences between deprivation of citizenship, on the one hand, where States may hope to demonstrate that, because of putative claims to alternative citizenship, their action will *not* result in statelessness; and determinations of status as refugee or stateless person, on the other, where a focus on ordinary meaning and present status may better serve the object and purpose of protection.²³⁵ A claimant with a well-founded fear of being persecuted ought not to be denied protection as a refugee on the basis of specious assertions as to the availability of alternative protection; the burden therefore is on the authority that would deny refugee status to prove that the individual *is* in fact considered as a national by another State according to its law.

Statelessness and refugee status are by no means identical phenomena.²³⁶ On

occasion, those fleeing may be deprived of their nationality, but it is quite common also for the formal link to remain for some time. Following the Russian revolution in 1917, for example, large numbers of citizens were eventually stripped of their status and for years Soviet Jews leaving the country permanently were required to renounce their citizenship.²³⁷

One question which has arisen, however, is whether a stateless person unable to return to his or her country of former habitual residence may qualify as a Convention refugee without having to show that he or she is outside such country by reason of a well-founded fear of persecution. The possibility that a different standard of protection was intended for stateless refugee claimants arises from a grammatical ‘anomaly’ in article 1A(2), which appears not to apply the ‘well-founded fear’ requirement in the same way to those with and those without a nationality. If interpreted literally, as Cooper J. said in *Rishmawi v Minister for Immigration and Multicultural Affairs*, the effect would be that ‘a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee’.²³⁸ That there are indeed certain practical differences between stateless and other refugees has been recognized in a number of judicial decisions. Courts in Austria and Germany, for example, have found in favour of refugee claimants outside their country of former habitual residence and unable to obtain its protection or to return there.²³⁹ As noted above, Canadian law imposes the requirement of well-founded fear on both categories, as a condition of presence outside the country of nationality/country of former habitual residence,²⁴⁰ but the stateless person’s particular lack of protection has been recognized by Canadian courts. In *Thabet v Minister of Citizenship and Immigration*, the Federal Court of Appeal said that,

[i]t is important to note the key distinction between the two groups of people so that neither advantages nor disadvantages are created. The distinction is contained in the wording of the refugee definition itself. In the case of nationals it talks of the claimant being ‘unwilling to avail himself of the protection of that country’. In the case of stateless persons it talks only of an unwillingness to return to that country. In this latter case the question of the availment of protection does not arise ... The definition takes into account the inherent difference between those persons who are nationals of a state, and therefore are owed protection, and those persons who are stateless and without recourse to state protection. Because of this distinction one cannot treat the two groups identically, even though one should seek to be as consistent as possible.²⁴¹

The view now generally accepted, which makes sense in pursuit of a ‘single test’ for refugee status, is that no substantial difference is intended between stateless and other refugees, and that the Convention aims to provide protection to a person, whether outside their country of nationality, or, not having a nationality and outside their country of former habitual residence, who has a well-founded fear of being persecuted on Convention grounds.²⁴²

5.1.3 Deprivation of citizenship, persecution, and the country of one’s nationality

The 1951 Convention is not concerned with nationality as such,²⁴³ save insofar as it is one of the indicators of the locus of persecution (former habitual residence being the other), and as the source of possible protection. The ‘country of one’s nationality’ is not a term of art, except in that one respect, and given the evidential focus on well-founded fear, there is no reason to suppose, either that it ceases to be the ‘relevant country of reference’, or that refugee status decision-makers need to be concerned with whether a particular act of deprivation of citizenship is or is not in accordance with international law; from the latter perspective, the act of deprivation is simply another fact that may contribute to a finding of well-founded fear, beyond which it has no legal significance whatsoever.

Nationality, considered as the right to have rights, usefully emphasizes the everyday importance of citizenship, even as it simultaneously recalls Hannah Arendt’s ‘prophetic skepticism’ about the enforceability of international human rights.²⁴⁴ For Arendt, any proclamation of antecedent or inalienable rights, such as being born free and equal in dignity, counted for nothing unless one were a member of a community organized to protect and guarantee them.²⁴⁵ With this in mind, as Kesby puts it, ‘nationality is not simply a necessary legal status for the exercise of a limited range of national rights, but in practice often for the full range of human rights, from rights of freedom of movement to the right to education and health care.’²⁴⁶

The references to nationality in Article 1A(2) lead to some confusion on occasion, with regard both to the appreciation of well-founded fear and to the relevant country against which such fear is to be assessed. Deprivation of citizenship and its counterpart, denial of the right to return, are often equated with persecution. International law certainly provides the bases upon which to characterize denationalization as arbitrary, discriminatory and even as ‘non-opposable’ to other States, but whether it amounts to persecution in the sense of

the 1951 Convention is another matter. The easy answer, and therefore probably the correct one, is that it all depends. The present state of the jurisprudence remains tilted in favour of the State's sovereign competence in nationality matters, rather than towards the individual to whom certain duties are owed. This may be due in part to the nature of a 'well-founded fear of being persecuted' and to the impression that denationalization is a once and for all act, incapable of being repeated, not sufficiently 'forward looking', and thus falling outside certain *a priori* assumptions about persecution.²⁴⁷ A more detailed examination of context and circumstance is called for, however, premised on the 'right to have rights' as fundamental and looking more closely at the conditions underlying denial or deprivation and their impact on the lives of those affected.²⁴⁸ On the one hand, it may be argued that denial or deprivation of citizenship is not indicative of a well-founded fear of persecution unless it is clearly linked to the likelihood of ill-treatment, threats to life or liberty, serious violations generally of civil and political rights, or the flagrant denial of economic, social and cultural rights. On the other hand, the situation in fact of those affected may be better appreciated if the fundamental nature of nationality is the starting point, and the ensuing assessment then recalibrated to equate breaking that link with the denial of protection.

The German Federal Administrative Court, for example, while taking account of all the circumstances, has nevertheless held that the effects of deprivation of citizenship for a reason relevant to asylum do not cease with the act of deprivation itself, which causes significant, ongoing harm.²⁴⁹ Similarly, the Court of Appeal in the United Kingdom, while accepting that deprivation of nationality did not necessarily give rise to refugee status, found in the instant case that not enough attention had been given to 'the loss and continued loss of civil rights'.²⁵⁰ Lord Justice Jacob went so far as to say that,

Once a claimant for refugee status has established that their country of origin has taken away their nationality on the grounds of race, they in my view have established a *prima facie* case for such status ... They have 'lost the right to have rights' ... And they have already been put in the position that their home state will not let them in—they cannot even go home.²⁵¹

The linkage between citizenship and enjoyment of a whole range of rights may therefore be what distinguishes its denial presumptively from threats to other protected rights and interests.

A further element of confusion may arise where the fact of deprivation of citizenship is seen as somehow changing the locus, so that the acting State is no longer the ‘country of reference’ for the purposes of Article 1A(2), and a claimant so affected must be treated differently.²⁵² This approach is unnecessarily legalistic, even if it appears to be driven in part by a commendable desire for refugee status decision-makers not to be seen as recognizing denationalization which is inconsistent with international law or which, given its egregious nature, is otherwise not opposable to other States. Understandably, there is some reluctance to insist that an individual continues to enjoy a status which they manifestly do not, but the determination of refugee status does not do this. In most cases it will be illogical to characterize the applicant for refugee status deprived of nationality as a stateless claimant, and their country as therefore a country of former habitual residence; what matters are the facts giving rise to a well-founded fear of persecution, one of which is or may be the arbitrary or discriminatory deprivation of citizenship.

This confusion and the resulting dilemmas are easily avoided by a straightforward, non-technical approach to Article 1A(2) that is fully consistent with the ordinary meaning of words, considered in context and in light of the object and purpose of the Convention. This demands less concern with the international ‘validity’ of deprivation of citizenship (a matter for other tribunals), and greater attention to approaching nationality contextually and as one of the indices of protection or no protection. It does not matter that the act of deprivation is not opposable or not to be recognized; refugee status determination is not about the opposability of the acts of States, but about whether their actions, including with regard to nationality, are sufficient to indicate the well-foundedness of fear of being persecuted and the lack of protection.²⁵³

Of course, the facts *may* dictate a more nuanced approach, for example, where an individual, having been deprived of citizenship in one State, establishes residence in another, from which he or she is then obliged to move on.²⁵⁴

5.2 Reasons for persecution

The Convention identifies five relevant grounds of persecution, all of which, in varying degrees, have been correspondingly developed in the field of non-discrimination.²⁵⁵ The linkage to discrimination has been taken up in many leading decisions in different jurisdictions, although the extent to which

discrimination is always a *necessary* element of persecution raises some theoretical issues.²⁵⁶ While gender, gender identity, and sexual orientation are not specified grounds of persecution in the Convention, they are commonly encapsulated under ‘particular social group’, although they could also come within the other grounds.²⁵⁷

5.2.1 Race

With regard to *race*, account should be taken of article 1 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination which defines that practice to include distinctions based on ‘race, colour, descent, or national or ethnic origin’.²⁵⁸ Given legal developments over the last fifty or so years, the broad meaning can be considered valid also for the purposes of the 1951 Convention, although interpretative developments are ongoing. Achiume, for example, adopts Haney López’s definition of race as ‘the historically contingent social systems of meaning that attach to elements of morphology and ancestry’.²⁵⁹ Reviewing the jurisprudence of the International Criminal Tribunals in 2000, Verdirame noted a shift towards the greater use of ‘subjective criteria’, including self-perception and the perception of others: ‘The Tribunals are ... beginning to acknowledge that collective identities, and in particular ethnicity, are by their very nature social constructs, “imagined” identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.’²⁶⁰ Recognizing race as a socially constructed concept also directs attention towards the perception of the persecutor.²⁶¹ As is the case for other Convention grounds, a person may be entitled to refugee status where he or she is perceived by the persecutor to be a member of a particular race, regardless of whether or not he or she self-identifies with that race.²⁶²

Persecution on account of race is all too frequently the background to refugee movements in all parts of the world.²⁶³ The international community has expressed particular abhorrence at discrimination on racial grounds, as evidenced by repeated resolutions of the General Assembly, but the point at which such practices amount to persecution in and of themselves is more controversial.²⁶⁴

See also, Lingaas, C., *The Concept of Race in International Criminal Law* (2020) 6, proposing that the ‘changed understanding’ of race since 1945 ‘necessitates an evolutive interpretation of race for the crime of genocide, apartheid, and persecution to embrace socially constructed identities and the

perception of an individual's belonging to a distinct racial group ... [T]he concept of othering is crucial not only to understand genocide, apartheid, and persecution, but essential to correctly identify and define race in international criminal law.' While a subjective interpretation of race will lead to greater protection, 'such an expansion remains within the ambit of the principle of legality if the perpetrator perceives the victims to be members of a different group, to which he assigns racial characteristics' (232).

5.2.2 Religion

Religion has long been the basis upon which governments and peoples have singled out others for persecution. In 1685, thousands of Huguenots fled from France to England and Prussia after revocation of the Edict of Nantes opened the way to massacre and oppression. The late nineteenth century witnessed pogroms of Jews in Russia and of Armenian Christians in Ottoman Turkey. The past century likewise saw large-scale persecution of Jews under the hegemony of Nazi and Axis powers up to 1945, with later targets in other regions including Jehovah's Witnesses in Africa and among the Commonwealth of Independent States, Muslims in Myanmar, Baha'is in Iran, Ahmadis in various Islamic countries, and believers of all persuasions in totalitarian and self-proclaimed atheist States.²⁶⁵

Article 18 of the 1966 Covenant on Civil and Political Rights, elaborating article 18 of the Universal Declaration of Human Rights, prescribes that everyone shall have the right to freedom of thought, conscience, and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such religion or belief.²⁶⁶ Article 18 'protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief', and encompasses newly established religions and those practised by religious minorities.²⁶⁷ No one is to be subject to coercion which would impair the freedom to have or adopt a religion or belief of choice.²⁶⁸

In 1962, the General Assembly requested the Commission on Human Rights to draw up a draft declaration and draft convention on the elimination of all forms of intolerance based on religion or belief,²⁶⁹ and in 1967 it took note of the Preamble and article 1 of a proposed convention,²⁷⁰ in which the Third Committee had suggested that the expression 'religion or belief' should include 'theistic, non-theistic and atheistic beliefs'.²⁷¹ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief,

adopted in 1981, indicates the interests to be protected, the infringement of which may signal persecution.²⁷² The ‘content’ of the right to freedom of thought, conscience and religion continues to be the subject of enquiry, although there have been advances in recent years, particularly in relation to conscientious objection to military service.²⁷³

Claims based on the ‘religion’ ground under the 1951 Convention present their own challenges, both for advocates and decision-makers.²⁷⁴ Conversion while in a country of potential refuge can raise particular evidentiary and credibility issues,²⁷⁵ and is the case for other Convention grounds, an individual cannot be expected to conceal his or her religion in order to avoid persecution.²⁷⁶ In *Y & Z*, the CJEU considered whether an applicant’s fear of persecution could be considered well-founded if he or she could ‘avoid exposure’ by ‘abstaining from certain religious practices’.²⁷⁷ The Court found,

[w]here it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status ... The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.²⁷⁸

The Court’s finding in *Y & Z* leaves it unclear whether an individual who would conceal their religious beliefs or practices precisely in order to avoid persecution could, for that reason, be denied asylum. This position has been rejected in relation to several grounds of the Convention definition on bases that are broadly applicable,²⁷⁹ and should similarly be rejected here.²⁸⁰ An applicant who would behave ‘discreetly’ in their country of origin due, at least in part, to a well-founded fear of persecution is entitled to protection under the Convention.

5.2.3 Nationality

The reference to persecution for reasons of *nationality* is somewhat odd, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and so fall outside the refugee definition. Conceivably, the nationals of State B resident in State A could find themselves persecuted on account of their nationality, driven out to a neighbouring country, and yet still denied the protection of State B, particularly that aspect which includes the right of nationals to enter their own

State.²⁸¹ However, nationality in article 1A(2) of the 1951 Convention is usually interpreted more loosely, to include origins and the membership of particular ethnic, religious, cultural, and linguistic communities.²⁸² It is not necessary that those persecuted should constitute a minority in their own country, for oligarchies traditionally tend to resort to oppression.²⁸³ Nationality, interpreted in this way, illustrates the points of distinction which can serve as the basis for the policy and practice of persecution.²⁸⁴ It may, for example, be relied on in claims by children who are denied the right to a nationality at birth, or access to education or health services.²⁸⁵ There may be some overlap between the various grounds and, likewise, factors derived from two or more of the criteria may contribute cumulatively to a well-founded fear of persecution.

5.2.4 Membership of a particular social group

Further potential overlap lies in the criterion, *membership of a particular social group*.²⁸⁶ The 1951 Convention is not alone in recognizing ‘social’ factors as a potential irrelevant distinction giving rise to arbitrary or repressive treatment. Article 2 of the 1948 Universal Declaration of Human Rights includes ‘national or social origin, property, birth or other status’ as prohibited grounds of distinction,²⁸⁷ a form of words repeated in article 2 of the 1966 Covenants on Economic, Social, and Cultural Rights and Civil and Political Rights; it also appears in article 26 of the latter Covenant, which calls for equality before and equal protection of the law.

The *travaux préparatoires* provide little explanation for why ‘social group’ was included. The Swedish delegate to the 1951 Conference simply stated that social group cases existed, and that the Convention should mention them explicitly.²⁸⁸ The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the ‘restructuring’ of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.

The initial intention may thus have been to protect known categories from known forms of harm; less clear is whether the notion of ‘social group’ was expected or intended to apply generally to then unrecognized groups facing new forms of persecution. The answer to that question will never be found, but there is no reason in principle why this ground, like every other, should not be

progressively developed.²⁸⁹ The experience of 1951 is also illustrative, for its implicit reference to the perception or attitude of the persecuting authority. It is still not unusual for governments publicly to write off sections of their population—the petty bourgeoisie, for example, or the class traitors; and even more frequent will be those occasions on which the identification of groups to be neutralized takes place covertly. In eastern Europe in the late 1940s and the 1950s, groups and classes and their descendants were *perceived* to be a threat to the new order, whatever their individual qualities or beliefs. In Vietnam in the late 1970s, the bourgeoisie were similarly seen as an obstacle to economic and social restructuring (in circumstances in which class and ethnicity happened to combine). The *characteristics* of the group and its individual members were what counted. More recently, attention has focused on other discrete candidate groups, such as those based on sex,²⁹⁰ sexual orientation and gender identity,²⁹¹ disability,²⁹² and HIV/AIDS status,²⁹³ among others.²⁹⁴ As paragraph 78 of the *UNHCR Handbook* puts it:

Membership of a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

Especially important is the conjunction of 'internal' characteristics and 'external' perceptions.²⁹⁵ *Linking*, rather than unifying, characteristics, more accurately represent social reality, while circumstances external to the group may have isolated it from the rest of society, or may lead to its separate treatment.

A superficial linguistic analysis suggests people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests. A fully comprehensive definition is impracticable, if not impossible, but an essential element in any description would be a combination of matters of choice with other matters over which members of the group have no control. In determining whether a particular group of people constitutes a 'social group' within the meaning of the Convention, attention should therefore be given to the presence of linking and uniting factors such as ethnic, cultural, and linguistic origin; education; family or other background; economic activity; shared values, outlook, and aspirations.²⁹⁶ Also highly relevant are the attitudes to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities. The importance, and therefore

the identity, of a social group may well be in direct proportion to the notice taken of it by others—the view which others have of us—particularly at the official level. The notion of social group thus possesses an element of open-endedness capable of expansion, as the jurisprudence shows, in favour of a variety of different classes susceptible to persecution.²⁹⁷

5.2.4.1 *The concept develops*

The 1986 United States case of *Sanchez-Trujillo v INS* illustrates some of the problematic issues that arise in identifying a social group at risk of persecution.²⁹⁸ The asylum applicants from El Salvador based their claim on membership of a class that included young, urban, working-class males, who were further identified as unwilling to serve in the armed forces of their country.²⁹⁹ Anticipating the need to ‘identify a cognizable group’, the claimants adduced fairly cogent statistical evidence showing the numbers of such young, urban non-combatant males who figured among the disappeared and the dead, to which they added personal testimony and experience. The Court found little guidance in the *UNHCR Handbook* reference to ‘persons of similar background, habits or social status’,³⁰⁰ considering instead that a social group implied ‘a collection of people closely affiliated with each other who are actuated by some common impulse or interest’. Moreover, ‘a voluntary associational relationship’ was also required, ‘which imparts some common characteristic that is fundamental to their identity’. In the Court’s view, ‘family members’ were a prototypical example, conveniently meeting its criteria of affiliation, common interest, or association. The family also has the advantage of being finite; it is usually small, readily identifiable, and terminable with difficulty. Potentially larger categories, including so-called statistical groups, such as the red-headed, the blue-eyed, or the over six-feet tall,³⁰¹ were dismissed, even though such arbitrary classifications have been the basis for persecutory practices in the past. Like others before and since, this Court was evidently anxious to guard against ‘sweeping demographic divisions’ that encompass a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings. Thinking and application have progressed substantially in the subsequent practice of States and tribunals, if not always without difficulty.

During the 1990s, the social group category produced several, not always easily reconcilable, judgments in different jurisdictions and particularly in Canada. The cases there involved China’s ‘one-child policy’, so far as it was

claimed that the parents of one or more children might run the risk of forcible sterilization and whether a social group could be based on sexual orientation, or on a fear of ‘domestic’ violence in their own country by women unable to obtain protection locally.³⁰²

In *Cheung*, the Canadian Federal Court of Appeal held that ‘women in China who have (more than) one child and are faced with forced sterilization satisfy enough of the ... criteria to be considered a particular social group’.³⁰³ In *Chan*, another case based on fear of forced sterilization (this time by a father), a majority of the Supreme Court dismissed the appeal on the ground that the appellant had not discharged the burden of proof, with respect either to the subjective or objective elements.³⁰⁴

Ward concerned a resident of Northern Ireland who had voluntarily joined the Irish National Liberation Army (INLA), a terrorist group dedicated to the political union of Ulster and the Irish Republic. Detailed to guard innocent hostages, he facilitated their escape on learning that they were to be executed. The INLA in turn ‘court-martialed’ and tortured him and decided that he should be killed. Amongst other grounds, he claimed to fear persecution by reason of membership in the particular social group constituted by the INLA. The Supreme Court of Canada held that the group of INLA members were not a ‘particular social group’; its membership was not characterized by an innate characteristic or an unchangeable historical fact, while its objectives also could not be said to be so fundamental to the human dignity of its members.³⁰⁵

The Supreme Court in *Ward* recognized also that the process of interpreting particular social group should reflect certain themes, namely, human rights and anti-discrimination. It considered that there were three possible categories of social group: (1) those defined by an innate or unchangeable characteristic, for example, individuals fearing persecution by reason of gender, linguistic background, and sexual orientation; (2) those whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, for example, human rights activists;³⁰⁶ and (3) those associated by a former voluntary status, unalterable due to its historical permanence. Given that ‘one’s past is an immutable part of the person’,³⁰⁷ the third category belongs essentially to the first.

5.2.4.2 The categories of association

The *Ward* judgment is of major importance on a variety of issues, but the

analysis of the social group question raises a number of concerns. What is meant by ‘groups associated by a former voluntary status’, is far from clear. The Court said that this sub-category was included ‘because of historical intentions’. However, there is no evidence to suggest that those apparently intended to benefit from the social group provision, the former capitalists of eastern Europe, were ever formally associated one with another. They may have been, but equally they may not. What counted at the time was the fact that they were not only *internally* linked by having engaged in a particular type of (past) economic activity, but also *externally* defined, partly if not exclusively, by the perceptions of the new ruling class.³⁰⁸

As the Supreme Court in fact recognized, capitalists were persecuted historically, ‘not because of their contemporaneous activities but because of their past status *as ascribed to them by the Communist leaders*’.³⁰⁹ In this sense, they were persecuted not because they were *former* capitalists, but because they *were* former capitalists; not because of what they had done in the past, but because of what they were considered to be today; not because of any actual or imagined voluntary association, but because of the perceived threat of the class (defined *incidentally* by what they had once done) to the new society. The approach of the new ruling class to the capitalist class reveals a clear overlap between *past* activity and/or status and the perception of a *present* threat to the new society.³¹⁰

Having proposed a ‘limiting’ approach to social group,³¹¹ it is hardly surprising that the Supreme Court at first seems conservative in its list of innate or unchangeable characteristics: ‘such bases as gender, linguistic background and sexual orientation’.³¹² In fact, this approach is not as restrictive as might appear; the list is clearly illustrative, and in principle other innate or unchangeable factors relevant to non-discrimination in the enjoyment of fundamental rights may also be included, such as ethnic or cultural factors, education, family background, property, birth or other status, national or social origin,³¹³ in short, the very sorts of *social* factors that are or ought to be irrelevant to the enjoyment of fundamental human rights.

Economic activity, shared values, outlook, and aspirations should not be excluded, because either they are part of the unchangeable past,³¹⁴ or they describe, if only generally, the idea of individuals associated for reasons fundamental to their human dignity, and the sort of ‘value’ association which voluntary participants ought not to be required to forsake.

5.2.4.3 Common victimization

In *Ward*, the Supreme Court was clearly of the view that an association of people should not be characterized as a particular social group, ‘merely by reason of their common victimization as the objects of persecution’;³¹⁵ on this point, it has been joined by courts in other jurisdictions.³¹⁶ The essential question, however, is whether the persecution feared is the *sole* distinguishing factor that results in the identification of the particular social group. Taken out of context, this question is too simple, for wherever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives, *all* of which contribute to the identification of the group, adding to its pre-existing characteristics.

For example, parents with one or more children can be considered as an identifiable social group because of (1) their factual circumstances and (2) the way in which they are treated in law and by society. Arbitrary laws might subject red-headed people, mothers of one or more children, and thieves to a variety of penalties, reflecting no more than the whims of the legislator. Where such laws have a social and political context and purpose, and touch on fundamental human rights, such as personal integrity or reproductive control, then a rational basis exists for identifying red-headed people and mothers of one or more children as a particular social group, *in their particular circumstances*, while excluding thieves.³¹⁷ For the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices, and laws.

Treatment amounting to persecution thus remains relevant in identifying a particular social group, where it reflects State policy or civil society attitudes towards a particular class.³¹⁸ As the penal law embodies State policy on criminals, so other laws and practices may illustrate policy towards individuals or groups who assert fundamental rights, for example, with respect to family life or conscience.³¹⁹ In both cases, the penalties help to identify the group at risk; so far as they also exceed the limits of reasonableness and proportionality, they may also cross the line from permissible ‘sanction’ for contravention of a particular social policy into impermissible persecution.

5.2.4.4 Gender-based claims

Although the principle of non-discrimination on the ground of sex is now well established in international law,³²⁰ a reference to sex or gender was not included

in article 1A(2) as the basis for a well-founded fear of persecution.³²¹ The interpretation of the Convention has however evolved to ensure greater protection those who fear persecution on the basis of gender.³²² Gender is defined in UNHCR Guidelines as ‘the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another’.³²³ As LaViolette notes, ‘gender-based persecution is not necessarily the same as persecution due to one’s sex, but rather includes persecution of persons who refuse to conform to social criteria specific to men and women’.³²⁴ Although women’s experiences tend to be the focus of such claims, male or intersex applicants may also fear persecution on this basis.³²⁵

Women may of course base a claim for refugee status on any of the five grounds in Article 1A(2) of the Convention.³²⁶ However, a particular need for protection in this field was recognized as claims began to be made by women seeking refuge from ‘domestic’ violence and from gendered violence in society, such as sexual violence and female genital mutilation (FGM).³²⁷ From the perspective of interpretation, however, the problem with much of the violence against women is precisely that it is perceived, either as ‘domestic’, or as individual and non-attributable to the State or other political structure.³²⁸ The term ‘domestic violence’ is commonly used to describe spousal violence applied in a domestic setting, out of the public eye, and for reasons personal to the aggressor. It is ‘private’, unlike the ‘public’ dimension to so much political, ethnic, or religious persecution, and it tends to serve individual, usually male, ends, such as aggression, sadism, oppression, or subjection.³²⁹ Violence has been considered as non-attributable to the State, when perpetrated by random individuals for personal reasons, including soldiers, policemen, or other holders of public authority, such as civil officials or State religious leaders, when acting outside or beyond authority.

Many societies have long turned a blind eye to domestic violence, on the ground that unless it was ‘excessive’, it was not a proper matter for State involvement or State penalties. The *policy* implicit in such a laissez-faire approach, not surprisingly, has found its reaction in the proposition that *all* violence against women is political, or in its slightly less radical variant, that all violence against women should be presumed to be political unless and until the State is shown to provide effective protection. Thus, it is argued, being a woman is a sufficiently political statement in itself, so far as violence against women,

domestic, sexual or public, is part of the process of oppression.

Within the scheme of international protection offered by the 1951 Convention relating to the Status of Refugees and its national counterparts, such an approach has not found support as such, and periodic proposals to add sex or gender to the list of Convention reasons have not been taken up. Gender-based claims have nonetheless been recognized as coming within the refugee definition, challenging the private/public distinction and drawing by analogy on rights-based approaches in other circumstances, on increasing sensitivity to the frequently systemic character of denials of rights to women, and on underlying obligations incumbent on all States to protect the human rights of everyone within their territory and subject to their jurisdiction. Executive Committee Conclusion No. 39 (1985) was an early step towards better protection, although it simply recognizes that States, ‘in the exercise of their sovereignty’, may interpret ‘social group’ to include women who face harsh or inhuman treatment for having transgressed the social mores of their community.³³⁰ The 1993 UN Declaration on the Elimination of Violence against Women,³³¹ moreover, acknowledges that all States have an obligation to work towards its eradication.

What might at first glance appear as ‘domestic’ violence may enter the public arena and therefore the traditional refugee domain when it passes into the ambit of State-sanctioned or State-tolerated oppression. This raises evidential considerations of some magnitude, however, and at a certain point cases call rather for a value judgment, than a purely factual assessment of conditions in this or that country. Nevertheless, gender-related persecution will often have political purposes, including the enforcement of conformity to a particular religious, cultural, or social view of society;³³² such persecution has included torture or oppression by State agents at the individual level, as well as more generalized harassment by sections of the public.³³³ Rape by a soldier, policeman, or person in authority, for example, may be characterized as the unauthorized private act of an individual, and therefore not persecution. An examination of the context in which the act takes place, however, may disclose a manifestation of public State authority; the conditions and the occasion may as much be the responsibility of the State, as the failure to provide an effective remedy. For women suffer particular forms of persecution *as women*, and not just or specifically because of political opinion or ethnicity. Even though men too may be sexually abused, their gender is not generally a consideration, although the abuse may be intended also to humiliate them when considered in the light of traditional societal norms.

Women may be raped because of their politics, but they are also raped because they are women and because rape inflicts a particular indignity and promotes a particular structure of male power.³³⁴

Even if ‘domestic’ violence is given a public, political face, however, there is still some distance between the act and the *reasons* in the Convention definition.³³⁵ The State is unwilling or unable to prevent or punish such violence as might otherwise amount to persecution, but *why* is the claimant so affected? The language of political opinion does not readily fit, and the question is whether membership of a particular social group will establish the sufficient link. Persecution on account of gendered discrimination may be due both to a claimant’s gender and their political opinion (much as an apartheid activist could be targeted both due to their opinion and their race). Many cases may therefore call for more than superficial examination. Dauvergne, for example, categorizes political opinion cases as (1) involving ‘women resisting or rejecting traditional norms, but not otherwise engaging in political activity, nor in any activity that is directed towards the state, and who have not articulated their actions in political terms’ (the ‘true challenge’, in her view); (2) opinions that the female applicant identifies as feminist; and (3) men challenging ‘traditional roles or practices assigned to women’.³³⁶

Within the EU, the recast Qualification Directive now provides in article 10(1) (d) that ‘[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’.³³⁷ This language is an improvement on the somewhat equivocal language in the original Directive, which provided that while ‘[g]ender related aspects’ could be considered by Member States, they did not, of themselves, create a ‘presumption’ of membership of a particular social group.³³⁸

If it is assumed that gender, in principle, is a sufficient identifying factor held in common, so that all women may comprise a social group, is this enough for Convention purposes to show that a woman who fears violence would be persecuted *for reasons of membership in that group?*³³⁹ The answer, some have argued, lies in further sub-categorization, and in *Islam*, for example, counsel argued that some three characteristics set the appellants apart from the rest of society, namely, gender, suspicion of adultery, and unprotected status.³⁴⁰ In this case, the applicants, citizens of Pakistan otherwise unconnected with each other, suffered violence in their country of origin after their husbands had falsely

accused them of adultery. They applied for asylum in the United Kingdom on the ground that having been abandoned by their husbands, lacking any other male protection and condemned by the local community for sexual misconduct, they feared persecution if returned, in that they would be physically and emotionally abused, ostracized and unprotected by the authorities, and might be liable to death by stoning. Three judges (Lord Steyn, Lord Hoffmann, and Lord Hope) considered that women in Pakistan constituted a particular social group, because they were discriminated against as a group in matters of fundamental human rights, because the State gave them no protection, and because they were perceived as not being entitled to the same human rights as men. Two judges (Lord Steyn and Lord Hutton) considered that the applicants also belonged to a more narrowly defined particular social group, the unifying characteristics of which were gender, being suspected of adultery, and lacking protection from the State and public authorities. Although not all members of the group were persecuted, the persecution feared by the applicants was sanctioned or tolerated by the State for reasons of membership of a particular social group; they were accordingly entitled to asylum.³⁴¹

As this case demonstrates, when taking account of conditions in a particular country, it may become clear that the group within the group is identifiable by reference to the fact of their liability, exposure or vulnerability to violence in an environment that denies them protection. Such a social group of women may be additionally identifiable by reference to other descriptors, such as race or class, which leads to their being denied protection in circumstances in which other women in the same society are not (so) affected or deprived. They face violence amounting to persecution, and other denials of rights, because of their gender, their race, and their class and because they are unprotected.³⁴² Clearly, gender is used by societies to organize or distribute rights and benefits; where it is also used to deny rights or inflict harm, the identification of a gender-defined social group has the advantage of external confirmation.³⁴³

In the United States, a woman's capacity to seek asylum on the basis of domestic violence remains highly contested at the time of writing. In the 2018 decision *Matter of A-B-*,³⁴⁴ the US Attorney General³⁴⁵ overruled the BIA's grant of asylum to the applicant, using it to vacate a 2014 BIA precedent decision that 'married women in Guatemala who are unable to leave their relationship' constitute a particular social group.³⁴⁶ The Attorney General stated that '[g]enerally, claims by aliens pertaining to domestic violence or gang violence

perpetrated by non-governmental actors will not qualify for asylum'.³⁴⁷ The ultimate effect of the Attorney General's decision is for the most part to deny meritorious claims at the first instance, either in the asylum offices or the immigration courts. Federal courts of appeals have taken different approaches as to whether, in practice, it precludes asylum claims based on domestic (or gang related) violence, but very few applicants have the considerable resources required to pursue their case to the federal appellate level.³⁴⁸ Anker considers the jurisprudence to be 'in flux',³⁴⁹ but identifies 'signs of new attention to *gender per se*' in the wake of the Attorney General's decision.³⁵⁰ The underlying problem for domestic violence and many other claims is the convoluted and constricted interpretation of 'particular social group' under United States law, which makes it nearly impossible to formulate a cognizable group. At the time of writing, the new US president has directed the relevant agencies to review the US approach to domestic or gang violence claims 'to evaluate whether the United States provides protection ... in a manner consistent with international standards'.³⁵¹ More importantly, the same agencies of Justice and Homeland Security have been tasked with promulgating regulations addressing the circumstances under which a person should be considered a member of a particular social group, as that term is derived from the 1951 Convention and 1967 Protocol.³⁵² This reappraisal, couched as it is in terms of the international legal obligations of the United States, provides an opportunity to realign US asylum jurisprudence with international standards.³⁵³

5.2.4.5 Sexual orientation and gender identity claims

An evolutionary interpretation of the article 1A(2) of the 1951 Convention has also facilitated the protection of lesbian, gay, bisexual, transgender, and intersex (LGBTI) asylum seekers. Claims on the basis of sexual orientation and gender identity are not expressly mentioned in the 1951 Convention, although persecution occurred on such bases in the Second World War.³⁵⁴ In recent decades, greater attention has been paid both to LGBTI individuals' rights and to their susceptibility to persecution.³⁵⁵ It is now recognized that persecution on the basis of actual or imputed sexual orientation or gender identity falls within the ambit of the Convention.³⁵⁶

Recent jurisprudence grapples instead with how to identify those with a well-founded fear of persecution. In the United Kingdom Supreme Court case *HJ (Iran)*,³⁵⁷ the parties to the joined appeals accepted that 'practising homosexuals'

constituted a particular social group within the meaning of article 1A(2) of the 1951 Convention. Might the appellants nonetheless fall outside Convention protection if persecution could be avoided by concealment, and should they be expected to conduct themselves accordingly? In his judgment, Lord Hope stressed that the group in question was defined by an immutable characteristic—sexual identity—which could not be changed:

To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are.³⁵⁸

This clear statement captures perfectly one of the essentials of the refugee definition, which protects those who fear persecution because of who they are, and who should not lose that protection if, fearing persecution, they might seek to conceal their ‘true’ identity. The simplicity of this approach is self-evident and it has been transposed and applied, without difficulty, to the analogous situation of the right to hold, and therefore also not to hold, political beliefs.³⁵⁹ It underpins the judgments of the Court of Justice of the European Union (CJEU) in *Y & Z*, on religious persecution,³⁶⁰ and *X, Y, & Z*,³⁶¹ on sexual orientation, respectively, and has been adopted by the European Court of Human Rights.³⁶² A similar approach has been taken in other jurisdictions.³⁶³ While this jurisprudential development is welcome, there is some evidence that decision-makers are now placing more emphasis on credibility as a reason for rejection, already a fraught issue.³⁶⁴ In addition, there appears to be an inherent difficulty in determining why a person would live ‘discreetly’ if returned. In *HJ (Iran)*, the Court drew a distinction between living discreetly where ‘a material reason’ was to avoid persecution, and doing so ‘simply because that was how [the applicant] would want to live, or because of social pressures’.³⁶⁵ In *YD (Algeria)*, the Court of Appeal considered the case of a young gay man who had fled to the UK aged 15, fearing that his uncle would kill him because of his sexuality, and that he ‘would be judged and treated badly, and would be in danger, in Algeria’.³⁶⁶ The First-tier Tribunal had found that he would not live openly as a gay man if returned to Algeria, but that this decision would not ‘necessarily’ be based on fear of persecution.³⁶⁷ Relying on an earlier country guidance decision, the Court of Appeal accepted that while ‘[v]ery few gay men live openly’ in Algeria,³⁶⁸ this was due to ‘social, cultural and religious norms in a conservative society subject to strict Islamic values’, which did not amount to persecution.³⁶⁹ The country

guidance decision itself acknowledged the ‘conundrum’:

If there is no evidence of persecution of gay men who have escaped ill-treatment from family by relocating elsewhere, why is there no evidence of gay men feeling able to live openly? Alternatively, is the absence of evidence of physical ill-treatment of gay men due to the fact that there are no gay men living openly?³⁷⁰

One may reasonably question if this conundrum can be resolved neatly,³⁷¹ particularly in relation to a society (like Algeria) in which homosexuality is criminalized.³⁷²

In *X, Y, & Z*, the Fourth Chamber accepted as ‘common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it’, finding support for this proposition in article 10(1) (d) of the original Qualification Directive,³⁷³ and, with regard to social perceptions, in the criminal laws that specifically target homosexuals. On the issue of criminalization, the Court’s position was limited by the scope of the referred question, which asked whether criminalization of homosexual activities and the threat of imprisonment constituted an act of persecution under article 9(1)(a) of the original Qualification Directive, read in conjunction with article 9(2)(c).³⁷⁴ Accordingly, the Court did not specifically examine whether criminalization of homosexual activities constituted ‘legal, administrative, police, and/or judicial measures *which are in themselves discriminatory*’ under article 9(2)(b), but focused instead on ‘*prosecution or punishment* which is disproportionate or discriminatory’ under article 9(2)(c).³⁷⁵ Within these parameters, the Court reiterated that persecution connotes acts that are sufficiently serious, and that ‘not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness’. In such circumstances, the mere existence of legislation did not reach the necessary threshold, although imprisonment in consequence thereof might do, ‘provided that it is actually applied in the country of origin which adopted such legislation’.³⁷⁶

Finally, the Court came also to ‘activities’ and the question of concealment or restraint. As the United Kingdom Supreme Court had done in *HJ (Iran)*, and as the CJEU had done in relation to religion in *Y & Z*, the Court here rejected the idea of concealment as ‘incompatible with the recognition of a characteristic so fundamental to a person’s identity that [they] cannot be expected to renounce it’.³⁷⁷ What mattered was whether, if required to return, the asylum seeker’s

homosexuality would expose him or her to a genuine risk of persecution. It was unnecessary, moreover, ‘to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas’.³⁷⁸

While the focus of this jurisprudence on the nature of fundamental characteristics aligned to the risk of persecution is relatively straightforward, it has attracted criticism from certain advocates and commentators.³⁷⁹ One area of contention is the finding in *X, Y, & Z* that criminalization of homosexuality does not, in and of itself, constitute ‘persecution’.³⁸⁰ This finding is in part an aspect of the restricted scope of the referred question examined by the Court.³⁸¹ However, the same conclusion was reached by the Court of Appeal in *YD (Algeria)*,³⁸² and by the European Court of Human Rights in *B & C v Switzerland*.³⁸³ In *B & C*, the Court found that ‘the mere existence of laws criminalising homosexual acts in the country of destination does not render an individual’s removal ... contrary to Article 3 of the Convention. What is decisive is whether there is a real risk that these laws are applied in practice’.³⁸⁴

As a general principle, focus on the risk to the *individual* requires that criminalization of homosexuality be treated as a factor amongst others in determining whether a well-founded fear of persecution exists—doctrine is tied to consideration of the individual’s particular situation in context.³⁸⁵ In practice, cases will turn not on whether rarely enforced laws can amount to ‘persecution’ in and of themselves, but instead on the risks posed by non-State actors, and the State’s ‘unwillingness and inability’ to protect against those risks, as evidenced by the existence of such laws.³⁸⁶

As noted elsewhere, however, the criminal law can be an indicator of State policy towards particular individuals or groups; in turn, it may both identify certain groups and, where application of the law exceeds the limits of reasonableness and proportionality, amount to persecution.³⁸⁷ With respect, it is difficult to see how a law which criminalizes an individual’s ‘fundamental right to be what they are’ with a term of imprisonment, for example, could fall within these limits. Unless a true dead letter,³⁸⁸ the very existence of such law may raise a reasonable apprehension of prosecution and thus of persecution. The criminalization of sexual orientation can also have a chilling effect on an individual’s potential to live a full life as a member of a polity, to express themselves freely, to call on and to receive the assistance of authorities in cases of discrimination or threats, and to enjoy respect and dignity for their private

lives.

5.2.4.6 A social view of ‘social group’

The jurisprudence of recent years shows courts and tribunals in different jurisdictions wrestling with the concept of particular social group, and a coherent, general approach is beginning to emerge.³⁸⁹ Clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity. Drawing the contours of such groups by reference to the likelihood of persecution confuses the issues of identity and risk, despite the fact that each is relevant to the other. The individualized approach of the Convention refugee definition requires attention to personal circumstances, time, and place, all of which may combine to distinguish those at risk from others who may share similar characteristics and yet not be in danger. Although there will be policy pressures to limit refugee categories in periods of increased population displacement, there is no rational basis for denying protection to individuals who, even if divided in lifestyle, culture, interests, and politics, may yet be linked across another dimension of affinity.

There is probably no single coherent definition, but rather a set of variables, a ‘range of permissible descriptors’. These include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by the way it is perceived; (2) involuntary linkages, such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.³⁹⁰

In the cases considered above, the courts inclined towards relatively simple bases of categorization, relying on innate or unchangeable characteristics and notions of association for reasons fundamental to human dignity. There are many ‘natural’ meanings of ‘social’, however, which have received little or no attention, but which may also prove a sufficient and appropriate basis for defining or describing social groups for the purposes of the Convention. Beyond the ideas of individuals associated, allied, or combined, characterized by mutual intercourse, united by some common tie,³⁹¹ stand those who, in simple sociological terms, are *groups in society*, in the ordinary, everyday sense which describes the constitution or make-up of the community at large. This is most evident in the use of language to describe, for example, the landlord class, the

working class, the ruling class, the bourgeoisie, the middle class, even the criminal class. For this reason it helps to emphasize, not so much that the group is, as it were, ‘set apart from society’, as that it is essentially a group *within* society which is faced with persecution within the social context of that very society (including its attitudes, prejudices, and actions).³⁹² The principle of non-discrimination, linked to fundamental rights, serves to distinguish between those deserving protection, because their social origins or situation now put them at risk; and those who do not, such as those who are liable to penalties for breach of the law, considered in its ordinary, common law sense.³⁹³

If a sociological approach is adopted to the notion of groups in society, then apparently unconnected and unallied individuals may indeed satisfy the criteria: mothers; mothers and families with two children; women at risk of domestic violence; capitalists; former capitalists, homosexual, bisexual, transgender, or intersex asylum seekers, and so on. Whether they then qualify as refugees having a well-founded fear of persecution by reason of their membership in a particular social group will depend on answers to related questions, including the perceptions of the group shared by other groups or State authorities, policies, and practices vis-à-vis the group, and the risk, if any, of treatment amounting to persecution. It can be difficult to recognize when discrimination shades into persecution, particularly where minority or even majority groups are systematically treated less favourably than others. One defining moment may occur when the individual group member chooses to oppose the system, by overt action or simply by non-conformity, actual or perceived. The proximate cause may be action or non-conformity, but the underlying *reason for* the persecution can often clearly be elsewhere; so with the social group, women, particularly in societies in which the attitudinal dimension indicates necessary conformity with another’s particular image of herself.³⁹⁴

5.2.5 Political opinion

Finally, the Convention adduces fear of persecution for reasons of political opinion. Article 19 of the 1948 Universal Declaration of Human Rights provides that: ‘Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ The basic principle is restated in article 19 ICCPR 66, but the right to freedom of expression is qualified there by reference to ‘special duties and responsibilities’.

The expression of certain types of opinion may therefore be judged unacceptable.³⁹⁵ Article 19 ICCPR 66 also protects the right not to hold an opinion,³⁹⁶ to change one's opinion,³⁹⁷ and not to express one's opinion.³⁹⁸

In the 1951 Convention, 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.³⁹⁹ The typical 'political refugee' is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question.⁴⁰⁰ A position of political neutrality—whether held by 'the conscientious non-believer or the indifferent non-believer'—can also fall within the ambit of political opinion, particularly when considered together with evidence regarding the perception or intentions of the persecutor.⁴⁰¹ Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status.⁴⁰² If they have been expressed, and if the applicant or others similarly placed have suffered or been threatened with repressive measures, then a well-founded fear may be made out. Problems arise, however, in assessing the value of the 'political act', particularly if the act itself stands more or less alone, unaccompanied by evident or overt expressions of opinion.⁴⁰³ Political activity undertaken in the country of (potential) refuge also poses evaluation challenges, some of which have been examined above in the context of 'good faith'.⁴⁰⁴

In principle, there is no reason why a well-founded fear of persecution should not be based on activity after departure. French doctrine, for example, appears not to rule out this possibility, and the jurisprudence also does not discriminate against those who may even have left their country of origin for reasons of personal convenience. The cases summarized in an early French commentary nevertheless emphasize an *active* political role of the sort likely to give rise to a fear of persecution, and whether the claimant is likely to have come to the attention of the authorities of his or her country of origin.⁴⁰⁵

Article 54 of the Swiss law on asylum comes to the issue from the perspective of 'subjective reasons arising after flight', and provides that asylum is not granted to a person who has only become a refugee by leaving his country of origin or by reason of their subsequent activities.⁴⁰⁶ However, although 'asylum' may be refused in this limited class of case, the application of the principle of *non-refoulement* continues to be accepted.⁴⁰⁷ Hullman, for example, cites one

case where knowledge of the individual concerned had likely come into the possession of the authorities of the country of origin (because of actions taken by the Swiss authorities), and refugee status was upheld.⁴⁰⁸ Although some European doctrine has typically attached particular importance to political activities *sur place* being a continuation of activities begun in the country of origin, this may be intended to go to the questions of credibility and ‘well-foundedness’, as the ordinary meaning of article 1A(2) would imply. Article 5 of the recast EU Qualification Directive, however, has failed to reconcile different approaches consistently with the Convention. On the one hand, post-departure activities ‘may’ be the basis for a well-founded fear of persecution; on the other hand, though ‘without prejudice’ to the 1951 Convention, Member States may decide not to grant refugee status in a *subsequent* application where the risk of persecution is based on circumstances which the applicant has created since leaving his or her country of origin.⁴⁰⁹ The drafting clearly discloses doubt as to the correctness of such action in international law, and is also internally inconsistent; it supposes the existence in fact of a risk of persecution, but suggests discretion to disregard the individual’s well-founded fear.⁴¹⁰

If the central issue of risk of relevant harm for a Convention reason is kept in focus, then it will be seen that there is no rational basis for distinguishing between an individual whose opinions and activities in the country of refuge represent a continuation of opinions and activities begun in the country of origin, and one whose political engagement only begins when he or she has left their homeland. The notion of continuity, as an evidential requirement, may provide some assurance that the person concerned is indeed a person of sincerely held opinions, such as might attract the attention of a persecutor, but this is one aspect only of the issue of credibility. Equally, there is no rational basis for distinguishing in the matter of refugee status between the innocent bystander to whom political opinions are imputed by the persecutor, and the less than innocent bystander whose self-interested actions lead the persecutor also to impute political opinions to the person concerned.⁴¹¹ The so-called good faith requirement seems to offer an answer to manipulation of the system, but it has no legal authority, is not mentioned in the Convention, and is not supported by any general principle of international law. What remains relevant in every case, however, is the question of credibility as it applies both to the claimant and to evidence relating to the country of origin.⁴¹²

It is equally no answer to a prospective refugee claim that the individual ought

to cease to engage in or moderate the conduct⁴¹³ or political activities targeted by the authorities or by non-State actors, or that they could conceal their political opinion, where such concealment is necessary in order to avoid persecution.⁴¹⁴

Although there are many recognized limitations attaching to human rights and fundamental freedoms, there is also commonly a ‘core content’ which, it has been held in related contexts, no one should be required to deny.⁴¹⁵ For example, the right to freedom of opinion, including political opinion, is invariably linked to freedom of expression, without which the former is practically meaningless.⁴¹⁶ Moreover, political opinion and political activity are inherently linked; ‘activity’ is implicit in the concept of freedom to hold opinions, and is directly related to the exercise of ‘political rights’ at large.⁴¹⁷ As the *UNHCR Handbook* observes with regard to a potential ‘political’ refugee,

There may ... be situations in which the applicant has not given any expression to his opinions. *Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities.* Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.⁴¹⁸

6. Persecution: issues of application

6.1 Persecution and laws of general application

Applications for refugee status are often denied on the ground that the claimant fears not persecution, but prosecution under a law of general application. Experience shows, however, that the law can as well be the instrument of persecution as any other measure. The question then is, if some laws can be the instruments of persecution, which are they? In 1993, the Canadian Federal Court of Appeal offered the following propositions with respect to persecution and an ordinary law of general application: (1) the Convention refugee definition makes the intent or any principal effect of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution; (2) the neutrality of such law vis-à-vis the five Convention grounds must be judged objectively; (3) an ordinary law of general application, even in non-democratic societies, should be presumed valid and neutral, and it is for the claimant to show that the law is persecutory, either inherently or for some other reason; and (4) the claimant must show not that a particular regime is generally oppressive, but that

the law in question is persecutory in relation to a Convention ground.⁴¹⁹

The relationship between laws of general application and persecution has been a controversial aspect of claims based on the alleged impact of China's 'one child policy', and in those involving conscientious objectors. Claimants in different jurisdictions argued that their being liable to forcible sterilization for breach of China's 'one child' policy amounted to persecution within the meaning of the Convention, and decisions in the matter have also been open to political considerations.⁴²⁰ In *Chang*, for example, the US Board of Immigration Appeals held that the policy is not persecutory and does not, by itself, create a well-founded fear of persecution, 'even to the extent that involuntary sterilization may occur'. To qualify for asylum, it found, the claimant must show that he or she is at risk because the policy is being selectively applied on Convention grounds, or being used to punish for those reasons.⁴²¹ The Canadian Federal Court of Appeal took a different approach in *Cheung*, emphasizing that 'the forced sterilization of women is a fundamental violation of basic human rights' which constitutes 'cruel, inhuman and degrading treatment'.⁴²² The Court in *Cheung* diverged from the Board's findings in its assessment that 'forced sterilization of Chinese women who have had a child is not a law of general application', but nonetheless noted that,

[e]ven if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status ... [I]f the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution.⁴²³

Every government has the right to enact, implement, and enforce its own legislation, inherent in its sovereignty and in the principle of the reserved domain of domestic jurisdiction. Notwithstanding the presumption of legitimacy in the legislative field, the discriminatory application of law or the use of law to promote discrimination may tend to persecution.⁴²⁴ In this sense, a human rights perspective can inform the approach to persecution, for example, by indicating which rights are absolute, which may be 'subject to such restrictions as are prescribed by law and reasonably necessary in a democratic society', whether restrictions are reasonably necessary, and whether any prohibition or penalty is proportional to the (social) objective that the legislation aims to achieve. The

issues involved can be illustrated by reference to what has been called the offence of *Republikflucht*, arising out of the restrictions often imposed by totalitarian States on travel abroad by their nationals. When unauthorized border-crossing and absence abroad beyond the validity of an exit permit attract heavy penalties, the question is whether fear of prosecution and punishment can be equated with a well-founded fear of persecution on grounds of political opinion, especially where the claim to refugee status is based on nothing more than the anticipation of such prosecution and punishment.⁴²⁵

On the one hand, the individual involved is simply treated according to law; on the other hand, the object and purpose of such laws might show that leaving or staying abroad is treated as a *political act*, either because it reflects an actual and sufficient political opinion, or because the State authorities may attribute dissident political opinion to the individual concerned.⁴²⁶

Lèse majesté offences provide a second example addressed by UNHCR in a recent Guidance Note.⁴²⁷ Such laws place restrictions on freedom of expression that may in certain circumstances underpin an asylum claim, whether or not the law is applied in a discriminatory manner,⁴²⁸ and whether the harm arising is sufficient to constitute persecution requires an analysis of the applicant's individual circumstances.⁴²⁹

6.1.1 Conscientious objectors

Issues of 'causation', attribution, and the motives for treatment amounting to persecution are also raised by asylum seekers who base their claim upon the fear of prosecution and punishment for conscientious objection to military service, or upon fear of sanctions imposed by non-governmental armed opposition elements. Objectors may be motivated by reasons of conscience or convictions of a religious, ethical, moral, humanitarian, or philosophical nature;⁴³⁰ they may be opposed to their own government, or to its policy on this occasion; they may object to all wars or to particular wars; they may consider the conflict to be contrary to international law, either in itself or because of the methods being employed; or they may simply not want to kill or be killed.⁴³¹ Against their claim to be refugees, it may be argued that they are punished not on account of their beliefs, but because of their failure to obey a law of universal application, that the 'right' to refuse to do military service is not a recognized human right, that punishment does not necessarily amount to persecution, and that there is no sufficiently close connection between refusal to serve and a Convention-based

motivation.⁴³²

In our view, however, the fundamental issues in determining entitlement to protection by an applicant on the basis of objection to military service are the sincerity of the conviction which sets him or her in opposition to their government, and the risk of treatment amounting to persecution, by reason of such objection. Serious questions relating to cause and motive must nevertheless be addressed.

6.1.1.1 The right of conscientious objection

As noted in previous editions of this work, decision-makers dealing with refugee claims involving refusal to do military service have frequently queried whether any right to conscientious objection existed, whether punishment in such circumstances amounted to persecution, and, if so, whether it was on account of a Convention reason, particularly if imposed under a law of general application applied without discrimination. The past decade has seen rapid development in this field; in 2007, it was possible to observe that, although the right to freedom of conscience itself was almost universally endorsed, no international human rights instrument yet recognized the right of conscientious objection to military service.⁴³³ Today, that right has now been recognized by the European Court of Human Rights under article 9 ECHR 50, and by the Human Rights Committee under article 18 ICCPR 66.⁴³⁴ It is also accepted by the Human Rights Council⁴³⁵ and the Office of the United Nations High Commissioner for Human Rights,⁴³⁶ and is recognized in the Charter of Fundamental Rights of the European Union, albeit only ‘in accordance with the national laws governing the exercise of this right’.⁴³⁷

In the United Kingdom case of *Sepet and Bulbul* in 2003, Lord Bingham declined to find a right of conscientious objection with ‘a measure of reluctance’, given that recognition ‘may well reflect the international consensus of tomorrow’.⁴³⁸ Although State practice is not uniform and there remain gaps in implementation,⁴³⁹ it can now be said that a right of conscientious objection is recognized under international law. Thus, attention must be turned to the parameters of that right, rather than its existence per se.

Jurisprudence from the institutions mentioned above and guidance from UNHCR provide some indications on the scope and content of the right.⁴⁴⁰ In 2011, the European Court of Human Rights, for the first time, recognized a right to conscientious objection to military service under article 9 ECHR 50 in

Bayatyan.⁴⁴¹ The applicant was a Jehovah’s Witness who was sentenced to two and a half years’ imprisonment after refusing a summons to perform military service; he had been willing to undertake civilian service, but none was available. In finding Armenia to have violated article 9, the Court departed from the Commission’s earlier case law,⁴⁴² emphasized developments in Europe and internationally,⁴⁴³ and concluded that,

opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.⁴⁴⁴

The protection guaranteed by art. 9 ECHR 50 is not absolute and may be ‘subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others’.⁴⁴⁵ Within the European context, therefore, States retain a margin of appreciation in deciding whether, and to what extent, an interference is necessary, although, as the Court emphasized, that margin is confined and structured by other considerations, including the ‘need to maintain true religious pluralism’ and the impact of ‘any consensus and common values emerging from the practices of State parties’.⁴⁴⁶ The Court did not consider Armenia’s restriction on the applicant’s freedom to be ‘necessary in a democratic society’, given the widespread adoption of alternatives to military service in member States. Accordingly, it considered that a State that did not offer alternative service enjoyed ‘only a limited margin of appreciation’ and was required to advance ‘compelling reasons to justify any interference’.⁴⁴⁷

The Court’s judgment in *Savda v Turkey*⁴⁴⁸ further clarified that, in principle, article 9 also protects pacifist and anti-militarist views not motivated by religious conviction, and the guarantees implicit in that provision require a procedure by which claims to conscientious objection must be determined according to law. A system that does not provide for alternative service and for an accessible and effective procedure for determining entitlement thereto will also fail to achieve that fair balance.⁴⁴⁹ The protection afforded to conscientious objectors under ECHR 50 was further strengthened in the 2017 judgment in *Adyan*.⁴⁵⁰ That case concerned four convicted Jehovah’s Witnesses who declined to participate either

in military service or in the alternative service available to conscientious objectors, on the basis that it was ‘not of a genuinely civilian nature’. The Court concluded that the introduction of alternative service in itself was not sufficient to show compliance with article 9 ECHR 50, and that the Court must ‘verify that the allowances made were appropriate for the exigencies of an individual’s conscience and beliefs’:

the right to conscientious objection guaranteed by Article 9 of the Convention would be illusory if a State were allowed to organise and implement its system of alternative service in a way that would fail to offer—whether in law or in practice—an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character.⁴⁵¹

In *Adyan*, the Court found the alternative service to fall short on both counts. While the work was of a civilian nature and primarily accountable to the heads of civilian institutions, military authorities were ‘actively involved’ in supervising it. It was therefore held not to be ‘of a genuinely civilian nature’.⁴⁵² The increased length of the alternative service (42 months, as compared to 24 months of military service) was considered to have a ‘deterrent effect’ and ultimately to be punitive.⁴⁵³ Accordingly, the Court found a violation of article 9 ECHR 50.

The Human Rights Committee’s approach has also shifted recently. The ICCPR provides a guarantee of freedom of thought, conscience and religion in article 18, subject to ‘such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. Article 8 provides that ‘forced or compulsory labour’ does not include ‘[a]ny service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors’.⁴⁵⁴ In 2006, the Human Rights Committee determined for the first time that the conviction of two Jehovah’s witnesses who refused to serve in circumstances where no civilian alternative was available breached article 18 ICCPR 66.⁴⁵⁵ The Committee found that article 8,

neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant, the understanding of which evolves as that of any other guarantee of the Covenant over time in view of its text and purpose.⁴⁵⁶

The Committee concluded that the authors’ conviction and sentence restricted

their ability to *manifest* their religion or belief.⁴⁵⁷ Article 18(3) provides that ‘[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. The Committee considered that the restriction was not necessary under article 18(3), noting that there were no laws recognizing conscientious objectors or providing for alternate service in the Republic of Korea.⁴⁵⁸

Since then, the Committee has changed its analysis of the right to conscientious objection quite dramatically. In a long line of cases, it has recognized the right to be *inherent* in the right to freedom of thought, conscience, and religion,⁴⁵⁹ such that analysis should be carried out wholly under article 18(1) rather than article 18(3) ICCPR 66. In *Atasoy*, the Committee set out the implications of this shift:

It is precisely because freedom of thought, conscience and religion is inherent in conscientious objection to compulsory military service, as recognized by the Committee, that the matter cannot be dealt with under article 18, paragraph 3. *There can now be no limitation or possible justification under the Covenant for forcing a person to perform military service.*⁴⁶⁰

The Committee’s espousal of an unconditional right to object has not escaped critique.⁴⁶¹ A consistent minority position in the Committee maintains that the majority’s explanation for its analytic shift is unpersuasive and that conscientious objection should instead be analysed under article 18(3).⁴⁶² The minority challenge is based on two grounds. First, it argues that the majority does not present a persuasive argument as to *why* conscientious objection to military service should be treated as an absolute right.⁴⁶³ Secondly, it argues that the majority view does not provide a basis for distinguishing the (absolute) right of conscientious objection to military service from ‘other claims to exemption on religious grounds from legal obligations’.⁴⁶⁴ Although the reasoning in the views themselves are summarily expressed, some answer to these critiques is provided in individual opinions by members of the majority.⁴⁶⁵

Practically, the distinction between the positions of the European Court of Human Rights and the Human Rights Committee may not be so great, since the latter has consistently held that a conscientious objector may be compelled to undertake a civilian alternative service ‘outside the military sphere and not under military command’, provided that the alternative service is ‘not of a punitive

nature'.⁴⁶⁶ It has also clarified that the 'absolute' right does not extend to other issues of conscience, such as the refusal of mandatory education or payment of taxes, on the basis that 'military service ... implicates individuals in a self-evident level of complicity with a risk of depriving others of life.'⁴⁶⁷ Nonetheless, the distinction between the 'passive' holding of a belief and its 'active' manifestation is a crucial one, and there is much to recommend the minority position.⁴⁶⁸ Be that as it may, the Committee's revised interpretation of article 18 has been consistently applied, accepted by UNHCR in its Guidelines on International Protection No. 10,⁴⁶⁹ and endorsed by the Office of the United Nations High Commissioner for Human Rights.⁴⁷⁰

Earlier jurisprudence on applications for asylum based in conscientious objection claims must also now be revisited in light of these international developments. For example, it is unlikely that two of the three key findings in the 2003 United Kingdom case *Sepet and Bulbul*—on causation and conscience respectively—would be sustained if the case were considered today.⁴⁷¹ The third key finding—that the treatment feared by the claimants, even if severe enough to amount to persecution, was not 'caused' by their belief, but by their refusal to obey a law of general application—was critically assessed in the third edition of this work.⁴⁷²

6.1.1.2 The right to object to participation in conflict 'condemned by the international community'

The context in which the individual exercises his or her freedom of conscience is determined not only by personal motivation and sincerity of belief, but also by the particular facts and broader political issues. This, in turn, may include positions taken by external actors, such as the Security Council, the General Assembly, other States, regional organizations, and so on.⁴⁷³ 'International public policy' may be confirmed, for example, where the military operation objected to is 'condemned by the international community as contrary to basic rules of human conduct',⁴⁷⁴ as the Security Council has done, for example, in relation to a number of conflicts. However, 'international condemnation' is not a term of art and evidence of such views may be obtained from a variety of sources.

Courts have recognized that a person who objects to participating in an internationally condemned conflict can claim that the risk of prosecution amounts to persecution,⁴⁷⁵ and in *Sepet and Bulbul*, Lord Bingham said,

There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community, or where refusal to serve would earn grossly excessive or disproportionate punishment.⁴⁷⁶

The recast EU Qualification Directive includes in its list of ‘acts of persecution’ ‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion’.⁴⁷⁷ The CJEU clarified the scope of this sub-provision in the 2015 case of *Shepherd v Germany*,⁴⁷⁸ which concerned a US citizen who had unsuccessfully sought asylum in Germany. The applicant enlisted in the US army in December 2003 and subsequently served in Iraq, working in helicopter maintenance. In 2007, while his unit was stationed in Germany, he received a travel order to return to Iraq. Ten days after receiving the order, he left the army, ‘believing that he must no longer play any part in a war in Iraq he considered illegal, and in the war crimes that were, in his view, committed there.’⁴⁷⁹ The applicant argued that his desertion carried the risk of criminal prosecution and social ostracism.⁴⁸⁰ The CJEU characterized the referring Court’s questions ‘in essence’ as asking whether article 9(2)(e),

must be interpreted as meaning that certain circumstances, relating in particular to the nature of the tasks performed by the soldier concerned, the nature of his refusal to perform military service, the nature of the conflict in question and the nature of the crimes which that conflict is alleged to involve, have a decisive influence in the assessment which must be carried out by the national authorities in order to verify whether a situation such as that at issue in the main proceedings falls within the scope of that provision.⁴⁸¹

The CJEU determined that article 9(2)(e) had broad personal scope—encompassing ‘all military personnel, including logistical or support personnel’—but a high evidentiary threshold.⁴⁸² The applicant must establish that it is ‘highly likely’ that war crimes will be committed, while the national authorities must determine, as part of their factual assessment, that it is ‘credible’ that war crimes would be committed.⁴⁸³ Operations carried out under a UN mandate are presumed (although this presumption is rebuttable) not to involve the commission of war crimes.⁴⁸⁴ Finally, the applicant must show that refusal to serve is the ‘only means’ by which to avoid participation in the alleged war

crimes.⁴⁸⁵ The Court also considered whether prosecution for desertion could constitute an act of persecution under articles 9(2)(b)–(c) of the Directive.⁴⁸⁶ The Court emphasized each State's 'legitimate right to maintain an armed force', finding nothing to suggest that a criminal sentence of up to five years was beyond what was necessary to exercise that right.⁴⁸⁷ The influence of this case on international refugee law will necessarily be tempered by the fact that it is limited to an interpretation of article 9 of the Directive, which gives a particularly narrow scope to the notion of conscientious objection.⁴⁸⁸

6.1.1.3 The nature of the dispute between the individual and the State

Conscientious objection raises questions as to the appropriate theoretical basis on which to distinguish between those opponents of State authority who do, and those who do not, require international protection. For example, sincerely held reasons of conscience may motivate the individual who refuses to pay such proportion of income tax as is destined for military expenditures;⁴⁸⁹ or the shopkeeper who wishes to trade on Sundays; or the parents who, on grounds of religious conviction, refuse to send their children to public schools.

The distinction between the 'passive' holding of a belief and its 'active' manifestation is key to understanding the boundaries of the relationship between the individual and the State. To a degree, the conflict between these individuals and the State is attributable to the 'choice' of the individual, who elects to place matters of principle or belief over obligations in law. The unrecognized conscientious objector to military service is constrained, in a direct physical sense, to act either in a way contrary to conscience or to face punishment. The objector must choose either to participate in the violence opposed, or to suffer the sanction. The reluctant taxpayer, on the other hand, has only to tolerate the use of funds for military purposes,⁴⁹⁰ while the would-be Sunday trader is simply restrained from transacting business at will.⁴⁹¹ Again, the conscientious objector is distinguishable because the State requires his or her *active* complicity in military service, not just tolerance or restraint or restrictions on certain conduct.⁴⁹²

A 1988 Council of Europe report emphasized the centrality of 'compelling reasons of conscience' in this context, in preference to a listing of 'acceptable' reasons for objection.⁴⁹³ Leaving aside any cumulative factors supporting refugee status (such as personal, social, religious or political background), the conscientious objector is also distinguishable from the 'mere' draft evader or

deserter by the sincerely held opinion. This locates the conflict of individual and State within the realm of competing (but nonetheless lawful) rights or interests, and separates out others whose motivations may be purely self-regarding and devoid of any recognized human rights basis.

Nor, as discussion above on internationally condemned conflicts and recent case law has illustrated, does it matter that the individual seeking protection is a ‘partial objector’.⁴⁹⁴ As Eide and Mubanga-Chipoya noted many years ago:

Partial conscientious objection to military service ... is built on the conviction that armed force may be justified under limited circumstances, derived from standards of international or national law or morality. Objection based on reference to standards of international law may concern the purpose for which armed force is used, or it may concern the means and methods used in armed combat.⁴⁹⁵

Finally, questions of conscience may evolve over time. There can therefore be no presumption that an enlisted soldier does not hold a conscientious objection to military service, whether partial or in its entirety.⁴⁹⁶

The fundamental issue in determining entitlement to protection as a refugee on the basis of objection to military service remains the sincerity of the conviction which sets the individual in opposition to their government, and the risk of treatment amounting to persecution. Military service and objection thereto, seen from the point of view of the State, are also issues which go to the heart of the body politic. Refusal to bear arms, however motivated,⁴⁹⁷ reflects an essentially political opinion regarding the permissible limits of State authority; it is a political act.⁴⁹⁸ The ‘law of universal application’ can thus be seen as singling out or discriminating against those holding certain political views.⁴⁹⁹ While the State has a justifiable interest in the maintenance of its own defence,⁵⁰⁰ the measures taken to that end should at least be ‘reasonably necessary in a democratic society’;⁵⁰¹ specifically, there ought to exist a reasonable relationship of proportionality between the end and the means.⁵⁰² In *Sepet and Bulbul*, the Court, having failed to associate the refusal to do military service with the right to freedom of conscience, thereupon also failed to situate the exercise of that right in its inherently political context and to consider the responsibility of the State to accommodate relevant difference.

Alternative service can help to reconcile the situation in a way that promotes community interests in defence and equality of treatment, and the individual’s interest in his or her own conscience.⁵⁰³ Whether alternative service meets

international standards is a question of fact in each case, having regard to conditions, nature, and duration.⁵⁰⁴ In the absence of genuine alternative service, or where insufficient weight is given to a sincerely held belief going to conscience, the likelihood of prosecution and punishment must be examined in order to determine whether they amount to persecution. This may be the case where the treatment is disproportionate, excessive or arbitrary, and whether it derives from official or unofficial sources.

6.1.1.4 Establishing a well-founded fear of being persecuted

A critical issue, therefore, is the circumstances under which the punishment or treatment, legal or extra-legal, feared by the claimant amounts to persecution. As a matter of principle, States are free to recognize conscientious objection *in itself* as a sufficient ground upon which to base recognition of refugee status. In this sense, they are free to attribute such value to the fundamental right to freedom of conscience that *any* measures having as their object to compel the individual to act contrary to sincerely held belief, or any punishment, such as deprivation of liberty, imposed to that end, amounts to persecution within the meaning of the 1951 Convention, regardless of its duration.⁵⁰⁵

As a matter of practice, however, States determining refugee status hold back from such absolute positions, in favour of taking full account of all the circumstances.⁵⁰⁶ International human rights law attaches special importance to the individual's freedom of conscience. The standards of reasonableness and proportionality must be applied to the particular facts of each case. Whether prosecution and punishment amount to persecution in the sense of the Convention will depend on the object and purpose of the law, the precise motivation of the individual who breaches such law, the 'interest' which such individual asserts and the nature and extent of the punishment. This in turn invites attention to (1) the genuineness of the applicant's beliefs, as a manifestation of freedom of conscience; (2) the nature of the individual's objection, so far as it may be relevant to the nature of the military conflict at issue (if any), or the way in which war is being waged; (3) the legality of the military action (if any), for which conscription is employed; (4) the scope and manner of implementation of military service laws; (5) the selective conscription of particular groups within society, and the bases of such distinctions; (6) the extent to which the right of conscientious objection is recognized, if at all; (7) the type of alternative service available, if any, its length and conditions by

comparison with military service, and the treatment of conscientious objectors performing such service; (8) the manner of prosecution and the proportionality and likelihood of punishment of conscientious objectors in the absence of alternative service; (9) the treatment of conscientious objectors subject to such punishment, including the extra-legal activities of paramilitary groups or sections of the populace; and (10) the extent to which penalties for conscientious objection may be employed selectively, against specific racial, religious, social, or political groups.

Finally, just as the right to freedom of expression ensures the protection of opinions from right to left, so the right to freedom of conscience protects beliefs and the manifestation of belief. An applicant who falls outside the parameters of the right of conscientious objection to military service may nonetheless have an arguable claim under the general protection guaranteed by rights to freedom of conscience.⁵⁰⁷

6.1.2 Political and non-political offenders

Similar considerations apply to the related question of non-extradition of political offenders. The IRO Constitution excluded ‘ordinary criminals who are extraditable by treaty’ as well as ‘war criminals, quislings, and traitors’ and a variety of other ‘undeserving’ groups; the UNHCR Statute and the 1951 Convention contain equivalent provisions.⁵⁰⁸ The exception in favour of political offenders developed in the nineteenth century in the context of bilateral extradition arrangements, and is not the consequence of any rule of general international law. No intrinsic duty obliges States to surrender fugitive criminals and extradition itself has traditionally been seen as a gloss upon the rule which permits the grant of territorial asylum.⁵⁰⁹ In practice, characterization of an offence as ‘political’ is left to the authorities of the State from which extradition is requested, and the function of characterization itself is evidently one in which political considerations will be involved, including the self-interest of the requested State as reflected in its military and other alliances.⁵¹⁰ Not surprisingly, divergent attitudes are revealed in municipal law. For example, the political offence exception did not figure in the extradition arrangements existing between Eastern European socialist States,⁵¹¹ although their constitutions commonly recognized the institution of asylum.⁵¹² In contrast, certain Western European States developed an elaborate comprehensive approach to purely political offences, complex political offences, and related political offences, all of which

might justify non-extradition.⁵¹³ Nevertheless, the weight to be accorded to the motives of the offender varied from jurisdiction to jurisdiction,⁵¹⁴ as did the practice on substantive limitations to the political offence exception. Some States have long excluded assassination of the head of State, while others have explicitly excluded acts of barbarism or offences the suppression of which is required under international obligations.⁵¹⁵ Moreover, appreciation of the political character of offences is clearly likely to vary according to the particular perspective of the requested State.⁵¹⁶

Much of the early debates and the jurisprudence concentrated on acts committed during the course of an insurrection,⁵¹⁷ and successive decisions of courts in the United Kingdom have limited the exception to offences committed in the context of parties in opposition and conflict.⁵¹⁸ To a significant extent, and taking account also of internationally agreed limitations, this approach is confirmed in the jurisprudence of the United States and other countries. The offence should have been committed in the course of some political dispute or conflict, and have been related to the promotion of political ends. Intention or motive is not conclusive, however, and there is a presumption against classifying as political those offences which may be loosely described as common law crimes, such as murder and robbery. Inherent limitations on the category of political offences, by reference to their nature and circumstances, are now the norm.

In the Federal Republic of Germany, for example, the law on international judicial assistance in criminal matters expressly excludes executed or attempted genocide, murder, and manslaughter from recognized political offences.⁵¹⁹

The French Code of Criminal Procedure provides that there shall be no extradition, ‘Lorsque le crime ou délit a un caractère politique ou lorsqu'il résulte des circonstances que l'extradition est demandée dans un but politique’.⁵²⁰ In a 1958 decision, for example, the *Office français de protection des réfugiés et apatrides* (OFPRA) applied the rule that,

Par crime de droit commun ... il y a lieu d'entendre toute infraction qui n'est pas commise à l'occasion de la lutte de l'intéressé contre les autorités responsables des persécutions dont l'intéressé est ou a été victime, sans d'ailleurs qu'il y ait lieu de donner au mot ‘crime’ le sens précis que lui prête le droit interne français.⁵²¹

Homicides and, in particular, the deaths of civilians or even State officials chosen at random, have been consistently found to fall outside the protection of the

political offence.⁵²²

Neither intention, nor the presence or absence of political motives alone will be sufficient to determine the characterization of the offence.⁵²³ In *McMullen v INS*, the US Court of Appeals for the Ninth Circuit expressly rejected ‘the argument that places the determination ... on the alien’s state of mind. The law focuses on the circumstances surrounding the acts.’⁵²⁴ Quoting the first edition of this work,⁵²⁵ among other sources, the Court further observed:

Of course, for a criminal act to be ‘political’, the individual must have been motivated by political reasons ... However, ‘motivation is not itself determinative of the political character of any given act.’ ... The critical issue is ‘whether there is a close and direct causal link between the crime committed and its alleged political purpose and object.’⁵²⁶

Notwithstanding certain contradictory elements, United States jurisprudence generally supports the view that indiscriminate violence is not a protected political act.⁵²⁷ In *Ordinola*, the Court considered whether the actions of a former Chilean paramilitary squad coordinator—including the alleged kidnapping and murder of civilians—fell within the political offence exception.⁵²⁸ Applying the ‘incidence test’,⁵²⁹ the Court found that while the actions occurred in the course of a violent political uprising, they could not be considered ‘incident to or in furtherance of quelling the violent uprising’,

the magistrate judge’s reasonable finding that Ordinola’s alleged offenses were carried out against innocent civilians largely dooms Ordinola’s argument ... To have been considered political offenses, Ordinola’s actions would had to have been in some way proportional to or in furtherance of quelling the Shining Path’s rebellion ... terror, for terror’s sake, was not a sufficient method of quelling the Shining Path’s uprising.⁵³⁰

McMullen concerned a former member of the Provisional IRA, who had successfully resisted extradition from the United States, and who now sought asylum and withholding of deportation to the Republic of Ireland.⁵³¹ The Ninth Circuit addressed precisely the issue, whether the petitioner was ineligible for asylum by reason of there being serious reasons to consider that he had committed a serious non-political crime. Emphasizing the asylum context, the Court favoured the use of a balancing approach to the alleged serious non-political crime, in which the proportionality of the act to its objective and the degree of atrocity would be taken into account. It noted that terrorist activities

were involved, including indiscriminate bombing campaigns, murder, torture, and maiming of innocent civilians who disagree with the objectives and methods of the Provisional IRA. In the view of the Court, ‘such acts are beyond the pale of protectable “political offence”’. There was no sufficient link between the acts and the political objective; they were so barbarous, atrocious, and disproportionate as to amount to serious non-political crimes. At several places, the Court stresses the civilian targets of Provisional IRA terrorist activities, in a manner that recalls the special protection accorded to civilians under the laws of war, and presents an analogy with the mandatory exclusion from the Convention of those who have committed war crimes.⁵³²

In *T v Secretary of State for the Home Department*, the House of Lords divided over the correct approach to ‘political offence’. Lords Keith, Browne Wilkinson, and Lloyd were of the view that there must be both a political purpose and a sufficiently close and direct link between the crime and the purpose; they further considered that the means employed, including the target and the likelihood of indiscriminate killing of members of the public, may ‘break’ the link and make the connection too remote. For Lords Mustill and Slynn, however, acts of violence such as the indiscriminate killing of persons unconnected with the government could not, by definition, amount to political crimes, and while the gravity of the offence was relevant to whether it was ‘serious’ for the purposes of article 1F(b), ‘the crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned.’⁵³³

In the absence of any definition or list of political crimes, national or international, this reasoning appears to beg the question, for experience shows that a crime may indeed be ‘political’ *precisely* because of the consequences which await the offender. Lord Mustill’s query of the approach adopted in *McMullen* to questions of means and ends and proportionality also misses the point: ‘why should a crime which would have been political in nature be turned into one which is not political, simply because the judge deems the offender to have gone too far?’⁵³⁴

The short answer is because that is how different jurisdictions have in fact placed limitations on the extent of immunity from extradition, and because few crimes are necessarily and inherently ‘political’, and because any crime ought to be considered in context; and finally, because the decision to be made itself has an inherently ‘political’ dimension. The idea that an offence ‘either is or is not

political when and where committed' may be appropriate from the single perspective of the criminal, but that view alone has not been accepted as sufficient by the courts. Lord Mustill suggested writing 'terrorism' into the modern concept of the political crime, and took the League of Nations definition ('criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'⁵³⁵) as an appropriate, objective model.

Lord Lloyd, on the other hand (who cited the approval in *McMullen* of the test proposed in the first edition of this work), was of the view that a definitive answer to the political crime question was unlikely: 'The most that can be attempted is a description of an idea.' Nevertheless, that could still be done:

A crime is a political crime for the purposes of article. 1F(b) ... if, and only if (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.⁵³⁶

In the European context, the development, or consolidation, of a restrictive approach to the political offence has reflected regional developments, such as the 1977 European Convention on the Suppression of Terrorism, as well as recognition of the new dimension of terrorist violence introduced by military and paramilitary organizations. From an international legal perspective, this progression is by no means new; already in 1948, States had agreed that genocide should not be considered a political offence for extradition purposes, and subsequent years have seen broad agreement on the depoliticization of other offences, such as hijacking, hostage-taking, and offences against diplomats.⁵³⁷

In general, it may be concluded that an offence will not be considered political if (1) 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 (2) if it is *disproportionate* in relation to the political aims. Beyond the traditional field of political opposition, conflict and violence, one as yet unexplored area of political activity concerns 'whistleblowers' and those who obtain and disseminate information which States deem confidential, secret, or essential to

national security. Depending on the circumstances and the procedural context, any related claim to international protection as a refugee will require close analysis of the nature of the activity, its relation to human rights, including freedom of expression, the right to disseminate information, and the public's 'right to know', considered against the State's sovereign interest in securing its own information and the personal data of individuals. Where the information in question discloses the commission of international crimes, that too must be factored in, as must the treatment and penalties likely to be imposed on the whistleblowers themselves.⁵³⁸

At one time it might have been fashionable to argue that the international community did not exist for the purpose of preserving established governments, and that the political offence exception was therefore valuable for the dynamic quality it brought to the relations between States, on the one hand, and between States and their citizens, on the other hand.⁵³⁹ International law, however, provided no guidance on the substance of the concept of political offence, other than its outermost limits, and States retained the broadest discretion. Given the range now of agreements restricting the concept of political offence, as well as the increasingly common rejection of political violence, particularly where innocent lives are taken or put at risk, it is increasingly open to question whether much remains in the way of core content. The underlying humanitarian issues—protection against persecution, torture, inhuman treatment, and so on—and what might be termed the expanding responsibilities of States in regard to an international *ordre public*, are in tension.⁵⁴⁰ Arguably, the 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.⁵⁴¹ 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.

6.2 Persecution and situations of risk

6.2.1 Internal protection/flight/relocation alternative

There is no reason in principle why an asylum seeker's fear of persecution should relate to the whole of his or her country of origin;⁵⁴² for various reasons, it may be impossible or impracticable for the asylum seeker to move internally, rather than to cross an international frontier.⁵⁴³ There is also authority for the

principle that, if ‘internal flight’ is to justify the denial of international protection, then it should be *reasonable* for the potential refugee to relocate to a safe area, although that apparently simple notion has given rise both to extensive discussion and to a range of not always consistent applications.⁵⁴⁴ Even the name of the concept is vexed, and, as noted below, the prevailing approach has been subject to criticism in academic commentary.⁵⁴⁵

While different jurisdictions have held that the principal criterion is the availability in fact of effective protection against persecution in another region,⁵⁴⁶ decisions have varied in regard to the requisite level of protection of other rights, such as those necessary to maintaining some sort of social and economic existence.⁵⁴⁷ In *ex parte Robinson*, a 1997 decision of the UK Court of Appeal,⁵⁴⁸ it was said that all the circumstances should be considered, ‘against the backdrop that the issue is whether the claimant is entitled to refugee status’. The Court referred to various tests, including the reasonable accessibility of the safe place, whether great physical danger or undue hardship had to be faced getting or staying there, and whether the ‘quality of the internal protection’ met ‘basic norms of civil, political and socio-economic human rights’. In the end, however, having listed the various tests, Woolf LJ opted for that proposed by Linden JA in the Canadian case of *Thirunavukkarasu*,⁵⁴⁹ namely, ‘would it be unduly harsh to expect this person ... to move to another less hostile part of the country?’ This was particularly helpful, so far as the words ‘unduly harsh’ fairly reflect that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country.⁵⁵⁰ The recast Qualification Directive incorporates a ‘reasonableness’ standard into its test for internal protection, drawing on conditions laid down by the European Court of Human Rights in its judgment in *Salah Sheekh*.⁵⁵¹ The United States Asylum Regulations also look to the reasonableness of relocation, and provide that consideration should be given to,

the totality of the relevant circumstances regarding an applicant’s prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.⁵⁵²

Exactly how to apply the ‘reasonableness test’ was examined by the UK House of Lords in *Januzi v Secretary of State for the Home Department*.⁵⁵³ The Court

considered but soundly rejected the argument that the ‘reasonableness’ of relocation is to be judged by ‘whether the quality of life in the place of relocation meets the norms of civil, political and socio-economic human rights’.⁵⁵⁴ Lord Bingham based his judgment firmly in the words of the 1951 Convention, beginning with the requirement that refugee status be based on a well-founded fear of persecution; if there is a place in which there is no fear of persecution and protection is available, and if the claimant could reasonably be expected to relocate there, then he or she cannot be said to be outside their country of origin by reason of well-founded fear.⁵⁵⁵ Moreover, the Convention provided no justification for such an extensive ‘human rights test’, which could also not be implied, for the Convention’s essential purpose was ‘to ensure the fair and equal treatment of refugees in countries of asylum’.⁵⁵⁶ In further support, he noted that the rule was not expressed in article 8 of the original EU Qualification Directive, that it was not sufficiently supported in the practice of States as to give rise to a rule of customary international law, and that it would lead to anomalous consequences.⁵⁵⁷ Instead, the Court found assistance in UNHCR’s Guidelines on internal flight, in particular, for their focus on the standards prevailing generally in the country of nationality and for the manner in which the reasonableness question is framed: ‘Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there.’⁵⁵⁸ As expressed by Lord Hope, ‘the words “unduly harsh” set the standard that must be met’, if relocation is to be considered unreasonable.⁵⁵⁹ Lord Hope did note, however, that,

The fact that the same conditions apply throughout the country of the claimant’s nationality is not irrelevant to the question whether the conditions in that country generally as regards the most basic of human rights that are universally recognised—the right to life, and the right not to be subjected to cruel or inhuman treatment—are so bad that it would be unduly harsh for the claimant to have to seek a place of relocation there. ... one does not need to rely on the European Convention on Human Rights to conclude that if conditions are that bad relocation there would be unduly harsh.⁵⁶⁰

In *AH (Sudan) v Secretary of State for the Home Department*, the House of Lords elaborated on the test in *Januzi*.⁵⁶¹ Lord Bingham noted that ‘a claimant for asylum could not reasonably or without undue hardship be expected to return to a place where his rights under article 3 [ECHR 50] or its equivalent might be infringed’, while emphasizing that there was no need to demonstrate such a risk

in order to meet the ‘unreasonable or unduly harsh’ test.⁵⁶² The *Januzi* test was ‘one of great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought’.⁵⁶³ Lord Bingham also recalled that the ‘humanitarian object’ of the Convention,

[i]s to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is.⁵⁶⁴

The *Januzi* approach was not followed in New Zealand,⁵⁶⁵ and although it found some support in the Australian High Court, it has since been overtaken by legislative developments.⁵⁶⁶ A 2014 amendment to the Migration Act 1958 provides that a person will only be considered to have a well-founded fear of persecution if ‘the real chance of persecution relates to *all areas* of a receiving country.’⁵⁶⁷ In our view, this amendment is inconsistent with the 1951 Convention and with international practice.⁵⁶⁸ In 2020, the Full Court of the Federal Court of Australia found that while ‘the reference ... to all areas of a receiving country is not qualified by a criterion of reasonableness’, it should nonetheless ‘be construed to mean all areas of a receiving country where there is safe human habitation and to which safe access is lawfully possible.’⁵⁶⁹ The Court did not consider it necessary to determine the practical differences between this construction and the reasonableness test endorsed in *Januzi*.⁵⁷⁰

While the ‘reasonableness’ test seems to have gained general acceptance in the courts, several commentators continue to argue for approaches that take greater account of general human rights considerations, if not of specific international legal obligations.⁵⁷¹ It remains to be seen whether, and to what extent, courts and States in their practice will be prepared to accommodate these calls.

6.2.2 Flight from armed conflict and violence

The fact of having fled from civil war is not incompatible with a well-founded fear of persecution in the sense of the 1951 Convention.⁵⁷² Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution.⁵⁷³ A closer look at the background to the conflict, however, and the ways in which it is fought, will often establish a link to the Convention. As the

Canadian Federal Court of Appeal stated in one case, ‘a situation of civil war ... is not an obstacle to a claim provided that the fear is not that felt indiscriminately by all citizens as a consequence ... , but that felt by the applicant himself, by a group with which he is associated, or, even by all citizens on account of a risk of persecution based on one of the reasons stated’.⁵⁷⁴ The 2016 UNHCR Guidelines on refugee status in situations of armed conflict and violence note:

The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual’s claim. *The test is whether an individual’s fear of being persecuted is well-founded.* At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, strengthens rather than weakens the well-founded nature of the fear of being persecuted of a particular individual.⁵⁷⁵

No ‘higher level of severity or seriousness’ of harm need be shown in a situation of armed conflict and violence as compared to other situations, ‘nor is it relevant or appropriate to assess whether applicants would be treated any worse than what may ordinarily be “expected” in situations of armed conflict and violence’.⁵⁷⁶ It nevertheless remains for the applicant to show that he or she is unable to obtain the protection of the State, and to establish the requisite Convention link.⁵⁷⁷

In other situations, it may be argued that the Convention does not and cannot apply to a conflict between two competing groups, or when there is no effective government responsible for the implementation of international obligations relating to human rights. A number of earlier German and French decisions and commentators, for example, drew distinctions between the civil war in Liberia and that in Somalia, finding for refugee status in the former (where rival factions had divided power between themselves and were competing for supremacy);⁵⁷⁸ and denying it in the latter (where clans, sub-clans, and factions competed amongst themselves, but none emerged as an authority in fact, controlling territory and possessing a minimum of organization).⁵⁷⁹ This reasoning, which draws on the ‘old’ legal history of civil war and recognition of belligerency, has no obvious relevance to the 1951 Convention.

Likewise, in our view, both the reasoning and the result in the UK case of *Adan v Secretary of State for the Home Department*⁵⁸⁰ disclose a number of problems. The House of Lords found, *inter alia*, that the appellant was not a refugee from Somalia, then in a situation of clan-based civil war, in that he could not show a well-founded fear of persecution for a Convention reason. Lord

Lloyd referred to ‘the principle that those engaged (sic) in civil war are not, as such, entitled to the protection of the Convention so long as the civil war continues, even if the civil war is being fought on religious or racial grounds’.⁵⁸¹ Referring to the Immigration Appeal Tribunal’s conclusion that all sections of society in northern Somalia were equally at risk so long as the civil war continued, Lord Lloyd considered that there was ‘no ground for differentiating between Mr. Adan and the members of his own or any other clan’.⁵⁸² It is not clear why, in the passage quoted above, Lord Lloyd referred to those ‘engaged’ in civil war, as opposed to those affected or potentially affected by it.⁵⁸³ The claimant’s case was not based on his active involvement in the conflict, but on the risk faced from the conflict, by reason of his clan membership. Indeed, any ‘involvement’ in such a conflict might well justify exclusion under article 1F(a), particularly if persecution or other war crimes are committed.

Moreover, the logic of denying refugee status to those affected by a civil conflict which itself engages or is driven by one or other Convention ground is not clear, and indeed, is not supported by authority; in our view, it is wrong.⁵⁸⁴ The idea of ‘differential risk’ or ‘differential impact’, also relied on by Lord Lloyd, may well be a misreading of an academic gloss,⁵⁸⁵ and the concept is roundly rejected by UNHCR in its 2016 Guidelines.⁵⁸⁶ Ultimately, in cases such as these, it is hardly necessary to go beyond the words of the Convention.⁵⁸⁷

Finally, the application of international humanitarian law (IHL) when assessing refugee status arising from a situation of armed conflict has been the subject of some debate; Storey has argued that IHL should be treated ‘in certain contexts as a primary reference point and as a starting-point’ when dealing with claims for international protection,⁵⁸⁸ while Zimmermann and Mahler consider that ‘acts in accordance with applicable norms of international humanitarian law, even if they cause damage to civilians or civilian objects, cannot amount to persecution’.⁵⁸⁹ In this respect, we find Durieux’s conceptualization of armed conflict as ‘contextual, and therefore in a sense, neutral’ compelling.⁵⁹⁰ As he notes, ‘when a decision-maker is faced with a claim to protection under the Refugee Convention, the subject matter is *not* armed conflict, it is persecution’.⁵⁹¹

6.2.3 The individual and the group

Wherever large numbers of people are affected by repressive laws or practices of general or widespread application, the question arises whether each member of

the group can, by reason of such membership alone, be considered to have a well-founded fear of persecution; or does persecution necessarily imply a further act of specific discrimination, a singling out of the individual?⁵⁹² Where large groups are seriously affected by a government's political, economic, and social policies or by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual.⁵⁹³ General measures, aimed as often at 'restructuring' society as at maintaining the *status quo*,⁵⁹⁴ will frequently be directed at groups identifiable by reference to the Convention reasons for persecution, and carried through with the object, express or implied, of excluding them from or forcing them into mainstream society. Where individual or collective measures of enforcement are employed, such as coercion by denial of employment or education, restrictions on language and culture, denial of access to food supplies, expropriation of property without compensation, and forcible or involuntary relocation, then fear of persecution in the above sense may exist; mere membership of the affected group can be sufficient. Likewise, where punishment under a law of general application may result, any necessary condition of singling out would be met by the decision to prosecute in a given case. Already in 1990, the US Asylum Regulations had explicitly dispensed with the 'singling out' or 'targeting' requirement, which now extends if the applicant can show 'a pattern or practice ... of persecution of a group persons *similarly situated* to the applicant', and his or her 'own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable'.⁵⁹⁵ Whether a well-founded fear of persecution exists will depend upon an examination of the class of persons in fact affected, of the interests in respect of which they stand to be punished, of the likelihood of punishment, and the nature and extent of the penalties.

6.3 Children as asylum seekers

In each and every situation involving children in flight or otherwise on the move, the best interests of the child remain a primary consideration, considered together with what is effectively a charter in their regard—the 1989 Convention on the Rights of the Child.⁵⁹⁶ In practice, a preliminary issue in all cases involving children and young persons, is whether they are accompanied. In principle, this has no bearing on whether they are refugees, but may affect how their claims are dealt with, as well as the solutions which may be proposed. Unaccompanied

children, in particular, need special attention, and a guardian or other person competent to protect their interests.⁵⁹⁷

The relationship between the regime of child protection and that of refugee protection is not yet perfect, and can lead to anomalies in practice and analysis. The *UNHCR Handbook* locates the refugee status of accompanied dependants, including children, in the context of family unity. If the head of the family is recognized as a refugee then, all things being equal,⁵⁹⁸ the ‘dependants are normally granted refugee status according to the principle of family unity’.⁵⁹⁹ Practical reasons and procedural convenience subordinate individual claims to an alternative principle, and the child’s status is relegated to that of dependency.⁶⁰⁰ This may often reflect social realities in the case of accompanied children, although UNHCR maintains that accompanied children are entitled to claim refugee status in their own right.⁶⁰¹ A more comprehensive approach is particularly required for the unaccompanied in search of protection, but the *UNHCR Handbook*, drafted some ten years before the CRC 89, focuses on refugee status as a primary consideration. With this underlying premise, the *Handbook* somewhat misleadingly invokes ‘mental development and maturity’ as the criterion for determining the existence of a well-founded fear of persecution.⁶⁰² The approach to refugee status in terms of maturity is misguided for several reasons,⁶⁰³ and seems to have been implicitly departed from in UNHCR’s 2009 Guidelines on Child Asylum Claims.⁶⁰⁴ The Guidelines, adopted 20 years after the CRC 89, endorse a ‘child-sensitive application of the refugee definition’, consistent with developments in international human rights law.⁶⁰⁵ They eschew the *Handbook*’s presumption that minors under the age of 16 are ‘not ... sufficiently mature’ to hold a well-founded fear,⁶⁰⁶ but do emphasize that, ‘[d]ue to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims’.⁶⁰⁷

However, the question of how best to assess a ‘well-founded fear of being persecuted’ in light of a child’s maturity, understanding of a situation, and capacity to feel fear remains. Claims by children are considered by some commentators to be an archetypal example of why including a ‘subjective’ element in the well-founded fear test is misconceived.⁶⁰⁸ The general approaches advocated in the *Handbook*—having ‘greater regard to certain objective factors’, or imputing parental fear to the child—appear often to hold sway.⁶⁰⁹ More simply, courts may ignore the subjective element entirely when assessing a

child's 'well-founded fear'.⁶¹⁰ Although maturity is generally irrelevant to the question whether or not a child may be persecuted, UNHCR's Guidelines do note that '[i]ll-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child'.⁶¹¹

In contrast with what may appear to be an overly elaborate adaptation of refugee status determination procedures to children, the principle of the *best interests of the child* looks more straightforward—it requires that decisions on behalf of the child be taken on the basis of all the circumstances, including his or her personal situation and the conditions prevailing in the child's country of origin.⁶¹² Ultimately, the welfare of the child, and the special protection and assistance which international law requires must take precedence over the narrow concerns of refugee status.⁶¹³ Decisions are needed for and on behalf of the unaccompanied child, which take account of his or her best interests and effectively contribute to the child's full development, preferably in the environment of the family. To channel children in flight into refugee status procedures will often merely interpose another obstacle between the child and a solution.

That being said, however, in some jurisdictions at present a successful refugee claim may be the only way by which to access child welfare services.⁶¹⁴ The United Kingdom immigration rules appear to be premised on the assumption that a child arriving alone is in need of protection and assistance. So far as such child may apply for asylum, the rules require priority treatment, close attention to welfare needs, and care in interviewing.⁶¹⁵ Nevertheless, the child's best interests are a primary concern. The likelihood of risk of harm in his or her country of origin must be factored in, but in many cases the most appropriate solution may still be reunion with family members who have remained behind.⁶¹⁶ Clearly, and as experience has too often confirmed, prolonged detention in a closed camp has a serious negative effect on any child's development, and must be avoided through prompt and appropriate decision-making.⁶¹⁷

7. Persecution and lack of protection

Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are

identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental, protected interests. Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the State faced with determining a claim to asylum or refugee status.⁶¹⁸ An element of relativity is perhaps inherent and inescapable in determining the value to be attributed to the protected interest (for example, life and freedom of conscience), and the nature or severity of the measure threatened (for example, death and some lesser interference).

Although persecution itself is undefined by any international instrument, an approach in terms of *reasons*, *interests*, and *measures* receives support by analogy from the human rights field. The International Convention on the Suppression and Punishment of the Crime of Apartheid,⁶¹⁹ for example, identifies the ‘crime of apartheid’ very much in these terms. The *reasons* are self-evident—race and racial domination; the *interests* threatened and in need of protection include the right to life; liberty of the person; freedom; dignity; participation in political, social, economic, and cultural rights; the right to work; the right to form trade unions; the right to education; the right to a nationality; freedom of movement and residence; freedom of opinion and expression; freedom of peaceful assembly and association; and non-discrimination. The *measures* that were used to defend apartheid and achieve its objectives included inhuman acts; systematic oppression; denial of rights; murder; infliction of serious bodily or mental harm; torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest; illegal imprisonment; deliberate imposition of substandard living conditions; legislative measures denying participatory rights; denial of development; segregation on racial lines; prohibition of mixed marriages; expropriation of landed property; forced labour; and denial of rights to political opponents.

The criteria for refugee status posited by article 1 of the 1951 Convention have the individual asylum seeker very much in mind. In the case of large numbers of asylum seekers, establishing a well-founded fear of persecution on a case-by-case basis can be impossible and impracticable. A *prima facie* or group determination, based on evidence of lack of protection, may therefore be the answer.⁶²⁰ This solution is implied by the second leg of the refugee definition adopted in the 1969 OAU Convention and by the Cartagena Declaration, which

extends 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 seek refuge in another country. UNHCR’s Guidelines on the *prima facie* recognition of refugee status set out its legal basis and several ‘procedural and evidentiary aspects’⁶²¹ and stipulate also that ‘[e]ach refugee recognized on a *prima facie* basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/instrument’.⁶²²

Certainly, a group determination may be called for in the initial stages of any movement where protection and material assistance are the first priorities. It may also be appropriate where groups that are not arriving on a large-scale basis nonetheless ‘share a readily apparent common risk of harm’.⁶²³ Establishing that civil war has broken out, that law and order have broken down, or that aggression is under way is relatively simple.⁶²⁴ The notion of lack of protection, however, is potentially wider and invites attention to the general issue of a State’s duty to protect and promote human rights. Clearly, not every failure by the State to promote and protect, for example, the various rights recognized by the 1966 Covenants, will justify flight across an international frontier and a claim to refugee status.⁶²⁵ Not all the rights are fundamental, some are subject to progressive implementation only, while others may in turn be the subject of permissible derogations.⁶²⁶

The list of fundamental protected interests proposed above can be expanded in the future, as hitherto unrecognized groups and individuals press their claims, and as the value of certain economic and social rights is increasingly accepted.⁶²⁷ Although States generally do not appear willing to accept any formal extension of the 1951 Convention refugee definition, their practice commonly reflects recognition of the protection needs and entitlements of a broader class. Nevertheless, one legal implication of developments in favour of refugees and of human rights generally is that there are limits to the extent of State power. If individuals, social groups, and classes are at the absolute disposal of the State, then repression, re-education, relocation or even expulsion aimed at the restructuring of society can be considered comprehensible, even acceptable. But where there are limits to State power, and individuals and groups have rights against the State or interests entitled to recognition and protection, then such measures may amount to persecution. The traditional response to those who flee in fear of persecution has been to grant protection, although States, the United

Nations, and UNHCR now regularly call for greater attention to causes. The necessary machinery and modalities for international cooperation to achieve these ends remain seriously underdeveloped, however, particularly when contrasted with the admittedly incomplete international refugee regime. With increased pressure to move likely in the coming decades across a broad spectrum of drivers—persecution, conflict, climate change, competition for resources, underdevelopment, poverty, and inequality—there will be a continuing need both for protection and for stronger institutions. In this context, international refugee law, international human rights law, and international humanitarian law will provide the foundations for progressive development.

¹ To the drafters of the 1951 Convention, at least initially, the absence of a clear legal status necessarily had repercussions on the refugee's right to recognition as a person before the law, as required by art. 6 UDHR 48, while such status was also essential in order to enable the refugee 'to lead a normal and self-respecting life'. See UN doc. E/AC.32/2 (3 Jan. 1950) *Ad hoc Committee on Statelessness and Related Problems*. Memorandum by the Secretary-General. Annex. Preliminary Draft Convention, para. 13. These references were dropped from the final version of the Preamble; today, although 'refugee status' is understood more as the formal confirmation of entitlement to international protection or asylum in the sense of solution, than as a particular civil quality, its absence or denial may well entail the marginalization of substantial numbers of individuals otherwise in need of refuge.

² See Steinbock, D. J., 'The refugee definition as law: issues of interpretation', in Nicholson, F. & Twomey, P., eds., *Refugee Rights and Realities* (1999) 13.

³ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued 2019) para. 28; Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 1 (1966) 340; Tribunal civil, Verviers (15 nov. 1989), *X c/ Etat belge*: see (1989) 55 RDDE 242; Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System', OEA/Ser.L/V/II.106, doc. 40 rev. (28 Feb. 2000) para. 118. The declaratory character of refugee status determination is formally recognized in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, recital (21).

⁴ See, generally, Grahl-Madsen (ⁿ 3); Weis, P., 'The Concept of the Refugee in

International Law' (1960) *Journal du droit international* 1; Schnyder, F., 'Les aspects juridiques actuels du problème des réfugiés' (1965-I) *Hague Recueil* 339; Aga Khan, S., 'Legal Problems relating to Refugees and Displaced Persons' (1976-I) *Hague Recueil* 287; Anker, D. E., *Law of Asylum in the United States* (June 2020 update); Hathaway, J. C. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014); Carlier, J. Y., 'Droit d'asile et des réfugiés: de la protection aux droits' (2008) *Hague Recueil* 90; Kälin, W., *Grundriss des Asylverfahrens* (1990); Germov, R. & Motta, F., *Refugee Law in Australia* (2003); Stevens, D., *UK Asylum Law and Policy* (2004); Alland, D. & Teitgen-Colly, C., *Traité du droit d'asile* (2002); Marx, R., *Kommentar zum Ausländer - und Asylrecht* (2. Aufl., 2005); *Kommentar zum Asylverfahrensgesetz*, (6. Aufl., 2005); Tiberghien, F., *La protection des réfugiés en France* (2ème édn., 1988).

⁵ The situation of refugees acknowledged under earlier arrangements and formally included in both Statute and Convention is not examined further; cf. Statute, para. 6(a)(1) and 1951 Convention, art. 1A(1); Grahl-Madsen (n 3) 108–41; Tiberghien (n 4) 401–41.

⁶ The term 'mandate refugee' will signify a refugee within the competence of UNHCR according to its Statute, or according to specific General Assembly resolutions. French law recognizes as refugees 'toute personne persécutée en raison de son action en faveur de la liberté ainsi qu'à toute personne sur laquelle le Haut-Commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut ... ou qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951': see art. L711–1, Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) <http://www.legifrance.gouv.fr/>. There is no obligation on a State party to accept an asylum application from an individual who has been accorded refugee status by UNHCR; however, the UK Supreme Court considers that a national decision-maker should give 'close attention' to a UNHCR decision and take 'considerable pause before arriving at a different conclusion': *I.A. (Appellant) v Secretary of State for the Home Department* [2014] UKSC 6, paras. 29, 49.

⁷ The term 'Convention refugee' will signify a refugee within the meaning of the 1951 Convention and/or 1967 Protocol.

⁸ Recognition as a Convention, but not as a mandate refugee would import no consequences of significance.

⁹ These optional limitations are not discussed further; see Grahl-Madsen (n 3) 164–72.

¹⁰ Statute, para. 8(a).

¹¹ Art. 35 of the Convention; art. II of the Protocol.

¹² Given the variety of State-administered procedures, which may engage UNHCR in different capacities, Burson considers that RSD should not be seen in 'binary terms, performed by either the State or UNHCR' but 'on a structural spectrum': Burson, B., 'Refugee Status Determination', in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021) 578.

¹³ Cf. various State objections, cited at Ch. 2, s. 3.2.

¹⁴ During 2018, UNHCR conducted refugee status decision-making in 55 countries with

partial or non-functioning asylum systems, registering some 227,800 applications. In 2019, UNHCR proposed to establish an ‘Asylum Capacity Support Group’, as called for in the Global Compact on Refugees: see ‘Note on International Protection’: UN doc. A/AC.96/1189 (11 Oct. 2019) para. 11; Global Compact on Refugees: UN doc. A/73/12 (Part II) para. 62. See also, ‘Refugee Status Determination’, EC/67/SC/CRP.12 (2016), discussing UNHCR’s ‘new strategic direction for RSD’.

¹⁵ UNHCR’s determination operates as a filter in such cases, although the final decisions on both status and acceptance are increasingly taken by governments themselves.

¹⁶ See Alexander, M., ‘Refugee Status Determination Conducted by UNHCR’ (1999) 11 *IJRL* 251; Kagan, M., ‘The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination’ (2006) 18 *IJRL* 1.

¹⁷ See UNHCR, ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’ (Aug. 2020); <https://www.refworld.org/docid/5e870b254.html>. For critique of the 2003 version, see ‘Document: Re: Fairness in UNHCR RSD Procedures: Open Letter’, (2007) 19 *IJRL* 161.

¹⁸ See further Ch. 11, ss. 2–4.

¹⁹ Cf. art. 31(1), 1969 Vienna Convention on the Law of Treaties: 1155 UNTS 331. The *UNHCR Handbook* (n 3) was prepared at the request of States members of the Executive Committee of the High Commissioner’s Programme, for the guidance of governments: UNHCR Executive Committee, Report of the 28th Session: UN doc. A/AC.96/549 (1977) para. 53.6(g). First published in 1979, it has been reprinted several times in many languages, generally with a new foreword by the current Director of International Protection and updated lists of States parties, and in recent editions, a compilation of UNHCR ‘Guidelines’ on selected issues of interpretation, which are referred to below. The content, however, is unchanged, being based on material and analysis available at the date of preparation, including UNHCR experience, State practice in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and relevant literature. The *Handbook* has been widely circulated and approved by governments and is frequently referred to in refugee status proceedings throughout the world; however, courts citing it, even with approval, commonly note that it is not binding. See also, UNHCR, ‘Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees’ (Apr. 2001).

²⁰ *UNHCR Handbook* (n 3) paras. 195–205.

²¹ *R v Governor of Brixton Prison, ex p. Ahsan* [1969] 2 QB 222, 233 (Goddard LCJ).

²² For example, did war service cause or contribute to cancer of the gullet leading to death? Cf. *Miller v Minister of Pensions* [1947] 2 All ER 372.

²³ *Fernandez v Government of Singapore* [1971] 1 WLR 987. The Court considered and applied s. 4(1)(c) of the Fugitive Offenders Act 1967 which provided: ‘A person shall not be returned under this Act ... if it appears ... that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion,

nationality or political opinion.’ See now, UK Extradition Act 2003, ss. 13, 81.

²⁴ *Fernandez v Government of Singapore* (n 23) 993–4. Cf. the quantification of future losses, both pecuniary and non-pecuniary, which courts undertake in personal injury claims; see for example, *Davies v Taylor* [1972] All ER 836, *Jefford v Gee* [1970] 2 QB 130.

²⁵ *Fernandez v Government of Singapore* (n 23) 994.

²⁶ This point is made in somewhat different fashion in *T v Secretary of State for the Home Department* [1996] AC 742, 755 (Lord Mustill).

²⁷ On approaches to fact-finding across civil, criminal, and administrative matters in Canadian jurisprudence, see generally Evans, H. C., *Refugee Law’s Fact-Finding Crisis: Truth, Risk and the Wrong Mistake* (2018).

²⁸ *Fernandez v Government of Singapore* (n 23) 994. This test remains applicable to ss. 13 and 81 of the Extradition Act 2003: see *Hilali v The National Court, Madrid* [2006] EWHC 1239 (Admin), [2006] 4 All ER 435, 449; *Government of Rwanda v Nteziryayo & Others* [2017] EWHC 1912 (Admin) para. 387 (although each uses the formulation ‘reasonable grounds for thinking’ in place of ‘substantial grounds for thinking’). Cf. art. 2, Draft Convention on Territorial Asylum, proposing a ‘definite possibility of persecution’ as the criterion for the grant of asylum; also art. 3, CAT 84; art. 3, ECHR 50.

²⁹ This approach should not be confused with ‘balancing’ (on which see further Ch. 4, s. 5.3.2), but reflects the inherent uncertainties in the nature of refugee claims and in the assessment of both personal and background information.

³⁰ See further below n 38.

³¹ *INS v Stevic* 467 US 407 (1984); Weinman, S. C., ‘*INS v. Stevic*: A Critical Assessment’ (1985) 7 HRQ 391.

³² The Board of Immigration Appeals (BIA) hears appeals, among others, against the decisions of immigration judges pertaining to asylum; it is housed under the Department of Justice, Executive Office for Immigration Review. See <http://www.usdoj.gov/eoir> for decisions of the BIA and the Attorney General—the ‘Virtual Law Library’.

³³ *Acosta*, 19 I&N Dec. 211 (BIA, 1985).

³⁴ *Ibid.*, 226.

³⁵ Cf. *Bolanos-Hernandez v Immigration and Naturalization Service*, 767 F.2d 1277 (9th Cir., 1984, as amended on denial of rehearing and rehearing *en banc*, 14 Jun. 1985). The Court of Appeals held that while evidence of a general level of violence was not alone enough, the uncontested evidence of a threat to the applicant’s own life was sufficient to establish a likelihood of persecution. The documentary evidence submitted also illustrated the likely fate of those who refused to cooperate with the non-governmental forces, and that the guerrillas had both the ability and the will to carry out their threats; to require further corroborative evidence would impose an impossible burden.

³⁶ 480 US 421 (1987).

³⁷ See *UNHCR Handbook* (n 3) para. 42: ‘In general, the applicant’s fear should be

considered well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there' (emphasis added). See also, Gibney, M., 'A "Well-founded Fear" of Persecution' (1988) 10 *HRQ* 109.

³⁸ *INS v Cardoza-Fonseca* ([n 36](#)) 431.

³⁹ Ibid., 428–9. The '*non-refoulement*' provision of US law has been changed on a number of occasions. Section 243(h) of the INA initially simply empowered the Attorney General to withhold deportation if of the opinion that the individual would be subject to persecution. This was amended by the 1980 Refugee Act to require that the Attorney General, 'shall not deport or return' any such individual, if he or she determines that that person would be persecuted. However, s. 241(b)(3)(A) now reverts to discretionary mode, to provide that the Attorney General, 'may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion': INA, s. 241(b)(3), 8 USC § 1231(b)(3). Moreover, the discretionary element in asylum—an applicant bears the burden of proving not only statutory eligibility but also that he or she merits asylum—was enhanced under the Trump administration.

⁴⁰ *INS v Cardoza-Fonseca* ([n 36](#)) 429, n 8.

⁴¹ Ibid., 430–1.

⁴² Ibid., 431.

⁴³ Ibid., 452.

⁴⁴ In their own way, both *Acosta* ([n 33](#)) and *Bolanos-Hernandez* ([n 35](#)) underline the importance of personal testimony and documentary evidence.

⁴⁵ Cf. Inter-American Court of Human Rights, *Velásquez Rodríguez* (Forced Disappearance and Death of Individual in Honduras, 29 Jul. 1988): (1989) 28 *ILM* 291—with respect to the standard of proof, international jurisprudence recognizes the power of the courts to weigh the evidence freely. The standard adopted should take into account the seriousness of the finding; not only direct, but also circumstantial evidence, indicia and presumptions may be considered, and are especially important where the type of repression is characterized by attempts to suppress all information and the State controls the means to verify acts occurring within territory.

⁴⁶ A similar approach has been taken in many complementary protection cases. See further [Ch. 7](#), s. 3.5.

⁴⁷ [1989] 2 FC 680, 683. Speaking for the Court, MacGuigan J said: 'It was common ground that the objective test is not so stringent as to require a *probability* of persecution. In other words, *although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not ...*' This test was endorsed by the Supreme Court of Canada in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, para. 120 (expressing preference for the formulation 'serious possibility'). See also *Salibian v MEI* [1990] 3 FC 250; *Arrinaj v*

Minister for Citizenship and Immigration [2005] FC 773; *Li v Minister for Citizenship and Immigration* [2003] FC 1514; *Begollari v Minister for Citizenship and Immigration* [2004] FC 1340; *Sakthivel v Canada (Citizenship and Immigration)* [2015] FC 292.

⁴⁸ Loi sur l’asile 1998, art. 7(1) ‘Preuve de la qualité de réfugié’. The article continues : ‘2. La qualité de réfugié est vraisemblable lorsque l’autorité estime que celle-ci est hautement probable. 3. Ne sont pas vraisemblables notamment les allégations qui, sur des points essentiels, ne sont pas suffisamment fondées, qui sont contradictoires, qui ne correspondent pas aux faits ou qui reposent de manière déterminante sur des moyens de preuve faux ou falsifiés.’

⁴⁹ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379—real, that is, substantial chance includes less than 50 per cent likelihood. The *Migration Act* 1958, s. 5J (meaning of *well-founded fear of persecution*) applies the ‘real chance’ test.

⁵⁰ *R v Secretary of State for the Home Department, ex p. Sivakumaran* [1988] 1 AC 958, 1000 (Lord Goff), 994 (Lord Keith). The Administrative Appeals Court of Hesse (Federal Republic of Germany) ruled that the test of persecution was a ‘reasonable likelihood’: *Hessischer Verwaltungsgerichtshof*, 13 UE 1568/84 (2 May 1990). The *Tribunal Supremo* of Spain has also ruled that asylum seekers coming from countries in turmoil need only establish a *prima facie* case in order to qualify for asylum or be granted refugee status: *Tribunal Supremo, Recurso de apelación 2403/88: La Ley*, vol. X, No. 2276 (1989); *Aranzadi*, Tomo LVI, v. III (1989).

⁵¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

⁵² The Qualification Directive or the recast Qualification Directive bind 26 of the 27 EU Member States. Denmark opted out of both the original and recast Directives, in accordance with arts. 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5, and the Treaty establishing the European Community [2002] OJ C325/33: Qualification Directive, recital (40); and recast Qualification Directive, recital (51). Ireland opted out of the recast Directive: see recast Qualification Directive, recital (50). The UK withdrew from the EU in 2020.

⁵³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (13 Jul. 2016) COM(2016) 466 final.

⁵⁴ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final (23 Sep.

2020) 3.

⁵⁵ The European Commission's initial proposal for a recast Directive notes its aim 'to ensure a higher degree of harmonisation and better substantive and procedural standards of protection, on the present legal basis, towards the establishment of a common asylum procedure and a uniform status': Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 final (21 Oct. 2009) 3.

⁵⁶ Ibid., 2–3. The 2016 Regulation Proposal notes that '[w]hile the existing recast Qualification Directive has contributed to some level of approximation of the national rules, it appears that recognition rates still vary between Member States and there is equally a lack of convergence as regards decisions on the type of protection status granted by each Member State' and 'a considerable variation among Member States' policies in the duration of the residence permits granted, as well as regards to access to rights': European Commission ([n 54](#)) at 3–4 (citations omitted).

⁵⁷ See, for example, discussion in Peers, S., 'Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive' (2012) 14 *EJML* 199; Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016) Ch. 5.

⁵⁸ Recast Qualification Directive, art. 7(1)–(2). See also recast Directive Proposal ([n 55](#)) 6 (proposing the language 'effective and durable'), and its Annex, setting out a detailed explanation of the proposal (at 3). Costello considers the amendments to art. 7(2) to be a 'compromise outcome': Costello ([n 57](#)) 201, see also 227, citing European Parliament, Committee Civil Liberties, Justice and Home Affairs, *Report on the proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast)* (COM(2009) 0551–C7–0250/2009–2009/0164(COD)) (14 July 2011). The Report's Explanatory Statement notes that '[t]here is a strongly held view in the [European Parliament] that, in principle, only states can be viewed as actors of protection: international bodies do not have the attributes of a state and cannot be parties to international conventions', and that the changes proposed to the original article 'aim to strengthen the requirements demanded of non-state actors if they are to be viewed as able to deliver effective and durable (now non-temporary) protection': at 39.

⁵⁹ Recast Qualification Directive, art. 7(1)(b) and recital (26) (with art. 7(1)(b) noting that protection may be provided by 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State'). See further recast Directive Proposal ([n 55](#)) Annex, 3; s. 4.3.

⁶⁰ UNHCR's suggestion to remove the reference to non-State actors in art. 7, on the basis that 'non-State actors in principle should not be considered actors of protection', as they 'do not have the attributes of a state and do not have the same obligations under international law', was not taken up by the drafters, despite receiving support from the European

Economic and Social Committee: see ‘UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 (21 October 2009)’ (2010) 5; ‘Opinion of the European Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted” (recast) COM(2009) 551 final/2 — 2009/0164 (COD)’ 2011/C 18/14 (2011) 4.2. See also [ECRE](#), [*Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive*](#) (2 Mar. 2010) 6–8; ‘ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)’ (undated) 6–7 (criticizing the decision to retain ‘non-State actors’ and noting that such actors are ‘extremely unlikely’ to fulfil the requirements of effective and non-temporary protection in practice). This issue is discussed further below at s. 4.3.1.

⁶¹ In contrast, art. 8 of the original Qualification Directive stipulated merely that ‘the applicant can reasonably be expected to stay in that part of the country’. Amendments to the Recital of the recast Qualification Directive further provide that internal protection should be ‘effectively available’; that there is a presumption against the availability of effective protection when the State or its agents are the persecutory actors; and that, in the case of unaccompanied minors, ‘the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available’: see recital (27). See also Hathaway & Foster ([n 4](#)) 343.

⁶² See further discussion in s. 6.2.1 below.

⁶³ See *Salah Sheekh v The Netherlands*, App. No. 1948/04 (ECtHR, 11 Jan. 2007) para. 141. See also recast Directive Proposal ([n 55](#)) 12; Peers ([n 57](#)) 212; Eaton, J., ‘The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive’ (2012) 24 *IJRL* 765.

⁶⁴ Recast Qualification Directive, art. 9(3). See further recast Directive Proposal ([n 55](#)) 7–8.

⁶⁵ The recast Qualification Directive provides that ‘[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’: art. 10(d). In contrast, the original Qualification Directive provided that ‘[g]ender related aspects *might* be considered, *without by themselves alone creating a presumption for the applicability of this Article*’ (emphasis added). See also recast Qualification Directive, recital (30), and further Peers ([n 57](#)) 213.

⁶⁶ Namely, that a group's members share an innate characteristic, common unchangeable background, or characteristic or belief so fundamental that they should not be forced to renounce it, *and* possess a 'distinct identity ... perceived as being different by the surrounding society': art. 10(d). See further [n 404](#) below.

⁶⁷ 'Purported', as it is hard to conceive how such a reduction in benefits could be carried out 'within the limits' of CSR 51 without falling foul of CSR 51, art. 3: see original Qualification Directive, art. 20(6). The corresponding clause on limiting the benefits of those holding subsidiary status has also been deleted: see original Qualification Directive, art. 20(7).

⁶⁸ Art. 23 of the recast Qualification Directive removes Member States' previous right to 'define the conditions applicable' to the provision of family members' benefits under arts. 24–34.

⁶⁹ Art. 24 (providing that beneficiaries of subsidiary protection, and their family members, are entitled to a 'renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years'). Under the original Qualification Directive, holders of subsidiary protection were only entitled to a one-year renewable permit. See further Peers ([n 57](#)) 216.

⁷⁰ Art. 25 (creating a general requirement to issue travel documents to beneficiaries and removing the prior caveat that Member States were only required to issue such documents '[w]hen serious humanitarian reasons arise that require [the beneficiary's] presence in another State').

⁷¹ Art. 30 (removing Member States' previous discretion to 'limit health care granted to beneficiaries of subsidiary protection to core benefits': compare original Qualification Directive, art. 30).

⁷² See arts. 26 and 34 (providing equal access to refugees and beneficiaries of subsidiary protection). See Peers ([n 57](#)) 217–18.

⁷³ See further [Ch. 7](#), s. 6.

⁷⁴ The recast Qualification Directive removes the requirement that a minor child be 'dependent' and adds as a category 'the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried': see art. 2(j). See also recital (19); Peers ([n 57](#)) 207–8; also Ippolito, F. & Velluti, S., 'The Recast Process of the EU Asylum System: A Balancing Act between Efficiency and Fairness' (2011) 30(3) *RSQ* 24, 45; recast Directive Proposal ([n 55](#)) 23.

⁷⁵ Arts. 11 and 16. See Peers ([n 57](#)) 214; [Ch. 4](#).

⁷⁶ Adding references to 'victims of human trafficking' and 'persons with mental disorders' to the indicative list of 'vulnerable persons' in art. 20(3).

⁷⁷ Art. 22, providing that such information shall be 'in a language that they understand or are reasonably supposed to understand'. Compare art. 22, original Qualification Directive ('in a language likely to be understood by them'). See further Peers ([n 57](#)) 215.

⁷⁸ Art. 31(5).

⁷⁹ See Peers ([n 57](#)) 205–6.

⁸⁰ The 2016 Regulation Proposal intends to pursue further harmonisation by providing for more prescriptive rules: European Commission ([n 54](#)) 4–5. See UNHCR’s comments and recommendations: ‘UNHCR comments on the European Commission Proposal for a Qualification Regulation—COM(2016) 466’ (Feb. 2018) 9–10 (on applicant obligations), 15–16 (on internal protection), 22–3.

⁸¹ See Recast Qualification Directive, recital (10) and art. 3; and Costello, noting a ‘worrying tendency to treat the [Qualification Directive] as embodying a ceiling rather than a floor of rights’: Costello ([n 57](#)) 201, and also 31.

⁸² See Costello ([n 57](#)) 198–203; Peers ([n 57](#)) 208. On the original Qualification Directive, see Lambert, H., ‘The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law’ (2006) 55 *ICLQ* 161; Klug, A., ‘Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?’ (2004) 47 *German Yearbook of International Law* 594; also, Gil-Bazo, M.-T., ‘Refugee Status, Subsidiary Protection and the Right to be granted Asylum under EC Law’ *New Issues in Refugee Research*, Research Paper No. 136 (2006).

⁸³ Recast Qualification Directive, recitals (3)–(4). These words also appear in the original Qualification Directive (recitals (2)–(3)) and are taken from the Presidency Conclusions, Tampere European Council 15 and 16 October 1999 (Tampere Conclusions) para. 13; text in (1999) 11 *IJRL* 738. The Conclusions also identified the aim of ‘an open and secure European Union, *fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments*, and able to respond to humanitarian needs on the basis of solidarity’: *ibid.*, para. 4 (emphasis added).

⁸⁴ Recast Qualification Directive, recital (10). See also para. 8, recalling that ‘considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes’ and the intention to ‘offer a higher degree of protection’.

⁸⁵ Recast Qualification Directive, recitals (12), (14); arts. 1, 3. Peers notes that this is despite the fact that the EU now has the competence fully to harmonize EU law, in accordance with art. 78, TFEU: Peers ([n 57](#)) 204.

⁸⁶ See general discussion of *sur place* claims in s. 5.1.1.

⁸⁷ Recast Qualification Directive, recitals (25), (30)–(31), (37).

⁸⁸ On which see further [Ch. 7](#), s. 6.

⁸⁹ Recast Qualification Directive, recital (35); cf. the scope of human rights protection described in [Ch. 7](#).

⁹⁰ Recast Qualification Directive, recital (48).

⁹¹ See further [Ch. 7](#), s. 6.

⁹² See further s. 5.1.2.

⁹³ See [n 75](#).

⁹⁴ 1969 Vienna Convention on the Law of Treaties ([n 19](#)) art. 41(1)(b).

⁹⁵ *Report of the International Law Commission on its 18th Session* (4 May–19 July 1966) 63, para. (9)—comment to draft art. 35, later art. 40; in its view, this requirement flowed ‘directly from the obligation assumed by the parties to perform the treaty in good faith’.

⁹⁶ *Report of the International Law Commission* ([n 95](#)) 65, paras. (1)–(3).

⁹⁷ Art. 41(2) provides: ‘Unless ... the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.’ The phrase ‘illegitimate modifications’ is used in the ILC Commentary to draft art. 37, the precursor to art. 41: (1966) II *Yearbook of the International Law Commission* 235.

⁹⁸ The earlier ‘Spanish Protocol’ purported not to amend the Convention, but to establish a rebuttable presumption that all Member States are ‘safe countries of origin’: Declaration relating to the Protocol on asylum for nationals of Member States of the European Union: OJ C340 (10/11/1997) 141; see also the declaration by Belgium at 144. Bribosia, E. & Weyembergh, A., ‘Extradition et asile: vers un espace judiciaire européen?’ (1997) *Revue belge de droit international* 69.

⁹⁹ Among others, the ‘logic’ would seem to imply EU-wide recognition of status granted in any of its parts, and effective implementation of Convention rights and standards within the Community as a whole.

¹⁰⁰ On the question of the ‘primacy’ of the Convention and the international obligations of Member States, see Lambert ([n 82](#)) 183–90; Gil-Bazo ([n 82](#)).

¹⁰¹ UNHCR *Handbook* ([n 3](#)) paras. 51–65; Grahl-Madsen ([n 3](#)) 188–216; Hathaway & Foster ([n 4](#)) 182–6; Zimmermann, A. & Mahler, C., ‘Article 1 A, para. 2’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 219. In the Rome Statute, persecution is defined as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 7(2)(g). However, this definition is specific to the context of art. 7, namely ‘crimes against humanity’, being acts ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’: art. 7(1). On the distinction between persecution as a crime and as a protective concept, see further s. 4.2.1.

¹⁰² See Maiani, F., ‘The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach’ in *Les Dossiers du Grihl: Les dossiers de Jean-Pierre Cavallé, De la persécution* (Feb. 2010) (while also recognizing, conversely, that this indeterminacy leaves the definition ‘vulnerable to restrictive interpretations, or even to manipulation’).

¹⁰³ See, for example, efforts to ‘identify definitional features’ in Storey, H., ‘Persecution: Towards a working definition’, in Chetail, V. & Bauloz, C., *Research Handbook on International Law and Migration* (2014) 459, 461, 516–17; and Storey, H., ‘What Constitutes

Persecution? Towards a Working Definition' (2014) 26 *IJRL* 272.

¹⁰⁴ Hathaway & Foster ([n 4](#)) 183. This approach is described as both flexible and capable of providing ‘guidance based on objective principle’: *ibid.* It was presented in Hathaway, J. C., *The Law of Refugee Status* (1991) 102–5.

¹⁰⁵ Hathaway & Foster ([n 4](#)) 195, n 78. The authors note that ‘the phrase “sustained or systemic” has occasionally been misunderstood as necessarily requiring a risk of repeated harm (hence excluding one-off harm such as death). However, this has mostly now been understood to be an error’: *ibid.*, 195, n 78. For earlier critique of the ‘sustained and systemic’ approach on the basis of its presumed exclusion of a ‘single-harm’ risk, see Zimmermann & Mahler ([n 101](#)) 348–49 and *Storey, ‘Persecution: Towards a working definition’* ([n 103](#)) 472–3. In this respect, the ‘sustained and systemic’ approach now seems more aligned to the language of the recast Qualification Directive: see art. 9(1)(a) (‘an act must ... be sufficiently serious by its nature or repetition’). But compare Migration Act 1958 (Australia), s. 5J(4) (‘[p]ersecution must involve systematic *and* discriminatory conduct’) (emphasis added). Compare also Canada and New Zealand, which each stick closely to the art. 1A(2) definition: Immigration and Refugee Protection Act (Canada), s. 96; Immigration Act 2009 (New Zealand), s. 129(1). See further discussion in the text below.

¹⁰⁶ See, for example, Hathaway & Foster ([n 4](#)) 193–208 (directing attention to whether a ‘generally accepted right *as codified in international law* is, on the facts of the case, at risk of being violated’. While recognizing that there will be cases where ‘a threat is so far at the margins of a rights violation as to amount to a *de minimis* harm’, they consider such cases will be ‘exceptional’: *ibid.*, 204, 206). Compare Zimmermann & Mahler ([n 101](#)) 350, 353; *Storey, ‘Persecution: Towards a working definition’* ([n 103](#)) 475–8, 517. See also Hathaway’s original four-tier model in Hathaway ([n 104](#)) 108–12. For discussion of the particular question of socio-economic rights, see Zimmermann & Mahler ([n 101](#)) 356–7; Hathaway & Foster ([n 4](#)) 203–4; Foster, M., *International Refugee Law and Socio-Economic Rights* (2007) Ch. 3.

¹⁰⁷ Hathaway & Foster ([n 4](#)) 183–6; see also *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 653 (Lord Hoffmann), accepting the formulation in the 1998 Refugee Women’s Legal Group *Gender Guidelines for the Determination of Asylum Claims in the U.K* that ‘Persecution = Serious Harm + The Failure of State Protection’.

¹⁰⁸ *Refugee and Protection Officer v CV and CW* [2017] NZLR 585, 592, agreeing with the Tribunal’s approach in *DS (Iran)* [2016] NZIPT 800788, para. 126, which rejected the argument that a ‘real chance of a breach of a human right ... of a sustained or systemic nature’ was sufficient to meet the requirement of ‘being persecuted’ under the refugee definition, without any further assessment of a risk of ‘serious harm’: para. 111. The Tribunal considered that the Hathaway formulation was ‘best regarded as *epexegetic* of “being persecuted”, and not a replacement or substitute definition for the express Convention term’: para. 125.

¹⁰⁹ Cf. *UNHCR Handbook* ([n 3](#)) para. 51: ‘[i]t may be inferred that a threat to life or

freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.'

¹¹⁰ The Convention requires a linkage between the act and a public official or other person acting in an official capacity. In *R v TRA* [2019] UKSC 51, [2019] 3 WLR 1073, 1103, para. 76, the UK Supreme Court found (by 4-1) that art. 1 was ‘sufficiently wide to include conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control’.

¹¹¹ The Committee against Torture’s practice in reviewing State action in matters of refusal of admission and removal of those whose return may lead them to face the risk of torture contributes significantly to the consolidation of ‘human rights-based protection’; see further Ch. 7.

¹¹² See, for example, art. 16, CAT 84; art. 7, ICCPR 66; art. 3, ECHR 50; art. 5, ACHR 69; art. 5, ACHPR 81; art. 8, ArabCHR 04; all texts in Brownlie, I. & Goodwin-Gill, G. S., eds., *Brownlie’s Documents on Human Rights* (6th edn., 2010).

¹¹³ The last-mentioned may be illustrative of the protection due to the conscientious objector but, in our view, it is not exhaustive; see further s. 6.1.1. See also, on the interpretation of art. 9 under the original Qualification Directive, Joined Cases C-71/11 and C-99/11 *Germany v Y & Z* (CJEU, Grand Chamber, 5 Sep. 2012); Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X, Y, & Z* (CJEU, 4th Chamber, 7 Nov. 2013).

¹¹⁴ Recast Qualification Directive, art. 9(2)(f).

¹¹⁵ Recast Qualification Directive, art. 9(3) (emphasis added). See also recital (29). Compare the 2004 Qualification Directive, art. 9(3). For discussion see IARLJ-Europe/EASO, ‘Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis’ (2016) 45 (noting that ‘[w]ith this addition, newly introduced by the [recast Qualification Directive], Article 9(3) addresses the issue of a causal link if persecution is inflicted by non-State actors alone or a combination of non-State and State actors’); Lehmann, J. M., ‘Availability of Protection in the Country of Origin: An Analysis under the EU Qualification Directive’, in Bauloz and others, eds., *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (2015) 137 (noting that while the definition of persecution remains rooted in harm, rather than a ‘harm + a failure of state protection’ approach, the amendment to art. 9(3) ‘effectively adopts the approach taken by the UK in *Shah and Islam*’). See n 107 and discussion in s. 3.1 above.

¹¹⁶ See discussion in recast Directive Proposal (n 55) 6–7, cited in IARLJ-Europe/EASO (n 115). ECRE considers that the amendment ‘significantly strengthens the protection of persons in situations where the risk of persecution emanates from non-State actors’, noting the particular case of gender-based persecution: ECRE Information Note on the Directive 2011/95/EU (n 60) 8.

¹¹⁷ Migration Act, s. 5J(4)(b)–(c).

¹¹⁸ Migration Act, s. 5J(5) (previously s. 91R(2)). Cf. *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, (2000) 204 CLR 1—High Court of Australia: a single act may suffice and it is not necessary to show systematic persecution. See also Migration and Refugee Division Legal Services, Administrative Appeals Tribunal, ‘A Guide to Refugee Law in Australia’ (2020) Ch. 4 (updated Aug. 2020), 11–13 <https://www.aat.gov.au/guide-to-refugee-law-in-australia>, noting that *Ibrahim* ‘remains law insofar as the meaning of “systematic” is concerned’, despite predating the enactment of s. 91R and s. 5J: at 13.

¹¹⁹ Migration Act, s. 5J(4)(a) (emphasis added).

¹²⁰ Migration Act, s. 5J(1)(b). See also *Chan v Minister for Immigration and Ethnic Affairs* (ⁿ 49). Storey critiques an earlier version of this statutory definition, as seeking to ‘fix on a definition of persecution without regard to whether it reflects this term’s universal definition. Indeed, its aim would appear to be to prevent judges from trying to achieve a universal definition’: Storey, ‘What Constitutes Persecution?’ (ⁿ 103) 274–5, citing Edwards, A., ‘Tampering with Refugee Protection: The Case of Australia’ (2003) 15 *IJRL* 192, 203.

¹²¹ Migration Act, s. 5J(6). See discussion of the origins of this provision (previously in s. 91R(3) of the Migration Act) in *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40, (2009) 238 CLR 642, 662–3, paras. 41–5 (Crennan and Kiefel JJ).

¹²² This passage (from the first edition of this work) was not clearly understood by Urie JA in *Canada (Attorney General) v Ward* [1990] 2 FC 667 (Federal Court of Appeal). He said that it was important to avoid confusing ‘the determination of persecution and ineffective protection’, that ‘the two concepts must be addressed and satisfied independently,’ and that the absence of protection did not serve as a presumption of persecution (at 680–1). On appeal, the Supreme Court of Canada, quoting the passage in the text, stated that having established that the claimant has a fear, the decision-maker is ‘entitled to presume that persecution will be *likely* and the fear *well-founded* if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution … The presumption is not a great leap … Of course, the persecution must be real —the presumption cannot be built on fictional events—but the *well-foundedness* of the fears can be established through the use of such a presumption’: *Canada (Attorney General) v Ward* [1993] SCR 689, 708 (emphasis in original). See also *Zalzali v Canada (Minister for Employment and Immigration)* [1991] 3 FC 605.

¹²³ See Grah-Madsen (ⁿ 3) 193, quoting Zink’s ‘restrictive’ interpretation.

¹²⁴ *Ibid.*, citing the liberal interpretations of Weis (ⁿ 4): ‘other measures in disregard of human dignity’; and Vernant, J., *The Refugee in the Post-War World* (1953) 8: ‘severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights’.

¹²⁵ Cf. Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 66–87.

¹²⁶ *Barcelona Traction* case [1970] ICJ Rep. 3, at 32.

¹²⁷ Cf. art. 15(2) ECHR 50; art. 4 ICCPR 66; art. 27 ACHR 69; But see also Meron, T., ‘On a Hierarchy of International Human Rights’ (1987) 80 *AJIL* 1; Weil, P., ‘Towards Relative Normativity in International Law?’ (1985) 77 *AJIL* 413.

¹²⁸ Art. 6, ICCPR 66.

¹²⁹ Ibid., art. 7.

¹³⁰ Ibid., art. 8.

¹³¹ Ibid., art. 15.

¹³² Ibid., art. 16. See ⁿ 1.

¹³³ Ibid., art. 18.

¹³⁴ Ibid., art. 9.

¹³⁵ Ibid., art. 17.

¹³⁶ ‘Enmity’ or ‘malignity’ is not necessary: see, in the High Court of Australia, *S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25, (2004) 217 CLR 387, 401, para. 38 (Gleeson CJ, Gummow and Kirby JJ).

¹³⁷ As was done by President Amin in the case of the Ugandan expulsions in 1972.

¹³⁸ *Foreign Language Press, The Hoa in Vietnam* (1978) 12.

¹³⁹ Cf. Amnesty International, *1980 Report*, 241–6; *1982 Report*, 249–52.

¹⁴⁰ Grahl-Madsen includes ‘removal to a remote or designated place within the home country’ in a list of measures which may amount to persecution: (ⁿ 3) 201.

¹⁴¹ Osborne, M., ‘Indochinese refugees: causes and effects’ (1980) 56 *International Affairs* 37, 38–44.

¹⁴² Human Rights Council, ‘Report of the independent international fact-finding mission on Myanmar’: UN doc. A/HRC/42/50 (42nd sess., 9–27 Sep. 2019) para. 80. See also paras. 23–5, 89–90 (noting that ‘[t]he Tatmadaw and ethnic Rakhine continue to prevent farmers from cultivating their lands and deliberately target their sources of food, including by burning paddy fields, confiscating farming and fishing tools, confiscating rice and other food stocks, and deliberately killing or confiscating livestock, such as cows, goats and chickens.’)

¹⁴³ Prosecutor v Tihomir Blaškić (ⁿ 145) paras. 149, 158, 167, 183, 185. For the other crimes listed in art. 5, see ⁿ 145 above. The Appeals Chamber in *Blaškić* (ⁿ 145), also approved the finding that the crime of persecution had developed in customary international law to encompass acts including ‘murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5’ (at para. 143, citing *Prosecutor v Kupreškić and Others*, Case IT-95-16 (14 Jan. 2000) Trial Chamber II, para. 615; see also paras. 580–1).

¹⁴⁴ Para. 3 defines ‘gender’ as follows: ‘For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’

¹⁵⁰ For text of the ICC Statute, see <https://www.icc-cpi.int/>. The *Elements of Crimes* in

relation to art. 7(1)(h) emphasize, ‘1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights ... 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.’ International Criminal Court, *Elements of Crimes* (2013) 7: <https://www.icc-cpi.int/>. In *Kupreškić* (n 148) paras. 580–1, the Trial Chamber considered that the art. 7(1)(h) limitation in the ICC Statute was ‘not consonant with customary international law’; relying on art. 10 of the same Statute, it declined to adopt such an interpretation for the purposes of the ICTY. The International Law Commission’s draft articles on Crimes against Humanity also contain a ‘connection’ requirement: International Law Commission, ‘Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading: Prevention and punishment of crimes against humanity’ (71st sess., 29 Apr.–7 Jun. & 8 Jul.–9 Aug. 2019), art. 2(1)(h). Amnesty International has criticized the draft article as being both inconsistent with customary international law, and more restrictive than the Rome Statute: [Amnesty International](#), [‘International Law Commission: The Problematic Formulation of Persecution under the Draft Convention on Crimes Against Humanity’](#) (Oct. 2018). The draft article as provisionally adopted at second reading, which post-dates Amnesty’s report, does not extend to a connection with war crimes, genocide, or the crime of aggression, while the Rome Statute encompasses a connection with ‘any crime within the jurisdiction of the Court’.

¹⁴³ See, for example, the *Nuremberg Trial Proceedings*, vol. 1, Indictment: Count One: <http://www.yale.edu/lawweb/avalon/avalon.htm>.

¹⁴⁴ Art. 5(h). For the ICTY Statute and reports of judgments, see <https://www.icty.org/>. Art. 5 of the Statute, ‘Crimes against humanity’, also lists (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape... and (i) other inhumane acts. See also Statute of the International Tribunal for Rwanda, art. 3: SC res. 955 (8 Nov. 1994) Annex.

¹⁴⁵ *Prosecutor v Tihomir Blaškić*, Case IT-95-14-A (29 Jul. 2004) Appeals Chamber, paras. 131–5. This formula has been repeated in several other decisions; see, for example, *Prosecutor v Dario Kordić and Mario Čerkez*, Case IT-95-14/2-A (17 Dec. 2004) Appeals Chamber, paras. 105–9; *Prosecutor v Vojislav Šešelj*, MICT-16-99-A (11 Apr. 2018) Appeals Chamber, Mechanism for International Criminal Tribunals, para. 159. The Appeals Chamber for the International Criminal Tribunal for Rwanda has adopted the same formula: see *Nahimana v Prosecutor*, Case No. ICTR-99-52-A (28 Nov. 2007) Appeals Chamber, para. 985, cited in *Prosecutor v Vojislav Šešelj*. See also *Popović and Others*, IT-05-88 (30 Jan. 2015) Appeals Chamber, paras. 761–2. Art. 3 of the Statute of the International Criminal Tribunal for Rwanda also provides for jurisdiction with regard to ‘persecutions on political, racial and religious grounds’. However, it does not employ the language of ‘armed conflict’,

but requires that crimes against humanity be ‘committed as part of a widespread and systematic attack against any civilian population on *national, political, ethnic, racial or religious grounds*’ (emphasis added).

¹⁴⁶ ‘Discriminatory intent’ is unique to the crime of persecution and is not an element in other crimes against humanity, such as murder; see *Prosecutor v Tadić*, Case IT-94-1 (15 Jul. 1999) Appeals Chamber, paras. 287–92, 305. The same has been held by the International Criminal Tribunal for Rwanda; see *Prosecutor v Akayesu*, ICTR-96-4 (1 Jun. 2001) Appeals Chamber, paras. 460–9. See also *Mugesera v Canada* [2005] SCC 40, Supreme Court of Canada (28 Jun. 2005) paras. 142–3.

¹⁴⁷ *Prosecutor v Tihomir Blaškić* ([n 145](#)) para. 143. In *Nahimana and Others v Prosecutor* ([n 145](#)) para. 985, the Appeals Chamber noted that ‘not every act of discrimination will constitute the crime of persecution; the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under article 3 of the Statute’ (citations omitted). Although persecution generally refers to a series of acts, a single act can be enough: *Prosecutor v Mitar Vasiljević*, Case IT-98-32-A (25 Feb. 2004) Appeals Chamber, para. 113; and while the ‘gravity test’ will only be met by gross or blatant denials of fundamental rights, the relevant acts must be considered in context and in light of their cumulative effect: *Prosecutor v Radoslav Brđanin*, IT-99-36-T (1 Sep. 2004) Trial Chamber II, paras. 996–7, 1032–48.

¹⁵¹ Cf. SC res. 819 (1993) (16 Apr. 1993) para. 5, in which the Security Council, ‘Reaffirms that any taking or acquisition of territory by threat or use of force, including through the practice of “ethnic cleansing”, is unlawful and unacceptable’; and para. 7, in which it ‘Reaffirms its condemnation of all violations of international humanitarian law, in particular the practice of “ethnic cleansing” and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts’.

¹⁵² *Mugesera v Canada* ([n 146](#)) paras. 146, 150. Referring to the importance of interpreting domestic law in accordance with the principles of customary international law and with Canada’s international obligations, the Court noted the specific relevance of sources such as the jurisprudence of international criminal tribunals: para. 82. On the issue of hate speech as persecution, see also *Nahimana and Others v Prosecutor* ([n 145](#)) paras. 986–8 (considering ‘the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity’, and ultimately concluding that ‘hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution’); and *Prosecutor v Šešelj*, MICT-19-99-A (11 Apr. 2018) paras. 159, 163 (noting the Tribunal’s approach in *Nahimana* and finding that ‘Šešelj’s speech rises to a level of gravity amounting to the *actus reus* of persecution as a crime against humanity’). On exclusion generally, see further [Ch. 4](#), s. 5.

¹⁵³ *Prosecutor v Milorad Krnojelac*, IT-97-25 (17 Sep. 2003) Appeals Chamber, paras. 220–2. In *Brđanin*, the Trial Chamber was careful to distinguish in its use of terms between ‘deportation’, which it considered to require crossing an international border; and ‘forcible

transfer’, which did not: *Prosecutor v Radoslav Brđanin* (n 147) paras. 541–4. It appears generally agreed that the illegality of deportation or transfer does not depend on removal to a particular destination: *Krnojelac*, *ibid.*, para. 218; *Prosecutor v Milomir Stakić*, IT-97-24-T (31 Jul. 2003) Trial Chamber II, para. 677.

¹⁵⁴ *Prosecutor v Simić and Others*, IT-95-9 (17 October 2003) Trial Chamber I, para. 125 (internal citations and emphasis omitted). The Trial Chamber further observed that, ‘what matters is the personal consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons’: *ibid.*, para. 128.

¹⁵⁵ *Ibid.*, para. 126.

¹⁵⁶ Türk, V., ‘Non-State Agents of Persecution’, in Chetail, V. & Gowlland-Debbas, V., eds., *Switzerland and the International Protection of Refugees* (2002) 95; Kälin, W., ‘Non-State Agents of Persecution and the Inability of the State to Protect’ (2001) 15 *Georgetown Immigration Law Journal* 415; Anker (n 4) §§ 4:8–11; Wilsher, D., ‘Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?’ (2003) 15 *IJRL* 68; Yeo, C., ‘Agents of the State: When is an Official of the State an Agent of the State?’ (2002) 14 *IJRL* 509; Moore, J., ‘From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents’ (1999) 31 *Columbia Human Rights Law Review* 81; Zimmermann & Mahler (n 101) 362 ff.; Hathaway & Foster (n 4) 303–7; UNHCR, ‘Guidance Note on Refugee Claims relating to Victims of Organized Gangs’ (Mar. 2010). See also the definition of ‘actors of persecution’ in the recast Qualification Directive, art. 6. Persecution for reasons of race or religion will often spring from hostile sections of the populace, while that for reasons of political opinion will more commonly derive from direct, official action. See Cons. d’Etat, *Dankha* (27 mai 1983) 42,074; CRR, *Duman* (3 avr. 1979) 9,744, cited in Tiberghien (n 4) 247, 394, respectively; also CRR, Section réunies (8 juin 1999) 315.503, *M. L.*—refugee status recognized where authorities tolerated threats and attacks on Christians by Islamic extremists.

¹⁵⁷ See *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, (2002) 210 CLR 1, 12–13, paras. 27–9, Gleeson CJ noting that the Convention does not refer to any particular type of persecutor, but to persecution, that is, conduct of a certain character which may include the actions of non-State agents. The Convention also does not specify *where* the threat or persecution must take place. Tiberghien, F., ‘Le lieu d’exercice des persecutions’: *Doc. réf.* no. 67 (6/15 mars 1989) 1–5—notes acceptance of the idea that a threat or other act committed in France can be equated with persecution in the country of origin, for example, (1) where the authorities of the country of origin undertake their activities abroad through groups which they control or manipulate; (2) where the persecutor is the country of residence, and the country of origin does not protect. Cf. Conseil d’Etat (4 dec. 1987) 61.376, *Urtiaga Martinez*, *ibid.*, 3—Basque threatened in France by group tolerated or encouraged by Spanish authorities, and name found on list in possession of suspected counter-terrorist group member; refugee status upheld.

¹⁵⁸ In the view of the *Ad hoc* Committee in 1950, ‘ “[u]nable” refers primarily to stateless

refugees but includes also refugees possessing a nationality who are refused passports or *other* protection by their own government': Report of the *Ad hoc* Committee: UN doc. E/1618, para. 39.

¹⁵⁹ These categories expressly include international organizations: see recast Qualification Directive, art. 6(c).

¹⁶⁰ Recast Qualification Directive, art. 7(1); see also recital (26). Protection can only be provided where the actor is 'willing and able to offer protection in accordance with [art. 7(2)]', which further provides that protection must be 'effective and of a non-temporary nature' and is 'generally provided' when the responsible authorities 'take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection'. See further s. 3.1, and s. 4.3.1. See also Ch. 1, s. 4.

¹⁶¹ Grahl-Madsen (ⁿ 3) 189; see also Hathaway & Foster (ⁿ 4) 288–332.

¹⁶² Grahl-Madsen (ⁿ 3) 192. For a brief discussion of earlier French doctrine on the source of persecution, see the second edition of this work, 72–3. The law has now been changed; see the Loi no. 2003–1176 (10 déc. 2003; Code de l'entrée et de séjour des étrangers et du droit d'asile <http://www.legifrance.gouv.fr/>.

¹⁶³ By 'State responsibility' is understood the body of principles which determines when and how one State may be liable to another for breach of an international obligation deriving either from treaty or from customary law. See also, in particular, Clapham, A., *Human Rights Obligations of Non-State Actors* (2006), generally and at 335–41.

¹⁶⁴ See the International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', annexed to UNGA res. 56/83 (12 Dec. 2001); also, Crawford, J., *State Responsibility: The General Part* (2013); Brownlie, I., *System of the Law of Nations: State Responsibility, Part I* (1983) 159–79.

¹⁶⁵ In *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668, the Court held that in an appeal against removal on art. 3 ECHR 50 grounds it had to assess whether there was a 'real risk' of harm on return, and whether that harm amounted to prohibited ill-treatment. It held further that where non-State agents were the source of harm, it would not constitute art. 3 ill-treatment *unless* the State in addition failed to provide 'a reasonable level of protection': 676–7, paras. 22–4.

¹⁶⁶ Note, however, that a successful insurrectional movement is liable for its activities *before* its assumption of power; see 'Articles on the Responsibility of States for Internationally Wrongful Acts' (ⁿ 164) art. 10(1); Borchard, E. M., *The Diplomatic Protection of Citizens Abroad* (1915) 241; *Bolívar Railway Co. Case (Great Britain v Venezuela)* Ralston's Report, 388, 394 (Umpire Plumley).

¹⁶⁷ Recast Qualification Directive, art. 7(1)–(2). The original Qualification Directive also accepted that 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State' could be actors of protection, but did

not include the provisos that such entities must be ‘willing and able to offer protection in accordance with [art. 7(2)]’ and that such protection must be ‘effective and of a non-temporary nature’: compare original Qualification Directive, art. 7.

¹⁶⁸ Joined Cases C-175/08, C-176/08, C-178/08, and C-179/08 *Abdulla v Bundesrepublik Deutschland* (CJEU, Grand Chamber, 2 Mar. 2010) para. 101, see also paras. 75–6; Errera, R., ‘Cessation and Assessment of New Circumstances: a Comment on *Abdulla*, CJEU, 2 March 2010’ (2011) 23 *IJRL* 521; Costello ([n 57](#)) 206–9.

¹⁶⁹ See references in [n 60](#) above. See also Hathaway & Foster ([n 4](#)) 289–92, 329; O’Sullivan, M., ‘Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?’ (2012) 24 *IJRL* 85 (arguing that the relationship between the individual and the State entails that ‘only states and state-like bodies can provide “protection” under refugee law’: at 109); ‘Response (James Hathaway)’, in Hathaway, J. C. & Storey, H., ‘What is the Meaning of State Protection in Refugee Law? A Debate’ (2016) 28 *IJRL* 480, 485–6 (arguing that ‘[i]t is completely at odds with the object and purpose of the [CSR 51] to require an individual to entrust his or her welfare to the efforts of some entity that, whatever its past record or *de facto* authority or power, bears no ongoing legal duty to protect anyone’), and ‘Surrebuttal (James Hathaway)’, at 491. But compare ‘Argument (Hugo Storey)’, at 482–4 (noting, *inter alia*, that ‘it remains an important axiom that protection is not to be defined so that it can only be afforded by a liberal democratic State’) and ‘Rebuttal (Hugo Storey)’, at 489.

¹⁷⁰ Recast Qualification Directive, recital (3). See also recitals (4), (22)–(24). Recital (22) also provides that ‘[c]onsultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention’. See further s. 3.1 above.

¹⁷¹ UNHCR comments on the Regulation Proposal ([n 80](#)) 14. Recent experience in Kosovo and elsewhere illustrates the difficulty of holding international organizations and even UN-authorized entities and operations to account for violations of human rights: Nowicki, M., Chinkin, C., & Tulkens, F., ‘Final Report of the Human Rights Advisory Panel’ (2017) 28 *Criminal Law Forum* 77; Nowak M., ‘Enforced Disappearance in Kosovo. Human Rights: Advisory Panel Holds UNMIK Accountable’ (2013) 18 *EHRLR* 275; Ryngaert C., ‘The Accountability of International Organizations for Human Rights Violations: The Cases of the UN Mission in Kosovo (UNMIK) and the UN “Terrorism Blacklists”’, in Fitzmaurice, M. & Markouris, P., eds., *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications* (2012) 73.

¹⁷² The ‘drafting history’ includes, in particular, debates in the United Nations Economic and Social Council (ECOSOC) in 1950, the two sessions of the *Ad hoc Committee on Statelessness and Related Problems* (in January–February and August 1950; the Committee was renamed the *Ad hoc Committee on Refugees and Stateless Persons*), and the Conference of Plenipotentiaries which settled the final text of the Convention in July 1951.

¹⁷³ See UN doc. E/AC.32/L.6/Rev.1 (30 Jan. 1950).

¹⁷⁴ See UN doc. E/AC.32/SR.18, para. 10 (31 Jan. 1950)—Mr Robinson (emphasis added).

¹⁷⁵ See UN doc. E/1618 (17 Feb. 1950) Annex.

¹⁷⁶ For reasons that are not clear, US law employs ‘on account of’ in preference to ‘for reasons of’ in its statement of the refugee definition: 8 USC § 1101(a)(42). This harkens back to one of the first US contributions to the definitions debate in 1950; see United States of America, ‘*Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)*’: UN doc. E/AC.32/L.4 (18 Jan. 1950).

¹⁷⁷ This is the sense of Acosta ([n 33](#)) and accompanying text, in which the BIA emphasized the relevance of ‘a belief or characteristic a persecutor seeks to overcome’, and of the persecutor having ‘the inclination to punish’ the claimant. Referring to persecution for reasons of political opinion in the *Ward* case, the Supreme Court of Canada noted that the ‘examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution’: see [n 122](#) at 740 f. See also, Kälin, W., Comment on Bundesverfassungsgericht (BRD) v. 10.7.1989—2 BvR 502/86 u.a. (EuGRZ 1989, S.444–455); *Asyl*, 1990/4, 13; *INS v Elias-Zacarias*, 502 US 478 (1992); 908 F.2d 1452 (9th Cir., 1990); Case Abstract No. *IJRL/0114* (1992) 4 *IJRL* 263; Anker, D., Blum, C. P., & Johnson, K. R., ‘*INS v. Zacarias: Is There Anyone Out There?*’ (1992) 4 *IJRL* 266; von Sternberg, M. R., ‘Emerging Bases of “Persecution” in American Refugee Law: Political Opinion and the Dilemma of Neutrality’ (1989) 13 *Suffolk Transnational Law Journal* 1; Storey, ‘What Constitutes Persecution?’ ([n 103](#)) 285 (proposing that ‘whether there is a well-founded fear of being persecuted is a matter to be approached from the perspective of the persecutor’).

¹⁷⁸ See the United States draft: UN doc. E/AC.32/L.4, para. B. Cf. the views of the United Kingdom: UN docs. E/AC.32/SR.6, para. 5; E/AC.32/L.2/Rev.1.

¹⁷⁹ See UN doc. E/AC.32/SR.18, paras. 10–16 (Mr Robinson); art. 1C(5), (6) CSR 51; and further [Ch. 4](#), s. 3.4.

¹⁸⁰ Strictly speaking, the refugee must also be without the protection of any other nationality which he or she may possess, or be able to ‘activate’; see further s. 5.1.2; also, Taylor, S., ‘Protection Elsewhere/Nowhere’ (2006) 18 *IJRL* 283.

¹⁸¹ See United States law: 8 USC §1101(a)(42)(B). UK immigration rules on asylum have been held not to apply to a refugee in a third country (*Secretary of State v Two citizens of Chile* [1977] Imm AR 36) or to a would-be refugee in his or her country of origin (*Secretary of State v X (a Chilean citizen)* [1978] Imm AR 73). On the lawfulness of immigration controls applied by UK officials in a foreign country with a view to preventing potential asylum seekers travelling to the UK, see *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2005] 2 AC 1, and further [Ch. 8](#), s. 4.3.2. Even if the Immigration Rules do not apply, the requirements of procedural fairness may provide a basis on which to challenge decisions under particular policies or programmes intended to benefit refugees and asylum seekers outside the UK; see, with particular

reference to children located in the ‘Jungle’ in Calais, *R (MK) v Secretary of State for the Home Department* [2019] EWHC 3573 (Admin); *R (Help Refugees Limited) v Secretary of State for the Home Department* [2018] EWCA Civ 2098; *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; *R (AM and Others) v Secretary of State for the Home Department* [2018] EWCA Civ 1815. On ‘in-country’ processing, see Higgins, C., ‘Safe Journeys and Sound Policy: Expanding protected entry for refugees’ (Kaldor Centre for International Refugee Law, Policy Brief 8, Nov. 2019) 10–14. See also [Ch. 10](#), s. 2.4, on protected entry procedures.

¹⁸² On the question of *non-refoulement* and the rejection of refugees at the frontier, see further [Ch. 5](#), s. 2; [Ch. 6](#), s. 1.1.

¹⁸³ While recognizing the ‘extraordinary weight of authority’ on this point, Hathaway and Foster argue that a bipartite approach to well-founded fear ‘is neither desirable as a matter of principle, nor defensible as a matter of international law’ and that ‘the concept of well-founded fear is rather inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear’: 92 (citations omitted). This argument, and the not unreasonable view that what is meant is not so much ‘fear’ as ‘apprehension’ or ‘anticipation’ regarding future events (at 105–6) is also developed at some considerable length in Hathaway, J. C. & Hicks, W. S., ‘Is there a Subjective Element in the Refugee Convention’s Requirement of “Well-founded Fear”?’, (2005) 26 *Michigan Journal of International Law* 505; in practice, however, decision-makers do not tend to make much of the subjective issue. See also, in the context of disability, Crock, M., Ernst, C., & McCallum, R., ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2013) 24 *IJRL* 735, 743; Motz, S., *The Refugee Status of Persons with Disabilities* (2020).

¹⁸⁴ The relevance or value of such an exercise is highly questionable in cases involving minority or mental disturbance. On children, see further s. 6.3.

¹⁸⁵ [UNHCR Handbook](#) (n 3) paras. 37–41.

¹⁸⁶ As others also have done, Hathaway & Foster (n 4) 91–181, note that any premise that applicants ‘found not to be credible necessarily lack subjective fear is fundamentally illogical’ and while ‘the testimony of a non-credible applicant cannot be relied upon to establish an actual risk of being persecuted, the required evidence of risk frequently exists separately from, and apart from, the applicant’s testimony’: at 101–2.

¹⁸⁷ On the assessment of claims, see further [Ch. 11](#), s. 4.

¹⁸⁸ The *Ad hoc* Committee referred to a refugee as a person who ‘has either actually been a victim of persecution or can show good reasons why he fears persecution’: UN doc. E/1618, 39. Evidence of past persecution alone has been considered sufficient in some circumstances; for example, in *Chen*, 20 I&N Dec. 16 (BIA, 1989), the Board of Immigration Appeals held that past persecution established a rebuttable presumption of reason to fear future persecution. This position is now part of US asylum regulations; see 8 CFR §208.13(b),

which provides that an applicant ‘may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution’, and that an ‘applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim’: 8 CFR § 208.13(b)(1). The presumption is rebuttable if the Service shows, by a preponderance of the evidence, that a fundamental change of circumstances has occurred, or that the applicant could relocate to another part of the country: 8 CFR §§ 208.13(b)(1)(i)(A)–(B), 208.13(b)(1)(ii). See further Anker ([n 4](#)) §§ 2:17–25. Cf. *Fernandopulle v Minister of Citizenship and Immigration* (2005) FCA 91, (2005) 253 DLR (4th) 425—no presumption that past persecution establishes well-founded fear as to the future.

[189](#) Art. 4(3) of the recast EU Qualification Directive emphasizes that an application for protection is to be carried out on an individual basis, with account taken of, among others, relevant country of origin information and the applicant’s position and personal circumstances, as it were, in context. Previous persecution or threats of harm are ‘a serious indication’ of well-founded fear, ‘unless there are good reasons to consider’ that they will not be repeated: art. 4(4). See also art. 4(5), on the benefit of the doubt. The *UNHCR Handbook* suggests that ‘[d]etermination of refugee status will … primarily require an evaluation of the applicant’s statements rather than a judgement on the situation prevailing in his country of origin’ (paras. 37, 42). This apparent attempt to ‘depoliticize’ the process in no way reflects the practical reality of refugee determination, however, which is precisely an essay in the assessment and evaluation of the situation prevailing in the country of origin. On the sources and uses of documentary information, see further [Ch. 11](#), s. 4.2.

[190](#) [1999] EWCA Civ 3000; see also *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360; Goodwin-Gill, G. S., ‘Comment: Refugee Status and “Good Faith”’ (2000) 12 *IJRL* 663; Hathaway & Foster ([n 4](#)) 80–90; Mathew, P., ‘Limiting Good Faith: “Bootstrapping” asylum seekers and exclusion from refugee protection’ (2010) 29 *Australian Year Book of International Law* 13; Hely, B., ‘A lack of good faith: Australia’s approach to bootstrap refugee claims’ (2008) 4 *Journal of Migration and Refugee Issues* 66. On political activity, see also s. 5.2.5.

[191](#) For this reason, relying on the fact that an applicant has not sought asylum at the earliest possible moment as a justification for rejection where there may nonetheless be objective reasons for considering that he or she has a well-founded fear of being persecuted is also suspect. In *Bula v Minister of Home Affairs* [2011] ZASCA 209, the Supreme Court of Appeal of South Africa rejected the argument that an application could be considered to be lacking in good faith ‘upfront’ (i.e., before consideration of the merits), simply because the appellants ‘had not used the first available opportunity to indicate their intention to apply for asylum’: see para. 75–7. The Court’s finding was based on the principle of legality, as ‘once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play’: paras. 79–80.

[192](#) *UNHCR Handbook* ([n 3](#)) para. 96.

[193](#) The various appeals are summarized in *Danian v Secretary of State for the Home*

Department [1999] EWCA Civ 3000.

¹⁹⁴ See, for example, *Refugee Appeal*: 2254/94 *Re HB* (21 Sep. 1994). In 2010 the RSAA was replaced by the Immigration and Protection Tribunal.

¹⁹⁵ As recognized by the RSAA in *Refugee Appeal*: 70720/97 (30 Jul. 1998).

¹⁹⁶ Grahl-Madsen ([n 3](#)) 248, 251–2.

¹⁹⁷ Hathaway ([n 104](#)) 35, 38, 59 (for discussion of *Danian* ([n 193](#)) in the second edition of that work, see Hathaway & Foster ([n 4](#)) 87–8); for more detailed analysis, see Goodwin-Gill ([n 190](#)). See also US practice: Anker ([n 4](#)) § 2:7 (noting that while in ‘early years ... *sur place* claims were more highly scrutinized than other claims’, with adjudicators ‘often finding (or assuming) that applicants engaged in activities ... within the United States for the sole purpose of gaining asylum’, ‘[c]urrent jurisprudence treats *sur place* claims as relatively uncontroversial’: citations omitted).

¹⁹⁸ See, for example, *Refugee Appeal No.* 70100/96 (28 Nov. 1997); see also *Refugee Appeal No.* 2226/94 (16 Oct. 1996). But see now Immigration Act 2009 (NZ), ss. 134(3), 140, 197, and 200, discussed below.

¹⁹⁹ See *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.

²⁰⁰ [1999] FCA 868, especially paras. 27–8, 31; *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, [2000] FCA 576-FCA FC; *Minister for Immigration and Multicultural Affairs v Farahanipour* (2001) 105 FCR 277, [2001] FCA 82 —FCA FC. However, as discussed below and at [n 207](#), Australian legislation now reflects the approach taken in *Somaghi* ([n 199](#)). Cf., in Ireland, in the context of subsidiary protection, *H.M. v Minister for Justice and Law Reform* [2012] IEHC 176, para. 39. The Court noted that ‘the question to be considered is not whether the applicant converted in good faith but whether this conversion will be viewed from the eyes of an Afghani religious judge and if so what would count as conversion in their eyes.’ The Court concluded that while a genuine convert could not be expected to conceal their faith, an ‘opportunistic converter’ was unlikely to come to the attention of the authorities.

²⁰¹ [1996] 1 WLR 507.

²⁰² Ibid., 513.

²⁰³ Ibid. See also the judgment of Ward LJ at 516–17; *H.M. v Minister for Justice and Law Reform* [2012] IEHC 176, para. 59; *F.V. v Refugee Appeals Tribunal* [2009] IEHC 268.

²⁰⁴ See Hathaway & Foster ([n 4](#)) 80–5; Mathew ([n 190](#)) 140–41 (on the recast Qualification Directive) and 146–54 (on former s. 91R(3) of the Australian Migration Act 1958, now contained in s. 5J(6) of the Act, and discussed further at [n 207](#)).

²⁰⁵ Immigration Act 2009 (NZ), s. 134(3). See also s. 140 (providing that an officer must not consider a subsequent claim unless the officer is satisfied that the change in one or more of the circumstances was not brought about by the claimant ‘acting otherwise than in good faith ... for a purpose of creating grounds for recognition’); ss. 197 and 200 (with respect to appeals).

²⁰⁶ Migration Act 1958 (Aust.), s. 5J(6) (emphasis added). Before amendments to the Migration Act in December 2014, this principle was included in s. 91R(3) of the Act. The background to the enactment of s. 91R(3) is set out in *Minister for Immigration and Citizenship v SZJGV* ([n 121](#)) 661–3 (Crennan and Kiefel JJ), who note that ‘[t]here can be little doubt that s 91R(3) was inserted into the Act to quell the controversy which had arisen by reason of decisions of the Federal Court and that the view expressed in *Somaghi* was to prevail’: at 664. See further Hathaway & Foster ([n 4](#)) 85, n 408; Migration and Refugee Division Legal Services, Administrative Appeals Tribunal ([n 118](#)) Ch. 3 (updated Nov. 2020) 17–23, 34–5; Mathew ([n 190](#)) 146–54.

²⁰⁷ Recast Qualification Directive, art. 4(3)(d).

²⁰⁸ Ibid., art. 5(3). Compare the UK Immigration Rules, para. 339P, intended to transpose the original Qualification Directive, which states: ‘A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on … activities which have been engaged in by a person since they left the country of origin … in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin’. In *YB (Eritrea)* ([n 190](#)), the Court found that the Qualification Directive does not ‘simply shut[] out purely opportunistic claims … and it could probably not have adopted such a rule consistently with the governing definition of a refugee in art. 1A of the Convention’: at para. 14 (Sedley LJ, with whom Wilson LJ and Tuckey LJ agreed). It recognized, however, that art. 5(3) ‘perhaps oddly’ allowed for ‘“subsequent”—that is, presumably, repeat—applications to be excluded if these are based on activity *sur place*, whether opportunistic or not’: ibid. The Court concluded that under art. 5(2), ‘activities other than bona fide political protest can create refugee status *sur place*’: para. 15. See also discussion in Mathew ([n 190](#)) 141–2; and s. 5.2.5.

²⁰⁹ See further, Ch. 13.

²¹⁰ See report of the *Ad hoc* Committee: UN doc. E/1618, 39: ‘The Committee agreed that for the purposes [of this provision], and therefore the draft Convention as a whole, “unable” refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or other protection by their own government. “Unwilling” refers to refugees who refuse to accept the protection of the government of their nationality.’ A number of decisions, particularly in Canada, have recognized that ‘inability’ also describes the situation of claimants who cannot obtain protection, for example, because the government or authorities of their country are non-existent, ineffective, or in active or passive collusion with the persecutors; see *Zalzali* ([n 122](#)); *Garcia v Minister of Citizenship & Immigration* 2007 FC 79.

²¹¹ See also, *UNHCR Handbook* ([n 3](#)) paras. 107–8 (describing the provision as ‘largely self-explanatory’); Zimmermann & Mahler ([n 101](#)) 281, 442–3, paras. 583–8.

²¹² See also ss. 91N(6), 91P, 91Q. By contrast with many other States party to the 1951 Convention, the question whether a person is a dual national and has effective protection in consequence is left to the unreviewable discretion of the Minister. The background to the

legislation is discussed in *NBLC v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 272, paras. 51–9.

²¹³ *MZXLT & Anor v Minister for Immigration & Anor* [2007] FMCA 799, paras. 89–99, 102; see also, Kirby J in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 190–193, paras. 94–9.

²¹⁴ *Jong Kim Koe v Minister for Immigration and Ethnic Affairs* (1997) 74 FCR 508, [1997] FCA 306.

²¹⁵ *SRPP v Minister of Immigration and Ethnic Affairs* [2000] AATA 878, paras. 108–9.

²¹⁶ *Williams v Canada (Minister of Citizenship and Immigration)* [2005] 3 FCR 429 (FCA), 2005 FCA 126, para. 22.

²¹⁷ Compare two ‘Law of Return’ cases, *Grygorian v Canada (Minister of Citizenship and Immigration)* (1995) 33 Imm LR (2d) 52 (FCTD) and *Katkova v Canada (Minister of Citizenship and Immigration)* (1997) 40 Imm LR (2d) 216 (FCTD). In the first case, protection was denied even though the claimant had never expressed an intention to immigrate to Israel and had never lived there, but in the second case, the Court accepted that the desire to settle in Israel was a prerequisite to immigration and that the Israeli Minister of the Interior had a discretionary power to deny citizenship.

²¹⁸ *FER17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCAFC 106. The Court considered s. 5 of the Migration Act, which defines ‘receiving country’ for the purpose of delimiting Australia’s protection obligations and refers to ‘a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country’.

²¹⁹ Ibid., paras. 39–57, 61–4.

²²⁰ This interpretation may appear to be confirmed indirectly by Article 1E of the 1951 Convention and by Article 1(1)(ii) of the 1954 Convention, both of which provide that the relevant treaty shall not apply to one who has taken residence in another country and who, although not formally a citizen, nonetheless is ‘recognized’ by the competent authorities as having the rights and obligations of a national of that country. Article 12(1)(b), recast Qualification Directive incorporates very similar wording.

²²¹ Cf. Art. 15 UDHR 48: ‘1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.’

²²² *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289. On the facts, the Court clearly considered the appellant to be an Ethiopian citizen of Eritrean ethnic origin, who was not at risk of persecution in Ethiopia but was trying to turn herself into a refugee by not seeking the protection of her embassy and applying for the documents which would enable her to return.

²²³ Ibid., para. 52.

²²⁴ Ibid., para. 83.

²²⁵ Ibid., para. 50 (Elias LJ).

²²⁶ In the simplest of terms, the well-founded fear of persecution is the primary consideration, from which unwillingness or inability to avail oneself of the protection of one's country follows, not the other way around.

²²⁷ See, generally, Kim, S., 'Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada' (2016) 28 *IJRL* 85; Wolman, A. & Li, G., 'Saeteomin Asylum Seekers: The Law and Policy Response' (2015) 27 *IJRL* 327; Wolman, A., 'North Korean Asylum Seekers and Dual Nationality' (2013) 24 *IJRL* 93; Chan, E. & Schloenhardt, A., 'North Korean Refugees and International Refugee Law' (2007) 19 *IJRL* 215.

²²⁸ The legal situation in fact is rather more complex; see *KK and Others (Nationality: North Korea) Korea CG* [2011] UKUT 92, paras. 21–31.

²²⁹ *NBLC v Minister for Immigration & Multicultural & Indigenous Affairs* ([n 212](#)) para. 45.

²³⁰ *KK and Others* ([n 228](#)) para. 82.

²³¹ Ibid., paras. 78–9, 83–4.

²³² Ibid., para. 91. This decision was upheld in *Secretary of State for the Home Department v SP (North Korea) & Others* [2012] EWCA Civ 114, in which the Court of Appeal took note also of evidence that, in practice, South Korean policy when deciding citizenship and support questions is to ascertain whether the person in question actually wants to live there: para. 18.

²³³ Afdeling Bestuursrechtspraak van de Raad van State/Dutch Council of State, Administrative Jurisdiction Division, Case 201404877/1/V2 (18 Jul. 2014). The United States has legislated to avoid these issues, and provides expressly that North Koreans are eligible for asylum and resettlement in the United States, and that they 'are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea': North Korean Human Rights Act of 2004, Pub. L. No. 108–333, 118 Stat. 1287. Eligibility for resettlement in the United States does not apply, however, to North Koreans who have in fact availed themselves of the right to citizenship in South Korea; see *In re K-R-Y and K-C-S, Respondents*, 24 I&N Dec. 133 (BIA, 2007) Interim Decision # 3560.

²³⁴ See [Ch. 13](#), s. 1.2.

²³⁵ *MK v Secretary of State for the Home Department* [2017] EWHC 1365 (Admin) para. 34. In the context of statelessness, where the evidence indicates the existence of a 'realistic prospect' of protection being available through the acquisition or reacquisition of nationality, UNHCR acknowledges that 'transitional' arrangements may be appropriate: [UNHCR, Handbook on the Protection of Stateless Persons](#) (2014) paras. 154–7.

²³⁶ A stateless person has been defined as 'a person who is not considered as a national by any State under the operation of its law' in art. 1, 1954 Convention relating to the Status of Stateless Persons: 360 UNTS 117. See further [Ch. 13](#). There is no historical, textual or commonsensical basis for the view that because a stateless person is not 'returnable' to his or her country of former habitual residence, so he or she is not in danger of being *refouled* and

therefore cannot be a refugee. Indeed, the first decades of refugee law and organization were premised precisely on the ‘returnability’ of the stateless, hence the inclusion of a return clause in the Nansen passports with which they were issued. Art. 1(1)(b) of the 1938 Convention concerning the Status of Refugees coming from Germany, for example, expressly took account of the fact that stateless persons previously resident in that country were also among those persecuted by the Third Reich. See also the third edition of this work; *Desai v Canada (Minister of Citizenship and Immigration)* [1994] FCJ No. 2032; also, New Zealand, RSAA, *Refugee Appeal* No. 73861 (30 Jun. 2005); Foster, M. & Lambert, H., *International Refugee Law and the Protection of Stateless Persons* (2019) 99.

²³⁷ Fischer Williams, J., ‘Denationalization’ (1927) 8 *BYIL* 45; *Religious Minorities in the Soviet Union* (Minority Rights Group, Report No. 1, rev. edn., 1977) 18–20.

²³⁸ [1997] 77 FCR 421, 428 (Federal Court of Australia). For recognition of a similar anomaly during the 1951 Conference and an amendment to ensure equality of treatment by reference to the relevant causal events, namely, ‘events occurring before 1 January 1951’, see UN doc. A/CONF.2/SR.34, 12 (Mr Hoare); the British amendment was adopted by 17 votes to none, with three abstentions.

²³⁹ See, for example, Decision of the Austrian Administrative Appeals Court in *A. v Ministry of Internal Affairs*, Verwaltungsgerichtshof (29 Jan. 1986) 84/ 01/0106, SlgNF 12.005(A) 47–50. Also, Decision of the Administrative Court of Berlin (3 Nov. 1989) No. VG 10 A 4.88.

²⁴⁰ Immigration and Refugee Protection Act 2001, s. 96(b).

²⁴¹ *Thabet v Canada (Minister of Citizenship and Immigration)* [1998] 4 FC 21, para. 17. See also *Al-Anezi v Minister for Immigration & Multicultural Affairs* [1999] FCA 355, (1999) 92 FCR 283 (Federal Court of Australia).

²⁴² *Revenko v Secretary of State for the Home Department* [2001] QB 601, [2000] 3 WLR 1519, paras. 1–75 (Pill LJ). No consideration of the interpretation of art. 1A(2) with regard to stateless persons would be complete without a reading of the judgment of Katz J in *Minister for Immigration and Ethnic Affairs v Savvin* [2000] FCA 478, [2000] 171 ALR 483. See now also art. 2(d), recast Qualification Directive.

²⁴³ In *AL (Myanmar)* [2018] NZIPT 801255, the New Zealand Immigration and Protection Tribunal suggested that, ‘the interpretation of “nationality” in Article 1A(2) of the Refugee Convention should mirror the approach under Article 1 of the 1954 Stateless Persons Convention’: para. 135. For the reasons set out below, this is neither necessary nor persuasive. See generally, Lambert, H., ‘Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status’ (2015) 64 *ICLQ* 1. See also, *B.D. (Bhutan and Nepal) v Minister for Justice and Equality* [2018] IEHC 461, para. 15.

²⁴⁴ Power, S., ‘Introduction’ in Arendt, H., *The Origins of Totalitarianism* (republished 2004) xix.

²⁴⁵ Arendt (n 244) 375: ‘The calamity of the righteous is ... that they no longer belong to any community whatsoever.’

²⁴⁶ Kesby, A., *The Right to have Rights: Citizenship, Humanity and International Law* (2012) 52; *Case of the Yean and Bosico Children*, Inter-American Court of Human Rights (8 Sep. 2005) Ser. C, No. 130. See also, Weil, P., ‘From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalized world’ (2011) 9 *International Journal of Constitutional Law* 615, 622.

²⁴⁷ Cf. Hathaway & Foster (n 4) 251–2. For a contextual appreciation of ‘erasure’ from the register of permanent residents as a violation having a continuous character, see the Third Section judgment in *Kurić v Slovenia*, App. No. 26828/06 (13 Jul. 2010) paras. 305–6, 358; and the Grand Chamber’s judgment (26 Jun. 2012) para. 240; BVerwG 10 C 50.07 (26 Feb. 2007) para. 25 (statelessness as ‘continuing persecution’/‘fortdauernde Verfolgung’).

²⁴⁸ See Foster & Lambert (n 236) 30–1, 144–93.

²⁴⁹ BVerwG 10 C 50.07 (26 Feb. 2007) paras. 18, 22–5: (‘a continuing significant impairment of the person concerned’/‘eine fortdauernde erhebliche Beeinträchtigung des Betroffenen’).

²⁵⁰ *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809; referring to Article 9(2)(b) of the Qualification Directive, the Court also recognized that persecution may take the form of administrative or other measures which are discriminatory or are implemented in a discriminatory manner: paras. 51, 52, 54 (Pill LJ).

²⁵¹ Ibid., para. 75; see also paras. 66–71 (Longmore LJ).

²⁵² Fripp, E., *Nationality and Statelessness in the International Law of Refugee Status* (2016) 208: ‘Is an unlawful and arbitrary deprivation of nationality, based in discrimination on the basis of race or some other Convention reason, and effective under domestic law, to be recognised so that the denationalising State ceases to be the country of reference for the purposes of article 1A(2) CSR51?’ See also, *AL (Myanmar)* (n 243) where the tribunal, in an instance of discriminatory denial/deprivation of citizenship, declined to treat the State in question as the ‘country of reference’: para. 138.

²⁵³ See *B.D. (Bhutan and Nepal)* (n 243) para. 24: ‘The only question is whether the discriminatory and persecutory nature of a law depriving persons of nationality is relevant to the determination of citizenship for the purposes of refugee status or statelessness. It is not.’

²⁵⁴ This does not exclude the possibility that an individual made stateless might subsequently establish their habitual residence in another State; such residence does not have to be lawful and no particular duration is required, but the individual needs to have made that country the focus of their life without the authorities having taken steps to bring such residence to an end: BVerwG 10 C 50.07 (26 Feb. 2009) paras. 31–3 (for English summary see <https://www.bverwg.de/260209U10C50.07.0>); *Maarouf v Canada* [1994] 1 FC 723. See also, *B.D. (Bhutan and Nepal)* (n 243).

²⁵⁵ See generally, *UNHCR Handbook* (n 3) paras. 66–86; Grahl-Madsen (n 3) 217–53; Hathaway & Foster (n 4) 390–1 (noting that the five Convention grounds ‘embody multiple manifestations of a single idea: fundamental socio-political disenfranchisement defined by reference to core norms of non-discrimination law’); Hathaway (n 104) 135–88. The

substantive linkage to non-discrimination was recognized by the Canadian Supreme Court in *Ward* (n 122). On the specific issue, see also Vierdag, E. W., *The Concept of Discrimination in International Law* (1973); McKean, W. A., ‘The Meaning of Discrimination in International and Municipal Law’ (1970) 44 *BYIL* 177; Goodwin-Gill (n 125) 75–87; Dowd, R., ‘Dissecting Discrimination in Refugee Law: an Analysis of its Meaning and its Cumulative Effect’ (2011) 23 *IJRL* 28.

²⁵⁶ See further s. 4; s. 6.2.3.

²⁵⁷ See, for example, Dauvergne, C., ‘Women in Refugee Jurisprudence’ in Costello, Foster, & McAdam (n 12) 737, 739; Millbank, J., ‘Sexual Orientation and Gender Identity in Refugee Claims’ in Costello, Foster, & McAdam (n 12) 763–5. The Committee on the Elimination of Discrimination against Women considers that States parties to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 have an obligation to ensure that a gender-sensitive interpretation is given to all five grounds of persecution: Committee on the Elimination of Discrimination against Women, ‘General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’: UN doc. CEDAW/C/GC/32 (14 Nov. 2014) para. 30; see also para. 13.

²⁵⁸ At 30 April 2021, 182 States were parties to the 1966 Convention. ‘Descent-based communities’ encompass ‘caste and analogous systems of inherited status’: Committee on the Elimination of Racial Discrimination, ‘General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent)’ (61st sess., 2002). See also art. 10(1)(a), recast Qualification Directive (noting that ‘the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group’); Hathaway & Foster (n 4) 394, 396–7.

²⁵⁹ Achiume, E.T., ‘Race, Refugees, and International Law’ in Costello, Foster, & McAdam (n 12) 44, citing Haney López, I., *White by Law: The Legal Construction of Race* (10th edn., 2006) 10.

²⁶⁰ See Verdirame, G., ‘The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals’ (2000) 49 *ICLQ* 578, 592–4.

²⁶¹ See discussion in Zimmermann & Mahler (n 101) 378–9, and also Lingaas (n 260) 139–41, 185–6, 229–30, 232, advocating in the international criminal law context for a ‘subjective perpetrator-based approach’ to race.

²⁶² In this sense, we disagree with Zimmermann and Mahler’s note that the persecutor’s perception may be critical to deciding whether the claimant ‘belongs to a “race”’: (n 100) 379 (emphasis added). Under art. 1A(2) CSR 51, the core question is whether the claimant has a well-founded fear of persecution ‘*for reasons of* race. For a general application of this principle, see CESEDA (France) (n 6), art. 711–2 : ‘Lorsque l’autorité compétente évalue si un demandeur craint avec *raison d’être* persécuté, il est indifférent que celui-ci possède effectivement les caractéristiques liées au motif de persécution ou que ces caractéristiques lui soient seulement attribuées par l’auteur des persecutions.’ See CNDA 20 mars 2019 M. M. n°

17044999 C *Recueil 2019* 46–8: refugee status recognized in the case of a Somali, orphaned at birth, at risk of persecution because of a lack of clan membership.

²⁶³ For example, Ugandan citizens of Asian origin were persecuted and expelled in 1972: see Goodwin-Gill ([n 125](#)) 212–16. The same year, large numbers of Burundi citizens of the Hutu tribe were massacred, while many others fled into neighbouring countries: *Selective Genocide in Burundi* (Minority Rights Group, Report No. 20, 1974); cf., ‘Transition in Burundi: The Context for a Homecoming’ (US Committee for Refugees, Sep. 1993). The combination of genocidal massacres in Rwanda in 1994 and successful military resistance caused the internal and external displacement of many thousands of both Hutu and Tutsi citizens: Prunier, G., ‘La crise rwandaise: structures et déroulement’ (1994) 13(2–3) *RSQ* 13; Degni-Ségui, R., ‘Rapports sur la situation des droits de l’homme au Rwanda du 28 juin 1994 et du 12 août 1994’, *ibid.*, 116. After 1975 thousands of Vietnamese citizens of Chinese ethnic origin felt compelled, along with many others, to seek protection in the countries of South East Asia: see [Ch. 2, n 64](#), and sources cited. In apartheid South Africa, institutionalized discrimination and its politics of repression likewise contributed to large-scale exodus: ‘Human Rights, War and Mass Exodus’ *Transnational Perspectives* (1982) 11, 14. See also Tiberghien ([n 4](#)) 87 f., 329–35.

²⁶⁴ See s. 4.2. In the view of the European Commission on Human Rights, discrimination on racial grounds could, in certain circumstances, constitute degrading treatment within the meaning of art. 3 ECHR 50: Decision on Admissibility, *East African Asians v United Kingdom*, App. No. 4403/70 (Oct. 1970) 30; (1981) EHRR 76. In *Cyprus v Turkey*, App. No. 25781/94 (ECtHR, Grand Chamber, 10 May 2001) paras. 309–11, the European Court of Human Rights found that the discriminatory treatment of the Karpas Greek-Cypriot community, which could ‘only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion’, had attained a level of severity amounting to degrading treatment under art. 3 ECHR 50. Cf. *Ali v Secretary of State* [1978] Imm AR 126 (discrimination likely to be faced by Kenyan citizen of Asian origin did not amount to persecution). In *Škorjanec v Croatia*, App. No. 25536/14 (28 Mar. 2017) para. 53, the European Court of Human Rights noted that ‘[t]reating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights.’

²⁶⁵ For summary accounts of the treatment of religious minorities in different States, see the Country Reports on Human Rights Practices, submitted annually by the US Department of State to the US Congress: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/>. See also Forum 18, an NGO based in Oslo, Norway, which promotes the implementation of art. 18 UDHR 48 and art. 18 ICCPR 66, primarily in Central Asia, Russia, the South Caucasus, and Belarus: <http://www.forum18.org/>; and UNHCR Eligibility Guidelines, for example, ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’ (30 Aug. 2018) 58–65; ‘Eligibility Guidelines for Assessing the International Protection Needs of Members of Religious

Minorities from Pakistan' (Jan. 2017).

²⁶⁶ Art. 9, ECHR 50 likewise recognizes the freedom 'to hold or not to hold religious beliefs and to practise or not to practise a religion', which also implies a freedom to manifest one's religion: *Case of Ibragim Ibragimov v Russia*, App. Nos. 1413/08 and 28621/11 (ECtHR, 28 Aug. 2018) paras. 88–9; see also *Kokkinakis v Greece* (1994) 17 EHRR 397, para. 31. A distinction may however be drawn between the freedom to practise religious belief and 'improper' proselytism; see *Kokkinakis v Greece* (1994) 17 EHRR 397, paras. 33, 44, 48–9; *Larissis v Greece*, App. Nos. 140/1996/759/958–60 (ECtHR, 24 Feb. 1998) para. 45. For a studied critique of the Court's jurisprudence, see Evans, C., *Freedom of Religion under the European Convention on Human Rights* (2001); also, Temperman, J., Jeremy Gunn, T., & Evans, M., eds., *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (2019); European Court of Human Rights, '[Guide on Article 9 of the European Convention on Human Rights](#): Freedom of thought, conscience and religion' (updated 30 Apr. 2020); Janis, M. & Evans, C., eds., *Religion and International Law* (2004). On interference with the manifestation of religion, see, for example, *Ranjit Singh v France*, App. No. 27561/08 (ECtHR, 30 Jun. 2009); *Eweida v United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10 (ECtHR, 15 Jan. 2013); *S.A.S. v France*, App. No. 43835/11 (ECtHR, Grand Chamber, 1 Jul. 2014), discussed and compared with Human Rights Committee views by Lady Hale, President of the Supreme Court, in 'Religious Dress', Woolf Institute, Cambridge (28 Feb. 2019).

²⁶⁷ Human Rights Committee, 'General Comment No. 22 (48): (art. 18)': UN doc. CCPR/C/21/Rev.1/Add.4 (adopted at 48th sess., 20 Jul. 1993) para. 2.

²⁶⁸ In *NABD v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142, the High Court of Australia noted that the right legal question to ask was not whether it was possible for the claimant to live in Iran in such a way as to avoid adverse consequences, but whether the claimant had a well-founded fear of persecution in Iran on the ground of religion. See also *Wang v Minister for Immigration and Multicultural Affairs* (2000) [2000] FCA 1599, 105 FCR 548, in which the Full Court of the Federal Court of Australia held that 'religion' includes the practice of a religious faith in community with others, and that a law regulating such practice, or applying only to those practising religion, is not a law of general application. Fear of prosecution or punishment for breach of such laws can therefore give rise to a well-founded fear of persecution for a Convention reason. The fact that an applicant has brought or intends to bring into existence circumstances that give rise to a fear of persecution by an unnecessary or unreasonable voluntary act (such as worshipping at a non-registered church) may be relevant to assessing the genuineness of the claim but is not determinative of whether the fear is well-founded. The Migration Act 1958 (Aust.), s. 5J(3) now provides that a person does not have a well-founded fear of persecution if he or she 'could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country'. However, exceptions are provided for modifications that would conflict with 'a characteristic that is fundamental to the person's identity or conscience', 'conceal an innate or immutable characteristic', or, *inter alia* and

without limiting the above two categories, require the person to ‘alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith’.

²⁶⁹ UNGA res. 1781(XVII) (7 Dec. 1962).

²⁷⁰ UNGA res. 2295(XXII) (11 Dec. 1967).

²⁷¹ Article reproduced in ‘*Elimination of All Forms of Religious Intolerance, Note by the Secretary-General*’: UN doc. A/8330, 8. This article, which includes definitions of discrimination on religious grounds and of religious intolerance, was adopted by 91 votes in favour, 2 against, with 6 abstentions. See also art. 10(1)(b), recast Qualification Directive.

²⁷² Declaration adopted without vote by UNGA res. 36/55 (25 Nov. 1981); text in Brownlie & Goodwin-Gill ([n 112](#)) 74.

²⁷³ See the annual reports of the Special Rapporteur on freedom of religion or belief, for example, UN docs. A/HRC/34/50 (17 Jan. 2017) paras. 22–33, 63; A/HRC/40/58 (5 Mar. 2019); and A/HRC/37/49 (28 Feb. 2018). On developments in relation to the content of the law of freedom of thought, conscience and religion in relation to conscientious objection, see discussion in s. 6.1.1 below.

²⁷⁴ See Akram, S. M., ‘Orientalism Revisited in Asylum and Refugee Claims’ (2000) 12 *IJRL* 7; Good, A., ‘Persecution for Reasons of Religion under the 1951 Refugee Convention: An Anthropological Approach’, 2006 Elizabeth Colson Lecture, Refugee Studies Centre, Oxford; 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’: HCR/GIP/04/06 (28 Apr. 2004); Helton, A. C. & Münker, J., ‘Religion and Persecution: Should the United States Provide Refuge to German Scientologists?’ (1999) 11 *IJRL* 310; Musalo, K., ‘Claims for Protection based on Religion or Belief’ (2004) 16 *IJRL* 165; Berlit, U., Dörig, H., & Storey, H., ‘Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach’ (2015) 27 *IJRL* 649. On the particular issues raised by *sur place* claims, see s. 5.1.1. See further discussion of the ‘religion’ ground in Zimmermann & Mahler ([n 101](#)) 379–87; Hathaway & Foster ([n 4](#)) 399–405.

²⁷⁵ See general discussion of *sur place* claims in s. 5.1.1; *FG v Sweden*, App. No. 43611/11 (ECtHR, 23 Mar. 2016) para. 123; ‘Interim report of the Special Rapporteur on freedom of religion or belief’: UN doc. A/64/159 (2009) para. 24; UNHCR Guidelines on International Protection: Religion-Based Refugee Claims ([n 274](#)) paras. 34–6; Berlit, Dörig, & Storey ([n 274](#)) 553–660 (noting, however, that claims of conversion in the country of origin involve a similar approach by decision-makers: at 655).

²⁷⁶ See UNHCR Guidelines on International Protection: Religion-Based Refugee Claims ([n 274](#)) 13. See further discussion on other grounds in ss. 5.2.4.5 (particular social group—sexual orientation and gender identity claims) and 5.2.5 (political opinion).

²⁷⁷ *Germany v Y & Z* ([n 113](#)) para. 73. See further Lehmann, J. M., ‘Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law—The

Case of *Germany v. Y and Z* in the Court of Justice of the European Union' (2014) 26 *IJRL* 65; Costello (n 57) 203–4. The Court was considering the refugee definition in art. 2(c) of the original Qualification Directive, which reflects art. 1A(2) CSR 51.

²⁷⁸ *Germany v Y & Z* (n 113) para. 79, see also para. 81. See the Court's subsequent judgment on sexual orientation, discussed further in s. 5.2.4.5, finding that a decision-maker 'cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country or origin or to exercise reserve in the expression of his sexual orientation': *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113) para. 79. See also [European Commission, 'Evaluation of the application of the recast Qualification Directive \(2011/95/EU\): Final Report'](#) (2019) 92ff, noting that most Member States 'confirmed that the assessment of the reasons for persecution could not be influenced by considerations of the possibility for the applicant to behave discreetly in the country of origin in order to avoid persecution'.

²⁷⁹ See *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, 489–91, paras. 40–7 (McHugh and Kirby JJ); *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596, 647–8, para. 82 (Lord Rodger): 'If ... the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so ... If ... a material reason ... would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted'. Concurring with this proposed approach, see Lord Walker (para. 98), Lord Collins (para. 100), Lord Dyson (para. 132), and, setting out the test in his own words, Lord Hope (para. 35). See also *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 AC 152, 166–7, paras. 17–20. In its Regulation Proposal, the European Commission proposes amending art. 10 of the recast Qualification Directive to note that a decision-maker 'cannot reasonably expect an applicant to behave discreetly or abstain from certain practices, where such behaviour or practices are inherent to his or her identity, to avoid the risk of persecution in his or her country of origin': see (n 54) 13, 35; see UNHCR's comments on the Commission Regulation Proposal: (n 80) 17 (recommending the deletion of the phrase 'where such behaviour or practices are inherent to his or her identity'). For further discussion see Hathaway & Foster (n 4) 168–9, 260–1; Zimmermann & Mahler (n 101) 343–5.

²⁸⁰ For a recent application of the principle in *HJ (Iran)* (n 108) to the 'religion' ground under art. 1A(2) CSR 51, see *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302, para. 60 (Lord Justice Irwin); paras. 66–8 (Lord Justice Singh).

²⁸¹ Such denial of protection could easily arise through the haphazard workings of citizenship and immigration laws; cf. the situation of citizens of the United Kingdom and Colonies resident in East Africa, discussed in Goodwin-Gill (n 125) 101–3, 164–7. See also the following decisions of the Commission des recours des réfugiés: *Huang*, 12,935 and 13,451 (26 janv. 1982), cited by Tiberghien (n 4) 318.

²⁸² See art. 10(1)(c), recast Qualification Directive, which adds 'common geographical or political origins or [a group's] relationship with the population of another State'. Cf. *London*

Borough of Ealing v Race Relations Board [1972] AC 342, in which the Court excluded nationality from the generic term ‘national origin’. See *UNHCR Handbook*, para. 74 (‘The term “nationality” in this context is not to be understood only as “citizenship”. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term “race” ’); Hathaway & Foster (n 4) 399; Zimmermann & Mahler (n 101) 389; Grahl-Madsen (n 3) 218–19; Report of the independent expert on minority issues, McDougall, G., UN doc. E/CN.4/2006/74 (6 Jan. 2006); Capotorti, F., *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1978): UN doc. E/CN.4/Sub. 2/384/Rev. 1, 5–15, 95–6; Rights of Persons belonging to National and Ethnic, Religious and Linguistic Minorities: UN doc. E/CN.4/1994/72 (13 Dec. 1993); Pejic, J., ‘Minority Rights in International Law’ (1997) 19 *HRQ* 666; Pentassuglia, G., *Minorities in International Law* (2002). Cf. Martinez Cobo, J. R., *Study of the Problem of Discrimination against Indigenous Populations* (1979): UN doc. E/CN.4/Sub. 2/L. 707; Elles, Baroness D., *International Provisions Protecting the Human Rights of Non-Citizens* (1980): UN doc. E/CN.4/Sub. 2/392/Rev. 1, 25 f. Note art. 27 ICCPR 66: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

²⁸³ Selective Genocide in Burundi (n 263); see also the analysis in *The Two Irelands—the Double Minority* (Minority Rights Group, Report No. 2, rev. edn., 1979).

²⁸⁴ Grahl-Madsen notes that persecution for reasons of nationality is also understood to include persecution for lack of nationality, that is, by reason of statelessness: (n 3) 219. See also Hathaway & Foster (n 4) 397–9. See further on the particular situation of Palestinians Ch. 4, s. 4.2.

²⁸⁵ See UNHCR, ‘Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’: HCR/GIP/09/08 (22 Dec. 2009) para. 41, noting that ‘race’ may also be a relevant ground in such cases.

²⁸⁶ See 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’: HCR/GIP/02/02 (7 May 2002); Aleinikoff, T. A., ‘Protected characteristics and social perceptions: An analysis of the meaning of “membership of a particular social group”’, in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 263; ‘Summary Conclusions: membership of a particular social group’, in Feller, Türk, & Nicholson, *ibid.*, 312; Hathaway & Foster (n 4) 423–61; Zimmermann & Mahler (n 101) 390–8; Anker (n 4) §§ 5:40–67.

²⁸⁷ During debate on the Universal Declaration, the USSR stressed the importance of abolishing ‘differences based on social conditions as well as the privileges enjoyed by certain groups in the economic and legal fields’.

²⁸⁸ UN docs. A/CONF.2/SR.3, 14—Mr Petren (Sweden): ‘experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included’; also SR.19, 14; SR.23, 8—Swedish amendment adopted by 14–0–8; A/CONF.2/9 (text of amendments).

²⁸⁹ See *Islam v Secretary of State for the Home Department* ([n 107](#)) 651 (Lord Hoffmann): ‘the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term “particular social group” rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.’ See also Lord Hope at 657.

²⁹⁰ Women have been recognized as a particular social group in certain circumstances: see further s. 5.2.4.4 below.

²⁹¹ See further s. 5.2.4.5 below.

²⁹² See, for example, Motz ([n 183](#)); Crock, M. and others, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (2017) 153–4; Crock, M., ‘Protecting Refugees with Disabilities’, in Costello, Foster, & McAdam ([n 12](#)); Crock, Ernst, & McCallum ([n 183](#)) 750–3; Hathaway & Foster ([n 4](#)) 451–2; Foster, M., ‘The “Ground with the Least Clarity”: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’ UNHCR, Legal and Protection Policy Research Series, PPLA/2012/02 (Aug. 2012) 61–3; Anker ([n 4](#)) § 5:66. For more general protection issues related to those with disabilities, see also Executive Committee Conclusion No. 110 (2010). Claims based on disability are an archetypal example of the importance of examining the circumstances of the *individual* asylum seeker once membership of a group is determined. Crock, Ernst, & McCallum argue that ‘the fact that acts that might, for some persons, be “merely” discriminatory might, for persons with disabilities, amount to persecution’, considering that ‘[t]here is no reason why, in theory, denial of appropriate modification and adjustments cannot amount to persecution’: see 748–9. Careful attention must be given to the individual’s circumstances in their social context.

²⁹³ See, for example, Anker ([n 4](#)) § 5:67; Foster ([n 292](#)) 63; Foster ([n 106](#)) 321–3; Tazfil, R., ‘HIV-Based Claims for Protection in the U.S. and U.K.’ (2010) 33 *Hastings International and Comparative Law Review* 501.

²⁹⁴ See generally Hathaway & Foster ([n 4](#)) 436–61 (covering, in addition to gender, sexual orientation and gender identity, and disability, discussion of family, age, economic or social class, and voluntary associations, and former status or association); Zimmermann & Mahler ([n 101](#)) 396–8 (on ‘classes and castes’ as particular social groups); UNHCR, ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’ ([n 156](#)) paras. 34–44; Anker ([n 4](#)) §§ 5:44–67 (covering, *inter alia*, gang-based claims and family and clan claims).

²⁹⁵ Cf. *Prosecutor v Jelisić*, Case No. ICTY-I-95-10 (14 Dec. 1999) Trial Chamber, para.

70: ‘[i]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single out that group from the rest of the community ... It is the stigmatisation of a group as a distinct national, ethnical or racial unity by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.’ Quoted in Verdirame (n 260) 593–4. In the context of race in international criminal law, see also Lingaas (n 260) 139–41, 185–6, 229–30, 232, arguing for a ‘subjective perpetrator-based approach’.

²⁹⁶ The US Board of Immigration Appeals adopted very similar language in *Acosta* (n 33); applying the *ejusdem generis* rule, the BIA limited its understanding of the term ‘social group’ to reflect a common, immutable characteristic, that is, one which it is either beyond the power of an individual to change, or which is so fundamental to individual identity or conscience that changing it should not be required. This might include sex, class, kinship or even shared past experience, but membership of a taxi-drivers’ co-operative, or a particular manner of wage-earning, did not fall within such a class of characteristics. For an alternative view on the inappropriateness of the *ejusdem generis* rule in this context, see Goodwin-Gill, G. S., ‘Judicial Reasoning and “Social Group” after *Islam* and *Shah*’ (1999) 11 *IJRL* 537; see also McHugh J, in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4, (1997) 190 CLR 225, 263.

²⁹⁷ Many commentators have favoured a broad approach; cf. Grahl-Madsen (n 3) 219—‘the notion ... is of broader application than the combined notions of racial, ethnic and religious groups’; Helton, A. C., ‘Persecution on Account of Membership in a Social Group as a Basis for Refugee Status’ (1983) 15 *Columbia Human Rights Law Review* 39. It is not, however, a ‘catch-all’ provision: Hathaway & Foster (n 4) 424. Cf. Council of Europe Committee of Ministers Recommendation Rec(2004)9 on the concept of ‘membership of a particular social group’ (30 Jun. 2004), which recommends that the concept ‘should be interpreted in a broad and inclusive manner in the light of the object and purpose of the 1951 Convention’, although not so as to ‘extend the scope of the Convention to impose upon states obligations to which they have not consented’.

²⁹⁸ For earlier cases, cf. Grahl-Madsen (n 3) 219–20; *Lai v Minister of Employment and Immigration* [1989] FCJ No. 826—capitalist background in China resulted in persecution due to family’s social position; *De Valle v INS* 901 F.2d 787 (9th Cir., 1990)—family members of deserters manifest diverse and different life-styles and varying interests and therefore do not constitute a social group; *Ramirez-Rivas v INS* 899 F.2d 864 (9th Cir., 1990)—name association with family subject to persecution sufficient to support social group claim.

²⁹⁹ 801 F.2d 1571 (9th Cir., 1986).

³⁰⁰ UNHCR *Handbook* (n 3) para. 77; see also discussion of this terminology in *K v Secretary of State for the Home Department*; *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, 462–3, para. 98 (Lady Hale) (cases decided jointly).

³⁰¹ Cf. Helton ([n 297](#)).

³⁰² See, among others, *Cheung v MEI* [1993] 2 FC 314 (Federal Court of Appeal); *Ward* ([n 122](#)); and *Chan v MEI* [1993] 3 FC 675 (Federal Court of Appeal), *Chan v Canada (MEI)* ([n 47](#)) (Supreme Court of Canada). See also Daley, K. & Kelley, N., ‘Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence’ (2000) 12 *IJRL* 148; Kelley, N., ‘The Convention Refugee Definition and Gender-Based Persecution: A Decade’s Progress’ (2001) 13 *IJRL* 559.

³⁰³ [1993] 2 FC 314, 320; the Court in *Chan v Canada (MEI)* ([n 47](#)) considered that the bracketed words ‘more than’ had been omitted accidentally.

³⁰⁴ See *Chan v MEI* ([n 302](#)) 692–3 and *Chan v Canada (MEI)* ([n 47](#)). See McHugh J’s review of case law from different jurisdictions in *Applicant A* ([n 296](#)) 259–63. See also, US Board of Immigration Appeals, *Chang*, 20 I&N Dec. 38 (BIA, 1989), finding the birth control policy not persecutory on its face, but a matter for case-by-case evaluation. The ruling in practice was significantly modified by policy instructions and later by legislation locating the issue in ‘political opinion’, not social group. In 1996, the refugee definition section of the Immigration and Nationality Act was amended to insert at the end: ‘[a] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion’: 8 USC § 1101(a)(42)(B). Dauvergne, C., ‘Chinese Fleeing Sterilisation: Australia’s Response against a Canadian Background’ (1998) 10 *IJRL* 77.

³⁰⁵ Why the refugee claim was based on social group was never clear. The claimant’s fear was not based on membership, but on his actions in a political context, motivated by conscience; political opinion was first raised by UNHCR in its intervenor brief; see *Ward*, [1993] 2 SCR 689, 740. Also, Bagambiire, D., ‘Terrorism and Convention Refugee Status in Canadian Immigration Law: The Social Group Category according to *Ward v. Canada*’ (1993) 5 *IJRL* 183, which considers the earlier Federal Court of Appeal decision.

³⁰⁶ In *Cheung*, particular weight was attached to a woman’s reproductive liberty as a basic right fundamental to human dignity. Women in China who have more than one child were ‘united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it’: [1993] 2 FC 314, 322.

³⁰⁷ *Ward* ([n 122](#)) 739.

³⁰⁸ Thus, in the sense of the text, the government of the Socialist Republic of Vietnam announced its intention to ‘restructure’ society and abolish the ‘bourgeoisie’: [Foreign Language Press, The Hoa in Vietnam \(1978\)](#).

³⁰⁹ *Ward* ([n 122](#)) 731 (emphasis added).

³¹⁰ In one sense, the ‘grouping’ will often be independent of will, so that the requirement of

voluntary associational relationship, if adopted in all cases, not only introduces an unjustified, additional evidential burden on the claimant (under the guise of interpretation), but also departs from the jurisprudence of earlier years, admittedly sparse, which nonetheless recognized the existence of a social group among individuals, who displayed little if any voluntary association relationship with others similarly situated. See, however, La Forest J, dissenting, in *Chan* (n 47) para. 87, also quoting Macklin, A., ‘*Canada (Attorney-General) v Ward: A Review Essay*’ (1994) 6 *IJRL* 362, 375.

³¹¹ ‘Foreign governments should be accorded leeway in their definition of what constitutes antisocial behaviour of their nationals. Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted’: *Ward* (n 122) 738–9. See also *Chan* (n 47) (La Forest J, dissenting) para. 65.

³¹² *Ward* (n 122) 739.

³¹³ On the ‘family’, see also, in the United Kingdom, the judgment of Lord Hope in *Fornah* (n 300) 443–8, paras. 39–52 (Lord Hope); 451–4, paras. 61–8 (Lord Rodger); 464–6, paras. 104–7 (Lady Hale). In the United States, the Attorney General has challenged the long-standing recognition that ‘family’ may constitute a particular social group: see *Matter of L-E-A*, 27 I&N Dec. 581 (AG, 2019) (noting that ‘in the ordinary case, a nuclear family will not, without more, constitute a “particular social group” because most nuclear families are not inherently socially distinct’); and discussion in Anker (n 4) § 5:44. The tests of ‘social distinction’ and ‘particularity’, are recent innovations of the BIA that ‘have not been universally accepted by the circuit courts’: ibid., § 5:42. In *C-A-*, 23 I&N Dec. 951 (BIA, 2006), the Board of Immigration Appeals affirmed that ‘sex’ and ‘family membership’ were obvious examples of characteristics which define a social group, and that ‘social visibility’ can help to define other particular social groups. In *W-G-R, Respondent*, 26 I. & N. Dec. 208 (BIA, 2014), the BIA renamed ‘social visibility’ as ‘social distinction’, in order to clarify that the element did not require ‘ocular’ or ‘on-sight’ visibility, a construction that was found to be reasonable and accorded *Chevron* deference in *Reyes v Lynch*, 842 F.3d 1125, 1131, 1136 (USCA, 9th Cir., 2016). The 9th Circuit also found the BIA’s construction of ‘particularity’ to be reasonable, namely ‘whether the group is discrete or is, instead, amorphous’: at 1135–6, 1132, citing *W-G-R, Respondent*, 214. See also *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA, 2014); and discussion and critique in Anker (n 4) § 5:41–3, particularly her view that ‘[s]ocial distinction should be read as another way of stating the basic Acosta test’ (§ 5:43). For a recent application of these tests in the context of landownership, see *Matter of E-R-A-L-, Respondent*, 27 I&N Dec. 767 (BIA, 2020).

³¹⁴ In which case it is irrelevant that economic activity is not a matter of fundamental human rights; what counts is that the activity ‘links’ people who then, on the basis of perceptions among the ruling class or society at large, are subject to treatment amounting to persecution.

³¹⁵ *Ward* (n 122) 729; also *Chan* [1993] 3 FC 675 (FCA).

³¹⁶ See *Islam v Secretary of State for the Home Department* (n 107) 634 (Lord Steyn), 656

(Lord Hope); cf. the different formulations adopted in *Applicant A* (n 296) 263 (McHugh J), 242 (Dawson J), 286 (Gummow J).

³¹⁷ See Macklin (n 310) 371–8.

³¹⁸ As McHugh J remarked in *Applicant A* (n 296) 264, ‘while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society’. For that reason also, ‘To identify a social group, one must first identify the society of which it forms a part’: *Islam v Secretary of State for the Home Department* (n 107) 652 (Lord Hoffmann). Lord Hope said: ‘The word “social” means that we are being asked to identify a group of people which is recognised as a particular group by society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised’: *ibid.*, 657.

³¹⁹ See s. 6.1.1, on conscientious objection to military service.

³²⁰ See UNHCR, ‘Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’: HCR/GIP/02/01 (7 May 2002). See also Hathaway & Foster (n 4) 436–42; Anker (n 4) §§ 5:45–52.

³²¹ Neither sex nor gender is mentioned in art. 3, which refers only to the Contracting States’ obligations to ‘apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin’. At the Conference of Plenipotentiaries, France (Mr Rochefort) opposed a proposal to specifically mention ‘sex’ made by the Yugoslavian delegate, Mr Makeido, since it ‘would imply that certain countries at present practised discrimination on the grounds of sex’ which ‘was not the case’. Several delegates challenged the Yugoslav proposal by raising purportedly unproblematic examples of discrimination under national legislation. The UK (Mr Hoare), for example, ‘wondered whether, supposing a woman refugee obtained employment in the government of a State where the salaries of women were smaller than those of men, it would be possible to allege that discrimination was being practised against that refugee’. The President also commented that he ‘doubted strongly whether there would be any cases of persecution on the grounds of sex’: See A/CONF.2/SR.5 (19 Nov. 1951) 9–11; and also A/CONF.2/SR.33 (30 Nov. 1951) 7. Needless to say, both social attitudes and discrimination law have changed considerably since 1951.

³²² See, for example, Anderson, A. & Foster, M., ‘A Feminist Appraisal of International Refugee Law’, in Costello, Foster, & McAdam (n 12) 66, noting concerns that ‘gender gains have not been adequately implemented in jurisprudence and that ongoing theoretical gaps and misconceptions about gender exist which affect decision-making’; Foster (n 292) 48, concluding that while gender-based groups were now generally accepted across jurisdictions, ‘difficulties remain in application’; Edwards, A., ‘Transitioning Gender: Feminist

Engagement with International Refugee Law and Policy 1950–2010’ (2010) 29(2) *RSQ* 21; Haines, R., ‘Gender-related persecution’, in Feller, Türk, & Nicholson (n 286) 319; Anker, D. E., ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133; and the cautious view expressed in Crawley, H., ‘[En]gendering International Refugee Protection: Are We There Yet?’, in Burson, B. & Cantor, D. J., eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 322. See also, generally Arbel, E., Dauvergne, C., & Millbank, J., eds., *Gender in Refugee Law: From the Margins to the Centre* (2014); Dauvergne (n 257).

³²³ UNHCR Guidelines on Gender-Related Persecution (n 320) para. 3. Sex, conversely, is considered a ‘biological determination’. See further discussion in Anderson & Foster (n 322) 60–3; Edwards 2010 (n 322) 37.

³²⁴ LaViolette, N., ‘Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines’ (2007) 19 *IJRL* 169, 182.

³²⁵ See UNHCR Guidelines on Gender-Related Persecution (n 320) para. 3; Edwards 2010 (n 322) 40–4; Anderson & Foster (n 322) 61–2, 68–9.

³²⁶ Edwards takes a somewhat rueful view of the UNHCR ‘Gender-Related Persecution Guidelines’, to which she herself contributed, noting their ‘overemphasis on particular facets of women’s lives’ at the expense of those facets that women share with men—‘the guidelines do not, for example, draw attention to women as opposition politicians, rebel leaders, or combat soldiers’: Edwards (n 322) 27–8.

³²⁷ See, for example, Crawley (n 322) 329–33; Anker (n 322). On the particular issue of FGM, see *Fornah* (n 300); UNHCR, ‘Guidance Note on Refugee Claims relating to Female Genital Mutilation’ (May 2009); Middleburg, A., & Balta, A., ‘Female Genital Mutilation/Cutting as a Ground for Asylum in Europe’ (2016) 28 *IJRL* 416; Hathaway & Foster (n 4) 214–16, 219, 312; Anker (n 4) §§ 5:46–8; UNGA, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’: UN doc. A/HRC/7/3 (2008) paras. 50–5.

³²⁸ For a recent example of this analytic approach, see the US Attorney General’s decision in *Matter of A-B-, Respondent*, 27 I&N Dec. 316, 339 (AG, 2018), discussed further below, noting that ‘[t]he Board cited no evidence that [the respondent’s] ex-husband attacked her because he was aware of, and hostile to, “married women in Guatemala who are unable to leave their relationship”. Rather, he attacked her because of his preexisting personal relationship with the victim.’ See generally, Crawley, H., *Refugees and Gender: Law and Process* (2001); Anker, D., Gilbert, L., & Kelly, N., ‘Women whose governments are unable or unwilling to provide reasonable protection from domestic violence may qualify as refugees under United States asylum law’ (1997) 11 *Georgetown Immigration Law Journal* 709. See also discussion in Hathaway & Foster (n 4) 375, 385, 422–3.

³²⁹ See generally, Castel, J. R., ‘Rape, Sexual Assault and the Meaning of Persecution’ (1992) 4 *IJRL* 39; Thomas, D. Q. & Beasley, M. E., ‘Domestic Violence as a Human Rights Issue’ (1993) 15 *HRQ* 36; *Prosecutor v Akayesu* (n 146) paras. 687–8; Anker, D., ‘Rape in

the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States' (1997) 2(12) *Bender's Immigration Bulletin*, Part I—Canada, 476–84; (1997) 2(15) *Bender's Immigration Bulletin*, Part II—The United States, 608–22; Heyman, M. G., 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations' (2005) 17 *IJRL* 729; Musalo, K., 'A tale of two women: the claims for asylum of Fauziya Kassindja, who fled FGC, and Rody Alvarado, a survivor of partner (domestic) violence', in Arbel, E., Dauvergne, C., & Millbank, J., eds., *Gender in Refugee Law: From the Margins to the Centre* (2014).

³³⁰ Report of the 36th Session: UN doc. A/AC.96/673, para. 115(4). The first edition of this work in 1983 suggested that it *may* be the case that the discrimination suffered by women in many countries on account of their sex alone, though severe, is not yet sufficient to justify the conclusion that they, as a group, have a fear of persecution within the meaning of the Convention. Times have changed, though the need for protection is no less.

³³¹ UNGA res. 48/104 (20 Dec. 1993). See also 1995 Beijing Declaration and Platform for Action; 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: (1994) 33 *ILM* 1534; all texts in Brownlie & Goodwin-Gill (n 112) 196, 211, 991.

³³² See UNHCR Guidelines on Gender-Related Persecution (n 320) paras. 22–34.

³³³ Art. 1 of the 1993 UN Declaration interprets violence against women widely: 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'. Such violence is seen not so much in terms of individual behaviour, but as a 'manifestation of historically unequal power relationships between men and women', which may occur in the family, in the general community, or be perpetrated or condoned by the State.

³³⁴ See *Prosecutor v Akayesu* (n 146) paras. 687–88: 'Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. See also Haines (n 322) 319, 336: 'Women are particularly vulnerable to persecution by sexual violence as a weapon of war', and citing also Crawley (n 328) 89–90; UNHCR Guidelines on Gender-Related Persecution (n 320) para. 24.

³³⁵ See Musalo, K., 'Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence' (2003) 52 *De Paul Law Review* 777; Kelly, N., 'Guidelines for Women's Asylum Claims' (1994) 6 *IJRL* 517; Mawani, N., 'Introduction to the Immigration and Refugee Board of Canada Guidelines on Gender-Related Persecution' (1993) 5 *IJRL* 240; 'IRB: Guidelines on Gender-Related Persecution' (1993) 5 *IJRL* 278; Oosterveld, V. L., 'The Canadian Guidelines on Gender-Related Persecution: An Evaluation' (1996) 8 *IJRL* 569.

³³⁶ Dauvergne, C., ‘Toward a New Framework for Understanding Political Opinion’ (2016) 37 *Michigan Journal of International Law* 243, 286. See also Edwards’ comment: ‘Why is it so difficult to recognize the acts of a woman in transgressing social customs as political? Why are certain acts ... considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?’: Edwards, A., ‘Age and gender dimensions in international refugee law’, in Feller, Türk, & Nicholson (n 286) 46, 68 (citations omitted); Hathaway & Foster (n 4) 421–3; Haines (n 322) 347–9; UNHCR Guidelines on Gender-Related Persecution (n 320) paras. 22–7, 32–4; and discussion of the Guidelines in Edwards 2010 (n 322) 27–8.

³³⁷ The Proposal for the recast Directive noted that ‘[t]he ambiguous wording of the last phrase of Article 10(1)(d) [of the original Qualification Directive] allows for protection gaps and for very divergent interpretations’, and that the amendment was intended to ‘provide clear and useful guidance and ensure consistency’: Recast Directive Proposal (n 557) 8. This addition was welcomed by UNHCR, which nonetheless called for the Directive to take an alternative, rather than a cumulative, approach in art. 10(1)(d): see UNHCR comments on the recast Directive Proposal (n 60) 7–8. See also the similar views expressed in ECRE, Comments on the recast Qualification Proposal (n 60) 10.

³³⁸ Original Qualification Directive, art. 10(1)(d) (‘Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article’). The European Commission’s 2019 report on the application of the recast Directive notes that while ‘[m]ost Member States’ have updated their legislation in accordance with the new language, and all report that ‘gender-related claims are taken into consideration as part of the assessment of the application’, there remain some gaps in law and also, according to certain NGOs and legal representatives, in practice: (n 278) 96–7.

³³⁹ See *Fornah* (n 300); *Khawar* (n 157).

³⁴⁰ *Islam v Secretary of State for the Home Department* (n 107) 643–4 (Lord Steyn); 652–3 (Lord Hoffmann); see also *Fornah* (n 300) 439–42, paras. 27–31 (Lord Bingham); 448–50, paras. 53–8 (Lord Hope); 456–8, paras. 75–81 (Lord Rodger); 466–7, paras. 111–14 (Lady Hale).

³⁴¹ For comment, see Vidal, M., ‘“Membership of a particular social group” and the effect of *Islam* and *Shah*’ (1999) 11 *IJRL* 528; Goodwin-Gill (n 296). In a number of recent cases, the CNDA has recognized women facing forced marriage as members of a particular social group; see CNDA 4 septembre 2020 Mme K. n° 19046460 C *Recueil* 2020 45—Burkina Faso (‘groupe social des femmes de l’ethnie nankana qui refusent de se soumettre à un mariage forcé’); CNDA 23 juin 2020 Mme R. épouse H. n° 17037584 C *Recueil* 2020 47—Iraq; CNDA 14 septembre 2020 Mme A. n° 19055889 C+ *Recueil* 2020 122—Palestinian woman from Gaza facing ‘un état personnel d’insécurité grave’ obliging her to leave

UNRWA's zone of operations.

³⁴² Laws of general application can operate similarly. The refugee sub-group, that is, the group within the larger group of those conforming or reluctantly conforming, is identified by the fact of prosecution and/or liability to sanction, considered together with the assertion by the sub-group of certain fundamental rights, such as those relating to conscience or belief. See Wang (n 268).

³⁴³ In *Applicant A* (n 296) 262, n 148, McHugh J referred to the Canadian Court's finding in *Mayers* 97 DLR (4th) 729 (1992), that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group. He noted that it seemed to have been common ground between the parties that the relevant group was 'Trinidadian women subject to wife abuse', but it did not follow 'that the applicant was abused because of her *membership* of that group' (emphasis in original). Macklin (n 310) 377, however, identifies the 'risk factor' in both *Mayers* and *Cheung* (a forcible sterilization case; above n 302) as one's identity as a woman. Cf. Lord Millett, dissenting, in *Islam v Secretary of State for the Home Department* (n 107) 653–4.

³⁴⁴ *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018) (n 328). For detailed analysis, see Jastram, K. & Maitra, S., 'Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation', (2020) 18 *Santa Clara Journal of International Law* 48; Anker (n 4), particularly § 5:40; § 5:49; also 'Recent Adjudication' (2018) 132 *Harvard Law Review* 803; Schoenholtz, A. I., Ramji-Nogales, J., & Schrag, P. G., *The End of Asylum* (2021) 33–6. Unusually, a second decision in *Matter of A-B-* was issued by the Attorney General in 2021, affirming the first decision and setting down 'additional guidance': 28 I&N 199 (A.G. 2021) 200.

³⁴⁵ On the Attorney General's power to review BIA decisions, see generally Pierce, S., *Obscure but Powerful: Shaping Immigration Policy through Attorney General Referral and Review* (Migration Policy Institute, 2021).

³⁴⁶ The Attorney General's decision in *Matter of A-B-* overruled the BIA's decision in *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA, 2014). It found *A-R-C-G* to have incorrectly applied the BIA's 2014 decisions on the meaning of particular social group in *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA, 2014) and *W-G-R, Respondent*, 26 I&N Dec. 208 (BIA, 2014); see *Matter of A-B-* (n 319). It also noted that *A-R-C-G* should not have been issued as a precedential decision, 'because [the Department of Homeland Security] conceded most of the relevant legal questions': *Matter of A-B-* (n 333). For an account of the background to the decision in *A-R-C-G* see Musalo, K., 'Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law' (2014–2015) 36 *Harvard International Review* 45.

³⁴⁷ *Matter of A-B-* (n 328) 320. The reference to gang violence was obiter, as there was no gang issue presented in Ms. A-B-'s case. The Attorney General also noted that demonstrating a government's unwillingness or inability to control the harm feared by private actors required the claimant to show that the government either 'condoned the private actions "or at least demonstrated a complete helplessness to protect the victims" ': at 337, citing *Galina v*

INS, 213 F.3d 955, 958 (7th Cir., 2000). But see *Grace v Barr*, 965 F.3d 883 (D.C. Cir. 2020) 900 (Tatel J), finding this standard to be distinct from the ‘unwilling and unable standard’, and, given that the government did not defend the new standard on the merits, arbitrary and capricious.

³⁴⁸ See Anker ([n 4](#)) § 5:40 and cases cited therein.

³⁴⁹ *Ibid.*, § 5:49.

³⁵⁰ *Ibid.*, § 5:49, § 5:45 and cases discussed therein, particularly *De Pena-Paniagua v Barr*, 957 F.3d 88 (1st Cir., 2020).

³⁵¹ See Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (2 Feb. 2021), s. 4(c)(i).

³⁵² *Ibid.*, s. 4(c)(ii).

³⁵³ For the most current information on gender-based claims and on particular social group jurisprudence generally, see the Center for Gender & Refugee Studies: <https://cgrs.uchastings.edu/>. We are grateful to Kate Jastram, CGRS’s Director of Policy & Advocacy, for advice on the current law.

³⁵⁴ See Türk, V., ‘Opinion: Ensuring Protection to LGBTI Persons of Concern’ (2013) 25 *IJRL* 120, 121.

³⁵⁵ See *ibid.*, 122–3, citing the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), which were drafted by a group of human rights experts. Principle 23 sets out the right to seek and enjoy asylum from persecution related to sexual orientation and gender identity, and States’ responsibility to ensure that these are legally recognized bases for claiming asylum. In 2017, a set of additional principles was adopted, which now also include the bases of ‘gender expression’ or ‘sex characteristics’: ‘Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles’ (24 Nov. 2007) 22–3.

³⁵⁶ Although UNHCR notes that ‘the application of the refugee definition remains inconsistent in this area’: see UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’: HCR/GIP/12/09 (23 Oct. 2012) paras. 1, 41. The UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity supplement UNHCR’s Guidelines on Gender-Related Persecution ([n 320](#)), and replace UNHCR’s ‘Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity’ (Nov. 2008). In the EU, see recast Qualification Directive, recital (30), art. 10(1)(d) (‘Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation ... Gender related aspects, including gender identity, shall

be given due consideration'). See also, generally, Spijkerboer, T., ed., *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (2013); Hathaway & Foster (n 4) 442–5; Anker (n 4) §§ 5:53–4, also, on the political opinion ground, § 5.29; Foster (n 292) 48–54; Güler, A., Shevtsova, M., & Venturi, D., eds., *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration* (2019); FMR, Issue 42: 'Sexual orientation and gender identity and the protection of forced migrants' (Apr. 2013); Ferreira, N., & Danisi, C, 'Queering International Refugee Law' in Costello, Foster, & McAdam (n 12); Millbank (n 257).

³⁵⁷ *HJ (Iran) v Secretary of State for the Home Department* (n 279). The following section is adapted and updated from Goodwin-Gill, G. S., 'The Dynamic of International Refugee Law' (2014) 25 *IJRL* 651, 661–4.

³⁵⁸ *HJ (Iran)* (n 279) 621, para. 11.

³⁵⁹ See *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), discussed further in s. 5.2.5.

³⁶⁰ *Germany v Y & Z* (n 113), involving persecution for reasons of religion and prohibitions on the manifestation of religion in public: see further s. 5.2.2.

³⁶¹ *Minister voor Immigratie en Asiel v X, Y, & Z* (n 113). Most Member States now confirm that 'assessment of the reasons for persecution could not be influenced by considerations of the possibility for the applicant to behave discreetly in the country of origin in order to avoid persecution': European Commission (n 278) 92 ff.

³⁶² See, on sexual orientation, the decision in *IK v Switzerland* (dec.), App. No. 21417/17 (ECtHR, 18 Jan. 2018) para. 24; accepted by the parties in *B & C v Switzerland*, App. Nos. 889/19 and 43987/16 (ECtHR, 17 Nov. 2020) para. 57. On the Court's jurisprudence in this area, see further Ferreira, N., 'An exercise in detachment: the Council of Europe and sexual minority asylum claims' in Mole, R. C. M., ed., *Queer Migration and Asylum in Europe* (2021).

³⁶³ See, for example, in Australia, *Appellant S395/2002* (n 279) and Migration Act 1958, s. 5J(3)(c)(vi), discussed in Migration and Refugee Division Legal Services, Administrative Appeals Tribunal (n 118) Ch. 3 (updated Nov. 2020) 28–34; in Finland, KHO: 2012:1 (Finland Supreme Administrative Court, 13 Jan. 2012), English summary available at www.refworld.org; in Canada, *Okoli v Canada (Citizenship and Immigration)*, 2009 FC 332, paras. 36–7; *Akpojiyovwi v Minister of Citizenship and Immigration*, 2018 FC 745, para. 9; *Nwabueze v Canada (Citizenship and Immigration)*, 2019 FC 1577, para. 20. See further references in Spijkerboer, T., 'Sexual identity, normativity and asylum', in Spijkerboer (n 356) 232, n 7, and the UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity (n 364) paras. 30–3.

³⁶⁴ See, for example, Millbank, J., 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13 *The International Journal of Human Rights* 391, 399; Spijkerboer, T., 'Foreword', in Güler, Shevtsova, & Venturi, eds., (n 364) viii. On the assessment of credibility see further

Ch. 11, s. 4.4.

³⁶⁵ *HJ (Iran)* ([n 279](#)) 647, para. 82 (Lord Rodger); see also 625, para. 22, and 630–1, para. 35 (Lord Hope); 653, para. 98 (Lord Walker); 653, para. 100 (Lord Collins); 661, para. 132 (Lord Dyson).

³⁶⁶ *YD (Algeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1683, paras. 4–6.

³⁶⁷ Ibid., para. 10, citing para. 29 of the First-tier Tribunal decision.

³⁶⁸ *OO (Gay Men) Algeria CG* [2016] UKUT 00065 (IAC) para. 183, cited in *YD (Algeria)* ([n 366](#)) para. 40. The Court of Appeal ‘accepted that [it] must accept the factual findings made by the Upper Tribunal’ in that decision (para. 41). Cf. CNDA 29 mai 2020 M. C. n° 19053522 C *Recueil* 2020 52-7—refugee status recognized of homosexual man from Lebanon, ‘où il ne peut vivre pleinement son homosexualité compte tenu de son environnement familial et géographique homophobe et où il risque d’être exposé à des violences et à des discriminations émanant tant de la société libanaise que d’agents travaillant pour des institutions gouvernementales’.

³⁶⁹ *YD (Algeria)* ([n 366](#)) para. 52.

³⁷⁰ *OO (Gay Men)* ([n 368](#)) para. 185, cited in ibid., para. 40.

³⁷¹ For the Upper Tribunal’s solution to the ‘conundrum’, see *OO (Gay Men)* ([n 368](#)) para. 186, cited in *YD (Algeria)* ([n 366](#)) para. 40.

³⁷² For the Court of Appeal’s approach to criminalization, see below [n 392](#).

³⁷³ For discussion of changes to art. 10(1)(d) in the recast Qualification Directive, see s. 5.2.4.4 above.

³⁷⁴ See *Minister voor Immigratie en Asiel v X, Y, & Z* ([n 113](#)) para. 37. Art. 9(1)(a) provides that acts of persecution must be ‘sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights’, while article 9(2)(c) notes that an act of persecution can consist of ‘prosecution or punishment, which is disproportionate or discriminatory’.

³⁷⁵ Emphasis added. See *Minister voor Immigratie en Asiel v X, Y, & Z* ([n 113](#)) para. 61. This critique is made in ‘X, Y and Z: a glass half full for “rainbow refugees”? The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in *X, Y, & Z v Minister voor Immigratie en Asiel*’ (3 Jun. 2014) paras. 42, 62. The International Commission of Jurists also noted that the referred question precluded consideration of criminalization in its ‘broader societal context’, that is, whether criminalization may constitute an act of persecution as part of an ‘accumulation of various measures’ under art. 9(1)(b): ibid., paras. 41–3, 52. See also Costello ([n 57](#)) 204–5 (noting that the Court’s decision ‘did not rule on whether [the criminalization and threat of imprisonment] could set up an accumulation of discriminatory “legal measures” under Article 9(2)(b)’).

³⁷⁶ *Minister voor Immigratie en Asiel v X, Y, & Z* ([n 113](#)) paras. 46, 48, 51–3, 55–6.

³⁷⁷ Ibid., para. 70. In her Opinion, Advocate General Sharpston acutely noted that the

problem with the restraint argument is that it invites an essentially subjective assessment and that, in any event, ‘discretion is not a sure protection’: Opinion of Advocate General Sharpston (11 Jul. 2013) in Joined Cases C-199/12 to C-201/12, *X, Y, & Z v Minister voor Immigratie, Integratie en Asiel*, paras. 67–9.

³⁷⁸ *Germany v Y & Z* ([n 113](#)) para. 78. See also Opinion of Advocate General Sharpston ([n 377](#)) paras. 71–2; *RT (Zimbabwe) v Secretary of State for the Home Department* ([n 279](#)) 175, para. 46: ‘Where is the core/marginal line to be drawn? ... we should guard against introducing fine and difficult distinctions of this kind’); UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity ([n 364](#)) para. 19 (‘[t]he distinction between forms of expression that relate to a “core area” of sexual orientation and those that do not, is ... irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution’).

³⁷⁹ See, in relation to *Minister voor Immigratie en Asiel v X, Y, & Z*, [Amnesty International](#), ‘EU Court ruling a setback for refugees’ Press release (7 Nov. 2013) and Amnesty International and the International Commission of Jurists, ‘Observations on the Case, issued following the written procedure, and hearings on 11 April and 11 July 2013’ (2 Oct. 2013), discussed in Goodwin-Gill ([n 367](#)) 663–5; International Commission of Jurists ([n 379](#)). In relation to *HJ (Iran)* ([n 279](#)), see, for example, Hathaway J. & Pobjoy, J., ‘Queer Cases Make Bad Law’ (2012) 44 *NYU Journal of International Law and Politics* 315, arguing that the UK Supreme Court in *HJ (Iran)* ‘departed in critical ways from accepted refugee law doctrine’: at 331. The authors also critique the judgment of the High Court of Australia in *Appellant S395/2002* ([n 279](#)). See discussion of Hathaway and Pobjoy’s approach in [Goodwin-Gill 2014](#) ([n 367](#)) 664–6; and other contributions engaging with Hathaway & Pobjoy’s argument in the journal issue: (2012) 44 *NYU Journal of International Law and Politics*.

³⁸⁰ See discussion in Goodwin-Gill ([n 367](#)) 663.

³⁸¹ See [n 379](#) above.

³⁸² *YD (Algeria)* ([n 366](#)) para. 54. See also para. 50, referring to *X, Y, & Z* ([n 113](#)).

³⁸³ *B & C* ([n 362](#)) para. 59, citing, inter alia, *X, Y, & Z* ([n 112](#)).

³⁸⁴ *Ibid.*

³⁸⁵ UNHCR Guidelines on Claims based on Sexual Orientation and/or Gender Identity recognize the need for a ‘fact-based’ analysis of both ‘the individual and contextual circumstances’: see [n 364](#), para. 28. In its view, ‘[e]ven if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament ... rising to the level of persecution’ (para. 27). Whether that threshold is met will depend on a careful analysis of the specific facts of the case in its context. The Yogyakarta Principles Plus 10 ([n 355](#)) 22: States must ‘[e]nsure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression or sex characteristics is accepted as a ground for the recognition of refugee status, including where [these elements] are criminalised and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence’.

³⁸⁶ See *B & C* (n 362) paras. 62–3, referring inter alia to UNHCR’s view in its Guidelines on Claims based on Sexual Orientation and/or Gender Identity (n 364) para. 36 that ‘laws criminalizing same sex relations are normally a sign that protection of LGB individuals is not available’, and finding that the Swiss courts ‘did not sufficiently assess the risks of ill-treatment ... and the availability of State protection against ill-treatment emanating from non-State actors’. See also discussion in *Appellant S395/2002* (n 279) 491, paras. 46–7 (McHugh and Kirby JJ).

³⁸⁷ See s. 5.2.4.3.

³⁸⁸ Compare the approach taken in the cases cited above to that taken by the Human Rights Committee in *Toonen v Australia*, UN doc. CCPR/C/50/D/488/1992 (4 Apr. 1994) paras. 8.2, 8.6, finding that Tasmanian laws criminalizing homosexuality which had not been enforced in a decade interfered with the author’s privacy under art. 17 ICCPR.

³⁸⁹ UNHCR Guidelines on Membership of a Particular Social Group (n 286). These Guidelines were expressly approved by the House of Lords in *Fornah* (n 300) 431–2, para. 15 (Lord Bingham), 464, para. 103 (Lady Hale), 468, para. 118 (Lord Brown).

³⁹⁰ Cf. Council of Europe Committee of Ministers Recommendation Rec(2004)9 on the concept of ‘membership of a particular social group’ in the context of the 1951 Convention relating to the status of refugees (30 Jun. 2004), for the position that ‘a “particular social group” is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors. Persecutory action towards a group may however be a relevant factor in determining the visibility of a group in a particular society’. Cf. CE 16 octobre 2019 Mme A. n° 418328 A *Recueil* 2019 53–4, in which the Court recognized as a social group women from a particular region in Nigeria, victims of trafficking for sex; ‘[elles] partagent une histoire commune et une identité propre, perçues comme spécifiques par la société environnante dans leur pays, où elles sont frappées d’ostracisme pour avoir rompu leur serment sans s’acquitter de leur dette’.

³⁹¹ ‘Cohesiveness’, however, is not required: *Islam v Secretary of State for the Home Department* (n 107) 632, 640–3 (Lord Steyn); 651 (Lord Hoffmann); 657 (Lord Hope); 662 (Lord Millett).

³⁹² See n 320.

³⁹³ Cf. art. 10(1)(d), recast EU Qualification Directive, which prescribes in part that, ‘a group shall be considered to form a particular social group where in particular:—members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*—that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’ (the same language was used in the original Directive). The axiomatic linkage of innate characteristics *and* social perception is somewhat dogmatic and out of touch with much of the doctrine described above, and has also been criticized by UNHCR and ECRE: see UNHCR comments

on the recast Directive Proposal ([n 60](#)) 7–8; ECRE Information Note on Directive 2011/95/EU ([n 60](#)) 10; UNHCR comments on the Regulation Proposal ([n 80](#)) 17. In *Fornah* ([n 300](#)), Lord Bingham emphasized that art. 10(1)(d) of the original Qualification Directive must be interpreted as if the criteria were *alternatives*, and that the Directive should be applied accordingly; 432–3, para. 16. This approach draws on UNHCR’s formulation, set out in the UNHCR Guidelines on Membership of a Particular Social Group ([n 286](#)) para. 11, which defines ‘particular social group’ as satisfied *either* by a finding that a group shares ‘a common characteristic other than their risk of being persecuted’ (which will often be ‘innate, unchangeable, or ... otherwise fundamental to identity, conscience or the exercise of one’s human rights’), *or* that the group is ‘perceived as a group by society’. The European Commission’s 2019 report ([n 278](#)) on the application of the recast Qualification Directive notes that most member States apply the two approaches covered in Article 10(1)(d) cumulatively, and that only five apply them alternatively (Greece, Ireland, Italy, Latvia, and Lithuania): 11, 94–6. The United Kingdom is omitted from this list, in apparent disregard of the judgment in *Fornah*; see also Foster ([n 292](#)) 39, n 221; Zimmermann & Mahler ([n 101](#)) 392–4; Costello ([n 57](#)) 202; and Hathaway & Foster ([n 4](#)) 429–32.

[394](#) Note, however, the caveat sounded by McHugh J in *Applicant A* ([n 296](#)) 264–5, concluding that the simple fact of opposition to policy or law is not itself sufficient to link individuals and that there is nothing external in the way of social attribute or characteristic to allow them to be perceived as a social group.

[395](#) Cf. art. 4 ICERD 66; art. 10 ECHR 50; *Handyside v United Kingdom* (1976) 1 EHRR 737; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Arrowsmith v United Kingdom* (1978) 3 EHRR 218. See also Bychawska-Siniarska, D., ‘Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners’ (Council of Europe, 2017). In contrast, the right to hold opinions without interference (art. 19(1) ICCPR 66) ‘is a right to which the Covenant permits no exception or restriction’: Human Rights Committee, General Comment No. 34 ‘Article 19: Freedoms of opinion and expression’: UN doc. CCPR/C/GC/34 (12 Sep. 2011) para. 9.

[396](#) *RT (Zimbabwe) v Secretary of State for the Home Department* ([n 279](#)) 170–1, para. 32: ‘Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom *not to hold* and *not to have to express opinions*.’)

[397](#) Human Rights Committee, General Comment No. 34 ([n 395](#)) para. 9.

[398](#) Ibid., para. 10; *RT (Zimbabwe) v Secretary of State for the Home Department* ([n 279](#)) 170–1, para. 32.

[399](#) This wording, which appeared in the first edition of this work, at 30, was adopted and endorsed by the Supreme Court of Canada in *Ward* ([n 122](#)); see also *Klinko v Minister of Citizenship and Immigration* [2000] 3 FC 327, (2000), 184 DLR (4th) 14, para. 33, further approving the above interpretation. It has also been accepted by UNHCR: see UNHCR, ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’ ([n 156](#)) para.

45; UNHCR Guidelines on Gender-Related Persecution ([n 320](#)) para. 32. See *Navarro v Canada*, 2011 FC 768, paras. 21–2 (distinguishing *Klinko* and finding that ‘the act of filing a police report alone or resisting criminality generally’ does not constitute ‘an opinion about a matter that engages the machinery of the state’). See also Zimmermann & Mahler ([n 101](#)) 399; Hathaway & Foster ([n 4](#)) 406.

[400](#) The approach to political opinion in art. 10(1)(e) of the recast Qualification Directive is tied to the potential ‘actors of persecution’ identified in art. 6, not just to State and government, while art. 10(2) recalls that it is immaterial whether the applicant for protection actually possesses the relevant characteristic, provided it is attributed to him or her by the persecutor. For discussion of the particular case of conscientious objection to military service, see s. 6.1.1.

[401](#) *RT (Zimbabwe) v Secretary of State for the Home Department* ([n 279](#)) 173–4, paras. 42–5. The context of the case was a ‘quite astonishingly brutal wave of violence’ which put at risk ‘not simply those who are seen to be supporters of the MDC [Movement for Democratic Change] but anyone who cannot demonstrate positive support for Zanu-PF or alignment with the regime’: *RN (Zimbabwe) v Secretary of State for the Home Department* [2008] UKAIT 00083, para. 216 (emphasis added), cited in *RT (Zimbabwe)* ([n 279](#)) 162, para. 2 (Lord Dyson). The statement in [the Michigan Guidelines on Risk for Reasons of Political Opinion \(2015\)](#) that ‘an “opinion” is a conscious choice or stance’ (para. 4) should be read in light of the Court’s approach to the ‘indifferent non-believer’.

[402](#) In *Ward*, the Supreme Court of Canada held that circumstances should be examined from the perspective of the persecutor, since this perspective is determinative in inciting the persecution: [1993] 2 SCR 689, 747. Cf. *S-P-*, 21 I&N Dec. 486, 487 (BIA, 1996), discussing and reaffirming *B-*, 21 I&N Dec. 66 (BIA, 1995), and noting that in the latter, the Board ‘did not become entangled in the impossible task of determining whether harm was inflicted because of the applicant’s acts or because of his beliefs underlying those acts’. See also Hathaway & Foster ([n 4](#)) 407–23; Zimmermann & Mahler ([n 101](#)) 400–1.

[403](#) It may not always be appropriate to view the (objective) political act as equivalent to the (subjective) notion of political opinion, for the asylum seeker’s actual motivation can make such an approximation pure fiction. The same applies in the case of the individual who is likely to be persecuted for political opinions *wrongly* attributed to him or her, and the humanitarian aspects of such cases may be better accommodated in a liberal asylum practice, than in a forced interpretation of refugee status criteria. However, see Belgium, Conseil d’Etat, no. 135.838, *x c/ CGRA* (8 oct. 2004): *RDDE* (2004) No. 130, 591—the claimant’s activities considered as political by his persecutors, though he himself had no significant political opinion. See also Musalo, K., ‘Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms’ (1994) 15 *Michigan Journal of International Law* 1179.

[404](#) See, for example, *Weinong Lin v Holder* 763 F.3d 244 (2nd Cir., 2014), in which the Court of Appeal noted that ‘claims of latter-day political awakening resemble those of newfound religious conscience, which can be “easy to manufacture”’, but recalled the view

expressed in *Ehlert v United States*, 402 US 99, 103 (1971) that ‘“those whose views are late in crystallizing” cannot be “deprived of a full and fair opportunity to present the merits of their conscientious objector claims”’: at 250. The case centred on whether the applicant’s political activities in the United States constituted ‘changed circumstances’ which would allow him to file what would otherwise be an untimely claim for asylum. The Court found that while the applicant’s ‘reasons for action stem from beliefs that have persisted over years, his actions themselves were new’: at 250. In Australia, the claimant bears the onus of showing that any conduct engaged in within Australia was ‘otherwise than for the purpose of strengthening the … claim to be a refugee’. If the claimant fails to so satisfy the Minister, the conduct is to be disregarded: Migration Act 1958, s. 5J(6). See further s. 5.1.1.

⁴⁰⁵ Tiberghien (n 4) 389–92 (‘Activités politiques entreprises durant le séjour en France’); see also Carlier, J.-Y. and others, eds., *Who is a Refugee? A Comparative Case Law Study* (1997) 384–5; also 70–1 (Belgium), 311–12 (Denmark).

⁴⁰⁶ Loi sur l’asile (26 Jun. 1998) art. 54—Motifs subjectifs survenus après la fuite. ‘L’asile n’est pas accordé à la personne qui n’est devenue un réfugié au sens de l’article 3 qu’en quittant son Etat d’origine … ou en raison de son comportement ultérieur.’

⁴⁰⁷ ‘Nul ne peut être contrainte, de quelque manière que ce soit, à se rendre dans un pays’/‘No one may be compelled, in any manner whatsoever, to return to a country’ in which life or liberty may be at risk for a refugee-related reason: art. 5, loi sur l’asile. This article extends protection to include non-return to a country from which in turn the person may be sent to a country in which he or she would be at risk for the reasons mentioned in the refugee definition set out in art. 3.

⁴⁰⁸ Hullman, K., ‘Switzerland’, in Carlier and others (n 405) 135–6; see also *Canada (Minister of Citizenship and Immigration) v Asaolu* (1998) 45 Imm LR (2d) 190 (FCTD): Citizenship and Immigration Canada sent claimant’s story and photograph to visa officer in Lagos, Nigeria to facilitate investigation of claim to refugee status; determination in favour of respondent as refugee *sur place* upheld, based on knowledge of human rights conditions in Nigeria and failure to explain how investigation conducted there.

⁴⁰⁹ See Peers, S. and others, eds., *EU Immigration and Asylum Law (Text and Commentary)* (2nd rev. edn., 2015) 94, arguing that art. 5(3) ‘should be confined to governing the situation in which an applicant creates the relevant circumstances *after* the initial application has been rejected’, although ‘available reports show confusion in the practice of the Member States’. This interpretation was cited with approval by the European Commission, which also noted that ‘[s]everal Member States … apply a higher level of scrutiny for first-time applications *sur place*’: European Commission (n 278) 53–4. See also Mathew (n 190) 140–41; YB (*Eritrea*) (n 190) para. 14.

⁴¹⁰ The drafting reflects German practice in particular, and the doctrine of *Nachfluchtgründe*; the equivocation flows perhaps from the practice of other States, such as the United Kingdom, which do not consider the Convention refugee definition to include any requirement that the applicant act in ‘good faith’: see also UK Immigration Rules, para. 339P,

intended to transpose the relevant provisions of the original Qualification Directive, as interpreted in *YB (Eritrea) v Secretary of State for the Home Department* (n 190). Somewhat unsurprisingly, the European Commission's Regulation Proposal notes 'significant differences' across Member States in the assessment of *sur place* applications, amongst other issues: (n 56) 9. See further European Commission (n 278) 53–7 (detailing different approaches and recommending the deletion of art. 5(3) of the recast Qualification Directive); UNHCR comments on the Regulation Proposal (n 80) 12 (recalling that *sur place* claims call for the same analytic approach as all other claims and that a person objectively at risk is entitled to protection 'notwithstanding his or her motivations', and also recommending the deletion of art. 5(3)). See above, s. 5.1.1.

⁴¹¹ Cf. *Nejad v Minister of Citizenship and Immigration* [1997] F.C.J. No. 1168: 'The new panel ... should consider ... whether the applicants became refugees *sur place* and whether it would be safe for them ... to return to Iran. They may not be very intelligent in their attending of the political rally in Canada; they are obviously not brave, but ... the law is not addressed only to save the brave, but also the weak, the timid and even the imprudent.'

⁴¹² See further Ch. 11, s. 4.4.

⁴¹³ See New Zealand, RSAA, *Refugee Appeal No. 74665/03* (7 Jul. 2004); *Appellant S395/2002* (n 279) 489, para. 40, McHugh and Kirby JJ. holding that 'persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality'. In *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), the UK Supreme Court held that 'the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights': 169, para. 25.

⁴¹⁴ Recent jurisprudential developments depart from the position in Zimmermann and Mahler that 'the critical question ... is whether it seems probable that a claimant will either express the respective opinion or act in such manner and whether he or she therefore will have reason to fear repressions in his or her home State': Zimmermann & Mahler (n 101) at 403 (emphasis added, citations omitted). In *HJ (Iran) v Secretary of State for the Home Department* (n 279) the Court found that a homosexual applicant who would behave 'discreetly' in the country of origin due, at the least in part, to a well-founded fear of persecution was entitled to refugee protection under CSR 51: see further s. 5.2.4.5. In *RT (Zimbabwe) v Secretary of State for the Home Department* (n 279), the Court found that the *HJ (Iran)* principle applied to asylum applicants claiming to fear persecution 'on the grounds of lack of political belief regardless of how important their lack of belief is to them': 176, para. 52. Lord Dyson noted that '[n]obody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution': 173, para. 42. See also Hathaway & Foster (n 4) 407–9.

⁴¹⁵ On freedom of thought, religion and opinion as lying at the 'core' of ICCPR 66, see

Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. edn., 2005) 408. See Human Rights Committee, General Comment No. 34 ([n 395](#)) para. 2 (freedom of opinion and expression ‘constitute the foundation stone for every free and democratic society’) and para. 21 (the imposition of restrictions on the freedom of expression under art. 19(3) ICCPR 66 ‘may not put in jeopardy the right itself’); and discussion in *RT (Zimbabwe) v Secretary of State for the Home Department* ([n 279](#)) 173–6, paras. 40–52; *HJ (Iran) v Secretary of State for the Home Department* ([n 279](#)) 657–8, paras. 114–15.

⁴¹⁶ With regard to art. 19 ICCPR 66, the Human Rights Committee has noted that para. 1 requires ‘protection of the right to hold opinions without interference’, to which the Covenant permits no exception or restriction; and that para. 2 requires States parties to guarantee, ‘even expression that may be regarded as deeply offensive’. Paragraph 2 protects ‘all forms of expression’, which can be disseminated, *inter alia*, via books, posters, dress, legal submissions, or electronic means, and includes ‘spoken, written and sign language and such non-verbal expression as images and objects of art’: Human Rights Committee, General Comment No. 34 ([n 395](#)) paras. 9–12.

⁴¹⁷ See, on art. 25 ICCPR 66, Human Rights Committee, ‘General Comment No. 25’: UN doc. CCPR/C/21/Rev.1/Add.7 (27 Aug. 1996).

⁴¹⁸ *UNHCR Handbook* ([n 3](#)) para. 82 (emphasis added).

⁴¹⁹ *Zolfagharkhani v Minister for Employment and Immigration* [1993] 3 FC 540, paras. 20–3. See also *S’s Case* ([n 137](#))—High Court of Australia: whether what results from the discriminatory implementation of a law of general application is persecution depends on whether the treatment is appropriate and adapted to achieving a legitimate national objective, namely whether it is consistent with the standards of civil societies which seek to meet the calls of common humanity; *Minister for Immigration and Citizenship v SZNWC and Another* [2010] FCAFC 157—Tribunal failed to consider whether the law criminalizing desertion by merchant seamen with a sentence of up to five years imprisonment was appropriate and adapted to achieving the identified objective of securing Bangladesh’s reputation as a source of merchant seamen; *SZVYD v Minister for Immigration and Border Protection* [2019] FCA 648—it was open to the Tribunal to find that a law prohibiting consumption of alcohol by Muslims in an overwhelmingly Muslim country was a law of general application. It did not discriminate against a social group, and even if Muslims in Bangladesh were a particular social group, the question of whether it was reasonably appropriate and adapted had been properly considered: paras. 12, 15–16.

⁴²⁰ On Chinese asylum claims in relation to coercive population control in the United States, Canada and Australia respectively, see Hamlin, R., *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (2014) Ch. 8.

⁴²¹ *Chang* ([n 304](#)). See also Hamlin ([n 420](#)) 148. *Chang’s* case was later superseded by legislation deeming those forced to abort a pregnancy or to undergo involuntary sterilization, or those persecuted for resisting such a procedure, to have been persecuted on account of

political opinion (and also providing that no more than 1000 refugees could be admitted under the sub-section in a financial year): See *Matter of X-P-T, Applicant*, 21 I&N Dec. 634, applying s. 601(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA); discussion in *Wong v Holder*, 633 F.3d 64 (2nd Cir., 2011); and Hamlin, *ibid.*, 150.

⁴²² *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 FC 314—the Federal Court allowed an appeal against a decision which had accepted that the applicant would be sterilized if forced to return and might also face imprisonment, but that this would be under a law of general application having the objective of population control, not persecution. The Court held that ‘women in China who have one child and are faced with forced sterilization’ constitute a particular social group, and forced sterilization in that context constituted persecution. The Canadian Supreme Court ‘assumed (without deciding)’ that *Cheung* was correctly decided in *Chan v Canada (MEI)* (ⁿ 47) 658, when it denied protection on the basis that the appellant had failed to demonstrate a well-founded fear of forced sterilization: 672. See also Hamlin (ⁿ 420) 152–5; Hathaway & Foster (ⁿ 4) 216–18.

⁴²³ *Cheung* (ⁿ 422) 323. The Court instead characterized forced sterilization as ‘a practice that affects a limited and well-defined group of people ... mainly conducted by local authorities, not the central government’.

⁴²⁴ The Recast Qualification Directive, art. 9(2)(b) provides that acts of persecution can take the form of ‘legal, administrative, police, and/or judicial measures ... which are implemented in a discriminatory manner’. See also Hathaway & Foster (ⁿ 4) 297. Cf. CRR (26 juillet 1990) *Gambini*, 93.031, Doc. réf. no. 145 (28 avr./7 mai 1991) Supp., JC, 4—lack of legislative provision for transsexuals in Argentina a situation of a general character and not discriminatory; CRR (23 mai 1988); *Gungor*, 74.537—flight because of homosexuality did not fall within the Convention, for in Tiberghien’s view (ⁿ 4): ‘un vide législatif n’est pas assimilable à une persécution, sauf si ce vide législatif est délibérément maintenu par un Etat pour persécuter une fraction de la population qu’il prive ainsi de protection.’ Cf. *Toboso-Alfonso*, 20 I&N Dec. 819 (BIA, 1990), in which the BIA found that a Cuban homosexual was persecuted as a result of the government’s desire that all homosexuals be forced to leave their homeland.

⁴²⁵ The issue is less relevant today, although it remains an issue in some States. In Sri Lanka, penalties for leaving the country illegally can include up to five years’ imprisonment and a fine: see 1948 No. 20 *Immigrants and Emigrants Act*, s. 45(b) and *Immigrants and Emigrants (Amendment) Act*, No.31 of 2006. In *SZTFR v Minister for Immigration and Border Protection* [2015] FCA 545, paras. 53–4, 58–9, the Federal Court of Australia upheld a finding that the Sri Lankan law criminalizing illegal departure was a law of general application which was not applied in a discriminatory manner. However, in *Jeyakumar v Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness* 2019 FC 87, the Canadian Federal Court found that the Sri Lankan applicant would ‘likely attract the attention of the authorities as soon as he arrives at the airport in Sri Lanka because he left Sri Lanka illegally without an internally-issued valid Sri Lankan passport’, and the assumption that he would come to no harm could not be justified on the

available evidence (paras. 42–55). In Sweden, the Migration Court of Appeal upheld the grant of refugee status to an Eritrean applicant who had left Eritrea illegally to avoid military service; it took account of the *travaux* to the *Aliens Act* which stated that a person facing severe punishment for illegally leaving the country should be considered a refugee on the grounds of political opinion: *A v The Swedish Migration Agency*, UM7734-16 (21 Jun. 2017); English summary available at www.refworld.org. For other examples of laws, see the first edition of this work. In certain circumstances, illegal exit coupled with a failed asylum application abroad may give rise to imputed political opinion: Hathaway & Foster (n 4) 77–8, 414 n 335; see also 248. With reference to US practice, Anker (n 4) § 5:27 notes that courts ‘generally are unwilling’ to find that State authorities attribute anti-government political opinions to those violating departure laws, ‘especially in the absence of evidence that the violator would be targeted for prosecution and be punished more severely than others’ (citations omitted).

⁴²⁶ Cf. the proposition that ‘prosecution only becomes persecution if likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial’: Storey, ‘Persecution: Towards a working definition’ (n 103) 518. In our view, this calls for a measure of nuance, as he also seems to recognize: *ibid.*, 501–4. See further below, and for practice in the United States, see Anker (n 4) § 4:6: ‘Distinguishing persecution from prosecution’.

⁴²⁷ UNHCR, ‘Guidance Note on Refugee Claims Relating to Crimes of *Lèse Majesté* and Similar Criminal Offences’ (Sep. 2015). See also Human Rights Committee, General Comment No. 34 (n 395) para. 38, expressing concern with regard to *lèse majesté* laws (cited in the Guidance Note). See also Hathaway & Foster (n 4) 280–1.

⁴²⁸ UNHCR notes that ‘[t]he existence of *lèse majesté* or similar criminal offences in the country of origin does not in and of itself establish a risk of harm in the event of return. Consideration needs to be given to the content of such laws, the penalties attached thereto and whether and how such laws are applied and enforced in practice. Depending on the country context, the existence of *lèse majesté* and similar criminal offences, even if not systematically or regularly applied and enforced, can, nevertheless, create or contribute to an atmosphere of intolerance to political dissent or debate and generate a threat of harm for persons holding political opinions, or perceived to hold political opinions, critical of the State, the ruler or other government officials’: ‘Guidance Note on Refugee Claims Relating to Crimes of *Lèse Majesté* and Similar Criminal Offences’ (n 427) para. 17. See also paras. 27–30, and discussion of discriminatory application in para. 25.

⁴²⁹ *Ibid.*, para. 23, citing [UNHCR Handbook](#) (n 3) para. 52.

⁴³⁰ See, on art. 18 ICCPR 66 (freedom of thought, conscience and religion), Human Rights Committee, ‘General Comment No. 22 (48): (art. 18)’ (n 267). The Committee considers that a right of conscientious objection, ‘can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their

particular beliefs’: para. 11.

⁴³¹ UNHCR *Handbook* (n 3) paras. 167–74; Grahl-Madsen (n 3) 231–8; Hathaway & Foster (n 4) 270–4.

⁴³² Reviewing jurisprudence of the French *Commission des recours* in 1993, Tiberghien concluded that if desertion or conscientious objection were not linked to a Convention reason, refugee status would not be upheld: Tiberghien, F., ‘La crise yougoslave devant la Commission des recours’, Doc. réf., no. 223 (17/30 août 1993, Supp., CJ, 1–10. What is required is either ‘un motif politique ou de conscience qui soit personnel au requérant’: cf. CRR, Sections réunies (29 janv. 1993) 217.894, Sporea, *ibid.*, 7—member of Romanian minority in Voivodina, opposed to ethnic and cultural hegemony and unwilling to serve for political reasons; appeal against refusal of refugee status upheld. An unwillingness to fight Croats ('fellow compatriots') is not enough, despite the fact that the UN has condemned the conflict: CRR, Sections réunies (29 janv. 1993) 229.937, Djukic, *ibid.*, 6. But the possibility of sanctions on family members in another State may support refugee status on the basis of a ‘conscientious’ objection to service; see CRR, Sections réunies (29 janv. 1993) 229.956, Dabetic, *ibid.*, 6: Claimant’s family members resided in different States (Croatia and Montenegro); he left Croatia to avoid conscription, and if returned to Yugoslavia, was likely to be conscripted into the *federal* army with resulting sanctions on relations in Zagreb.

⁴³³ See the third edition of this work, 105 and references.

⁴³⁴ A careful reading of the supporting material, such as the resolutions adopted by the Human Rights Council and the Commission on Human Rights, suggests that a number of States continue to have reservations with regard to the right itself and the modalities of alternative service; see, for example, Human Rights Council resolutions 24/17 and 20/2, and Commission on Human Rights resolutions 2004/35, 2002/45, 2000/34, 1998/77, 1995/83, 1993/84, 1991/65, 1989/59, and 1987/46.

⁴³⁵ See Human Rights Council, Resolution 24/17, ‘Conscientious objection to military service’ (24th sess., 27 Sep. 2013) para. 1 (‘Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion or belief’).

⁴³⁶ Human Rights Council, ‘Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/35/4 (35th sess., 6–23 Jun. 2017) para. 60.

⁴³⁷ EUCFR, art. 10(2) (‘Freedom of thought, conscience and religion’).

⁴³⁸ *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, 870–1, para. 20 (referring specifically to Waller LJ’s conclusions on the existence of such a right in the Court of Appeal’s judgment in that case). See also the finding of the Inter-American Commission on Human Rights in *Cristián Daniel Sahli Vera and Others v Chile*, Case 12.219, Report No. 43/05, OEA/Ser.L/V/II.124 doc. 5 (2005) para. 100.

⁴³⁹ See ‘Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/35/4 (n 436) para.

9 (noting that ‘[s]ome States that have not ratified the Covenant do not recognize the universal applicability of the right to conscientious objection to military service’; and Human Rights Council, ‘Approaches and challenges with regard to application procedures for obtaining the status of conscientious objector to military service in accordance with human rights standards: Report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/41/23 (41st sess., 24 Jun.–12 Jul. 2019) para. 4 (noting that ‘those seeking to exercise [the right to conscientious objection to military service] continue to face challenges’ and that ‘[a] number of States still do not recognize such a right, and as a result do not have in place provisions for conscientious objection to military service’). For recent national court decisions recognizing a right to conscientious objection, see discussion in the latter report at paras. 7–8, referring in particular to a ‘landmark decision’ of the Supreme Court of the Republic of Korea (Supreme Court en banc Decision 2016Do10912 (1 Nov. 2018), finding that conscientious objection constituted ‘justifiable grounds’ for failing to respond to a conscription call under art. 88(1) of the Military Service Act). For analysis of the Supreme Court’s decision, see Kim, J.H., (Justice), ‘The Judicial Responsibility to Guarantee Fundamental Rights: Reviewing the Decision of the Supreme Court of Korea on Conscientious Objection to Military Service’ (2020) 22 *Asia-Pacific Law & Policy Journal* 1. See also CNDA 18 décembre 2020 M. I. n° 19013796 C *Recueil* 2020 28, rejecting refugee status by a South Korean on the basis of legal developments, including an amnesty and the possibility of civil service.

⁴⁴⁰ See UNHCR, ‘Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees’: HCR/GIP/13/10/Corr.1 (12 Nov. 2014). Cf. Goodwin-Gill ([n 367](#)) 657–61.

⁴⁴¹ *Bayatyan v Armenia*, App. No. 23459/03 (ECtHR, Grand Chamber, 7 Jul. 2011).

⁴⁴² See discussion and the case cited *ibid.*, paras. 93–6; 99. The Commission had considered art. 9 ECHR 50 to be qualified by art. 4(3)(b), which provides that ‘forced or compulsory labour’ does not include ‘any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service’. In *Bayatyan*, the Court adopted the HRC’s argument in *Yoon and Choi v Republic of Korea* (see further [n 455](#) below), finding that art. 4(3)(b) ECHR 50 ‘neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by [art. 9]’: *ibid.*, para. 100.

⁴⁴³ See *Bayatyan* ([n 441](#)) paras. 102–7.

⁴⁴⁴ *Ibid.*, para. 110.

⁴⁴⁵ ECHR 50, art. 9(2). See also Goodwin-Gill ([n 367](#)) 659, referring to comments in the third edition of this work.

⁴⁴⁶ *Bayatyan* ([n 441](#)) para. 122.

⁴⁴⁷ *Ibid.*, paras. 123, 128. See also, for a similar approach, *DS (Iran)* ([n 108](#)) para. 264.

⁴⁴⁸ *Savda v Turkey*, App. No. 42730/05 (ECtHR, 12 Jun. 2012), in which a violation was

found with regards to a ‘secular’ conscientious objector.

⁴⁴⁹ Ibid., paras. 94, 96.

⁴⁵⁰ *Adyan and Others v Armenia*, App. No. 75604/11 (ECtHR, 12 Oct. 2017).

⁴⁵¹ Ibid., para. 67.

⁴⁵² Ibid., paras. 68–9. The Court concluded that ‘the alternative labour service was not sufficiently separated hierarchically and institutionally from the military system at the material time.’

⁴⁵³ Ibid., 70.

⁴⁵⁴ ICCPR 66, art. 8(3)(c)(ii).

⁴⁵⁵ Human Rights Committee, *Yoon and Choi v Republic of Korea*, UN doc. CCPR/C/88/D/1321-1322/2004 (3 Nov. 2006). In its 1993 General Comment No. 22, the Human Rights Committee took a more cautious approach, noting its belief that a right of conscientious objection ‘can be derived from article 18’, but stating that ‘[w]hen this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service’: ‘General Comment No. 22 (48) (art. 18)’ ([n 267](#)) para. 11 (emphasis added). In her dissenting opinion in *Yoon*, Wedgwood noted that ‘in the interval of more than a decade since [General Comment No. 22 was adopted], the Committee has never suggested in its jurisprudence under the Optional Protocol that such a “derivation” is in fact required by the Covenant’ (citation omitted). For previous communications on this issue, see *Yoon*, para. 8.3, n 3.

⁴⁵⁶ *Yoon* ([n 455](#)) para. 8.2.

⁴⁵⁷ Ibid., para. 8.3.

⁴⁵⁸ Ibid., para. 8.4. A similar approach was taken in *Jung and Others v Republic of Korea*, UN doc. CCPR/C/98/D/1593-1603/2007 (23 Mar. 2010) paras. 7.2–7.4.

⁴⁵⁹ See, amongst others, Human Rights Committee, *Jeong and Others v Republic of Korea*, UN doc. CCPR/C/101/D/1642-1741/2007 (24 Mar. 2011) para. 7.3; *Atasoy and Sarkut v Turkey*, UN doc. CCPR/C/104/D/1853-1854/2008 (29 Mar. 2012) para. 10.4; *Kim and Others v Republic of Korea*, UN doc. CCPR/C/106/D/1786/2008 (25 Oct. 2012) para. 7.4; *Abdullayev v Turkmenistan*, UN doc. CCPR/C/113/D/2218/2012 (25 Mar. 2015); *Uchetov v Turkmenistan*, UN doc. CCPR/C/117/D/2226/2012 (15 Jul. 2016) para. 7.6; *Durdyyev v Turkmenistan*, UN doc. CCPR/C/124/D/2268/2013 (17 Oct. 2018) para. 7.3; *Bae and Others v Republic of Korea*, UN doc. CCPR/C/128/D/2846/2016 (13 Mar. 2020) paras. 7.3, 7.5; *Nazarov and Others v Turkmenistan*, UN doc. CCPR/C/126/D/2302/2013 (25 Jul. 2019) para. 7.3. These views are discussed in Human Rights Council, ‘Conscientious objection to military service: Analytical report of the United Nations High Commissioner for Human Rights’ (35th sess., 2017) paras. 5–8 and Mathew, P., ‘Draft dodger/deserter or dissenter? Conscientious Objection as grounds for refugee status’, in Juss, S. S. & Harvey, C., eds., *Contemporary Issues in Refugee Law* (2013) 178–81.

⁴⁶⁰ Atasoy ([n 459](#)) paras. 12–13 (emphasis added). Art. 18(3) ICCPR 66 states that ‘[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.

⁴⁶¹ See Goodwin-Gill ([n 367](#)) 660–1 (arguing that the views in Atasoy ([n 459](#)) need careful consideration given their summary form, inconsistency with prior views, lack of reference to State practice, and lack of consideration of limitations to which the manifestation of religion or belief may be lawfully subject).

⁴⁶² See, for example, Jeong ([n 459](#)) Appendix (Individual opinion by Committee members Mr Yuji Iwasawa, Mr Gerald L. Neuman, and Mr Michael O’Flaherty (concurring)); Atasoy ([n 459](#)) Appendix (I. Individual opinion of Committee member Mr Gerald L. Neuman, jointly with members Mr Yuji Iwasawa, Mr Michael O’Flaherty, and Mr Walter Kälin (concurring)); Kim ([n 459](#)) Appendix II (Individual opinion of Committee member Mr Michael O’Flaherty (concurring)); Appendix III (Individual opinion of Committee member Mr Walter Kälin (concurring)); Appendix IV (Individual opinion of Committee members Mr Gerald L. Neuman and Mr Yuji Iwasawa (concurring)); Abdullayev ([n 459](#)) Appendix I (Joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany, and Konstantine Vardzelashvili (concurring)); Uchetov ([n 459](#)) Annex (Joint opinion of Committee members Yuji Iwasawa and Yuval Shany (concurring)). At the time of writing, a minority opinion was appended in all but four of the Committee’s views addressing conscientious objection to military service, those being Durdyyev ([n 459](#)); *Yegendurdyyew v Turkmenistan*, UN doc. CCPR/C/117/D/2227/2012 (14 Jul. 2016); Bae ([n 459](#)); and Nazarov ([n 459](#)).

⁴⁶³ Atasoy ([n 459](#)) Appendix (I. Individual opinion of Committee member Mr Gerald L. Neuman, jointly with members Mr Yuji Iwasawa, Mr Michael O’Flaherty, and Mr Walter Kälin (concurring)) 13. See also Kim ([n 459](#)) Appendix III (Individual opinion of Committee member Mr Walter Kälin (concurring)) 16–17.

⁴⁶⁴ Atasoy ([n 459](#)). See also Kim ([n 459](#)) Appendix IV (Individual opinion of Committee members Mr Gerald L. Neuman and Mr Yuji Iwasawa (concurring)) 18.

⁴⁶⁵ See, for example, Atasoy ([n 459](#)) Appendix (II. Individual opinion of Committee member Sir Nigel Rodley, jointly with members Mr Krister Thelin and Mr Cornelis Flinterman (concurring)), arguing that ‘it is precisely in time of armed conflict, when the community interests in question are most likely to be under greatest threat, that the right to conscientious objection is most in need of protection, most likely to be invoked and most likely to fail to be respected in practice’: at 15–16; Atasoy ([n 459](#)) Appendix (III. Individual opinion by Committee member Mr Fabián Omar Salvioli (concurring)); Kim ([n 459](#)) Appendix V (Individual opinion of Committee member Mr Fabián Salvioli (concurring)).

⁴⁶⁶ See Durdyyev ([n 459](#)) para. 7.3 and cases cited therein.

⁴⁶⁷ *Kim and Others v Republic of Korea*, UN doc. CCPR/C/112/D/2179/2012 (15 Oct. 2014) para. 7.3 (citation omitted).

⁴⁶⁸ See, for example, *DS (Iran)* ([n 108](#)) paras. 253–7, critiquing the majority’s view and preferring the views of the minority. The Tribunal’s characterization of refusal to serve as ‘externalising’ one’s internal belief ‘by associated conduct’—the ‘external projection of a freely chosen but otherwise internally confined belief by way of associated activity or symbolism’ seems a logical and sensible approach: at paras. 255–6.

⁴⁶⁹ UNHCR Guidelines on Claims to Refugee Status related to Military Service ([n 440](#)), replacing [UNHCR’s Position on Certain Types of Draft Evasion \(1991\)](#). Cf. Goodwin-Gill ([n 367](#)) 657–61.

⁴⁷⁰ See Human Rights Council, ‘Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/35/4 ([n 436](#)) para. 60 (‘Under international law, the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion or belief’). In contrast, the Human Rights Council has followed the more equivocal language in the Committee’s General Comment No. 22 (see discussion in [n 455](#) above): Human Rights Council, Resolution 24/17, ‘Conscientious objection to military service’ (24th sess., 27 Sep. 2013) para. 1 (‘Recognizes that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion or belief’).

⁴⁷¹ Namely, that there was no ‘core human right’ called conscientious objection to military service which could be shown to be violated; and Lord Hoffmann’s argument that freedom of conscience ends where manifestation of conscience begins. See further discussion of *Sepet & Bulbul* ([n 438](#)) in the third edition of this work, 112–16. In that edition, we argued that these two approaches sat uneasily with the finding that refugee status can indeed be accorded to one who refuses military service, if such service might require him or her to commit atrocities or gross human rights abuses, or where refusal to serve would earn grossly excessive or disproportionate punishment. As a matter of logic, grossly excessive or disproportionate punishment cannot turn non-Convention persecution into Convention persecution. Even if ‘disproportionate punishment’ is presumed to be discriminatory, still the question remains, on what Convention ground? The degree of punishment may be evidence of persecution, but the link to the Convention must lie somewhere else; and in our view, that can only be through the political opinion that is reflected in the exercise of freedom of conscience.

⁴⁷² In which we argued that the Court’s approach to causation is insufficient as it did not take adequate account of relevant difference, a point cogently made 60 years ago: ‘Since each religion or belief makes different demands on its followers, a mechanical approach of the principle of equality which does not take into account the various demands will often lead to injustice and in some cases even to discrimination’: United Nations, ‘Study of Discrimination in the Matter of Religious Rights and Practices’: UN doc. E/CN.4/Sub.2/300/Rev.1 (1960) 15. In the matter of human rights, matters of conscience (beliefs sincerely held in the exercise of this freedom) are matters of relevant difference, which is why freedom of conscience is a fundamental human right not subject to derogation, even in time of national emergency.

⁴⁷³ The UN and OHCHR Guide ‘Conscientious Objection to Military Service’ (2012) 20–1 cites UNGA res. 33/165 (20 Dec. 1978) as ‘implicitly’ recognizing ‘one type of selective [conscientious] objection’. The resolution recognizes ‘the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*’ and urges Member States to ‘consider favorably the granting to such persons of all the rights and benefits accorded to refugees’.

⁴⁷⁴ See *UNHCR Handbook* (n 3) para. 171.

⁴⁷⁵ Cf. *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1127 (Hutchison LJ).

⁴⁷⁶ *Sepet & Bulbul* (n 438) 863, para. 8. In *PK (Ukraine) v Secretary of State for the Home Department* [2019] EWCA Civ 1756, the England and Wales Court of Appeal remitted the case to the Upper Tribunal to determine whether ‘a draft evader facing a non-custodial punishment for failing to serve in an army which regularly commits acts contrary to IHL is entitled to refugee status’: paras. 31–3. See also *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69, [2004] 1 WLR 1825; *Zolfagharkhani v Minister of Employment and Immigration* (n 419); *Ciric v Minister of Employment and Immigration* [1994] 2 FC 65. Cf. *Hinzman v Minister of Citizenship and Immigration*, 2006 FC 420 (US conscientious objector in Canada, and whether in the case of ‘mere foot soldier’, the lawfulness of the military conflict in question is relevant to the question of refugee status); and *Hinzman v Minister of Citizenship and Immigration*, 2007 FCA 171, (declining to answer ‘whether evidence of the illegality of a military action is relevant to an analysis governed by paragraph 171 of the [UNHCR] Handbook’, since the applicants had failed to demonstrate that they had sought and were unable to obtain State protection: at paras. 37, 62).

⁴⁷⁷ Art. 9(2)(e), recast Qualification Directive. This does not exhaust the category of persecution by reason of conscientious objection. It is also considerably narrower than the Commission’s original proposal for the 2004 Qualification Directive: see European Commission, ‘Proposed draft for the Qualification Directive (2002/C 51 E/17) COM(2001) 510 final--2001/0207(CNS): Official Journal of the European Communities C 51 E/325 (26.2.2002. ECRe’s recommendation to broaden art. 9(2)(e) in the recast Qualification Directive by including persecution arising from conscientious objection to military service was not taken up: see *ECRE 2010* (n 60) 10.

⁴⁷⁸ Case C-472/13 (CJEU, Second Chamber, 26 Feb. 2015). For analysis see Gärditz, K. F., ‘*Shepherd v Germany*’, in *International Decisions*, (2015) 109 *AJIL* 623.

⁴⁷⁹ As summarized by the Court in *Shepherd v Germany* (n 478) para. 17.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*, para. 30.

⁴⁸² *Ibid.*, para. 46. See also paras. 36–8.

⁴⁸³ *Ibid.*, para. 46. See also paras. 39–40. On this issue see also earlier discussion by the New Zealand RSAA, stressing that there is, ‘no need for the particular conflict to have been the subject of a formal condemnation by resolution of a supranational body, although plainly

the existence of such condemnation would be relevant to the inquiry. Rather, what is happening on the ground as to observance of the laws of war by parties to the conflict is key': New Zealand, RSAA, *Refugee Appeal No. 73578* (19 Oct. 2005) para. 87; the Tribunal, recognizing refugee status, held that there was indeed a risk of violation of the laws of war, and that the applicant's position was 'political'. See also *Krotov* (n 477).

⁴⁸⁴ *Shepherd v Germany* (n 478) para. 41 ('an armed intervention engaged upon on the basis of a resolution adopted by that Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus ... although the possibility can never be excluded that acts contrary to the very principles of the Charter of the United Nations will be committed in war operations, the fact that the armed intervention takes place in such a context must be taken into account.') This presumption is critiqued by Gärditz in light of the Court's prior jurisprudence: (n 478) 629. Moreover, well-documented concerns regarding the conduct of certain peace-keeping forces are reason also for treating any presumption with caution.

⁴⁸⁵ *Shepherd v Germany* (n 478) para. 44.

⁴⁸⁶ Art. 9(2) provides in relevant part that acts of persecution can take the form of 'legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner', or 'prosecution or punishment which is disproportionate or discriminatory'.

⁴⁸⁷ *Shepherd v Germany* (n 478) para. 52.

⁴⁸⁸ See also Gärditz (n 478) 627–8 (arguing that 'caution should be taken in transferring elements of the ECJ's interpretation into international refugee law': at 627).

⁴⁸⁹ See Grief, N., 'British Quakers, the Peace Tax and International Law', in Janis, M. W. & Evans, C., eds., *Religion and International Law* (1999) 339, referring to the campaign for a conscientious objector status for taxpayers.

⁴⁹⁰ In *Prior v Canada* [1988] FCJ No. 107, a claim by a taxpayer who objected on grounds of conscience to contributing to military expenditure, was struck out, the Court finding no 'offence to conscience', no being 'forced to act in a way contrary to ... beliefs'. The Canadian Constitution does not guarantee that the State will not act inimically to a citizen's standards of proper conduct, but merely that a citizen will not be required to do something contrary to those standards, subject to the reasonable limitations recognized by s. 1 of the *Canadian Charter of Rights and Freedoms*.

⁴⁹¹ See *R v. Big M Drug Mart* [1985] 1 SCR 295; *Edwards Books and Art Limited v The Queen and Others* [1986] 2 SCR 713. In *Jones v The Queen* [1986] 2 SCR 284, the issue of compulsory school attendance was examined, in a context closer to the experience of the conscientious objector. The legislation in question was held to be a reasonable limitation on a parent's religious convictions regarding the education of children. The authorities did not purport to exercise absolute control, and there was no absolute obligation to attend public schools. Instruction could be given elsewhere, including at home, provided it was certified as

efficient; the appellant objected, again on religious grounds, to seeking such certification, but the Court found this to be demonstrably justifiable under Canadian law.

⁴⁹² This point was recognized by the Human Rights Committee in *Kim v Republic of Korea* ([n 459](#)) para. 7.3 (citation omitted), discussed above.

⁴⁹³ ‘Compelling’ here being used in the sense of ‘impossible to resist’: [Council of Europe, ‘Conscientious Objection to Military Service, Explanatory Report’](#), CE doc. 88.C55 (1988) paras. 15–17.

⁴⁹⁴ See, for example, *BE (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 540, in which the Court considered it to be ‘common ground that, once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion’: at paras. 35, 40. See also *DS (Iran)* ([n 108](#)) paras. 281–2; and UNHCR Guidelines on Claims to Refugee Status related to Military Service ([n 440](#)) paras. 3, 11. However, the OHCHR considers that ‘very few’ States currently recognize selective conscientious objection: see ‘Report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/41/23 ([n 439](#)) para. 26, citing OHCHR, ‘Conscientious Objection to Military Service’ (2012) 58.

⁴⁹⁵ ‘Conscientious Objection to Military Service’: UN doc. E/CN.4/Sub.2/1983/30/Rev.1 (the Eide/Mubanga-Chipoya Report) 3–4.

⁴⁹⁶ See UNHCR Guidelines on Claims to Refugee Status related to Military Service ([n 440](#)) para. 23 (in relation to an unlawful armed conflict); ‘Report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/41/23 ([n 439](#)) paras. 22 ff., citing Council of Europe, Recommendation CM/Rec(2010)4 of the Committee of Ministers to Member States on Human Rights of Members of the Armed Forces, paras. 40–46 (noting in particular that ‘[p]rofessional members of the armed forces should be able to leave the armed forces for reasons of conscience’: para. 42; Mathew ([n 459](#)) 185–6, 195).

⁴⁹⁷ See also UNHCR Guidelines on Religion-Based Refugee Claims ([n 274](#)) paras. 25–6; UNHCR Guidelines on Claims to Refugee Status related to Military Service ([n 440](#)) paras. 47–59.

⁴⁹⁸ This approach was cited with approval by the Canadian Federal Court of Appeal in *Zolfagharkhani* ([n 419](#)) para. 36; see also *Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 150; [2002] FCA 814 (Federal Court of Australia); *SZMFJ v Minister for Immigration and Citizenship (No.2)* [2009] FCA 95, para. 6 (noting that while the Full Court of the Federal Court reversed the decision in *Erduran* based on a Tribunal transcript not available to the lower court, it ‘did not disagree with the statements of principle in *Erduran* and those statements have been applied subsequently’). Cf. *Mehenni v Minister for Immigration and Multicultural Affairs* (1999) [1999] FCA 789, 164 ALR 192, in which the Court had no doubt that both full and partial objectors could be a particular social group, but considered that a law of general application applied in a non-discriminatory way would not amount to persecution ‘for reasons of’ such membership. In our view, analysis

along the spectrum of political opinion, which ‘necessarily’ opposes the individual to the authority of the State, is capable of bridging that gap.

⁴⁹⁹ Cf. Hill J in *Applicant N 403 v Minister for Immigration and Multicultural Affairs* [2000] FCA 1088 (23 Aug. 2000) para. 23, referring to Australia’s draft laws during the Vietnam War, which allowed those with ‘real conscientious objections’ to serve in non-combatant roles: ‘Without that limitation a conscientious objector could have been imprisoned. The suggested reason for their imprisonment would have been their failure to comply with the draft law, a law of universal application. But if the reason they did not wish to comply with the draft was their conscientious objection, one may ask what the real cause of their imprisonment would be. It is not difficult ... to argue that in such a case the cause ... would be the conscientious belief, which could be a political opinion, not merely the failure to comply with a law of general application. It is, however, essential, that an applicant have a real, not a simulated belief.’

⁵⁰⁰ The converse is that no State has the right to wage a war of aggression, or to employ unlimited choice of weapons. In *Zolfagharkhani* ([n 419](#)) the Court found that, ‘The probable use of chemical weapons ... is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion’: para. 34.

⁵⁰¹ Cf. *Akar v Attorney General of Sierra Leone* [1970] AC 853, in which the Privy Council declined to accept that a law dealing with citizenship was *by that fact alone* ‘reasonably necessary in a democratic society’ so as to avoid constitutional limitations, including provisions on discrimination. The European Court of Human Rights interprets the phrase ‘necessary in a democratic society’ to mean ‘justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued’; see *Moustaquim v Belgium* (1991) 13 EHRR 802, para. 43; *Beldjoudi v France* (1992) 14 EHRR 801; *Berrehab v The Netherlands* (1989) 11 EHRR 322, paras. 25, 29; *Bistieva v Poland*, App. No. 75157/14 (ECtHR, 10 Apr. 2018) para. 77.

⁵⁰² In the United Kingdom, throughout the Second World War, conscientious objectors were permitted the alternative of civilian service. Exemption from that was also permitted if reasons of religion or conscience demanded, while the criterion for exemption was the honesty or sincerity, rather than the ‘validity’ of the views held. See Barker, R., *Conscience, Government and War* (1982); Hayes, D., *Challenge of Conscience. The Story of the Conscientious Objectors of 1939–1949* (1949). Some 60,000 conscientious objectors were registered in the United Kingdom during the Second World War, that is, some 1.2 per cent of the total conscripted: Barker, *ibid.*, 115.

⁵⁰³ Although States may of course resolve the situation by simply exempting conscientious objectors from service altogether: see ‘Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/35/4 ([n 436](#)) para. 20.

⁵⁰⁴ On alternative service, see ECtHR case law and Human Rights Committee views cited above; ‘Report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/41/23 ([n 439](#)) paras. 56–8; Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Conscientious Objection to Military Service*: UN doc. E/CN.4/Sub.2/1983/ 30/Rev.1, paras. 104–15, 150–3.

⁵⁰⁵ Cf. Human Rights Council res. 24/17, ‘Conscientious objection to military service’: UN doc. A/HRC/RES/24/17 (27 Sep. 2013) para. 13; ‘Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights’: UN doc. A/HRC/35/4 ([n 436](#)) paras. 24–6.

⁵⁰⁶ See, for example, *Ali Manto v Minister of Immigration, Citizenship and Refugees, Minister of Public Safety and Emergency Preparedness* 2018 FC 335 (25 Mar. 2018) para. 19 and cases cited.

⁵⁰⁷ See art. 18 UDHR 48; art. 18 ICCPR 66; art. 12 ACHR 69; art. 9 ECHR 50.

⁵⁰⁸ Para. 7(d) and art. 1F, respectively. See further [Ch. 4](#).

⁵⁰⁹ O’Connell, D. P., *International Law* (2nd edn., 1970) 720; *Asylum* case [1950] ICJ Rep. 266, at 274; Lauterpacht, H., ‘The Law of Nations and the Punishment of War Crimes’ (1944) 21 *BYIL* 58; Bassiouni, M. C., *Crimes against Humanity in International Criminal Law* (1992).

⁵¹⁰ Goodwin-Gill ([n 125](#)) 143 ff., 226–8; Corey, J. M., ‘INS v Doherty: The Politics of Extradition, Deportation and Asylum’ (1992) 16 *Maryland Journal of International Law & Trade* 83.

⁵¹¹ See Shearer, I. A., *Extradition in International Law* (1971) 65–6; Epps, V., ‘The Validity of the Political Offence Exception in Extradition Treaties in Anglo-American Jurisprudence’ (1979) 20 *HarvILJ* 61, 86; Gold, M. E., ‘Non-extradition for political offences: the Communist perspective’ (1970) 11 *HarvILJ* 191.

⁵¹² See the provisions listed in *A Selected Bibliography on Territorial Asylum* (1977): UN doc. ST/GENEVA/LIB.SER.B/Ref.9, 68–74.

⁵¹³ See, in particular, the Swiss cases: *Pavan*, Ann. Dig., 1927–8, 347 (in which the theory of predominance is advanced); *Ficorilli* (1951) 18 ILR 345; *Kavic* (1952) 19 ILR 371; also, Whiteman, M., *Digest of International Law*, vol. 6, 799 ff.

⁵¹⁴ In *Giovanni Gatti*, Ann. Dig. 1947 case no. 70: Kiss, *Répertoire de la pratique française en matière de droit international public* (1966) vol. 2, 213–14, the Court of Appeal of Grenoble took the view that motive alone does not give a common crime the character of a political offence; such offence springs from the nature of the rights of the State which are injured. Cf. *Public Prosecutor v Zind*, (5 Apr. 1961) 40 ILR 214.

⁵¹⁵ Kiss ([n 514](#)) 210, 212, 216–17; cf. art. 3, 1957 European Convention on Extradition, as amended by its Fourth Protocol CETS No. 212. See also, art. 4(2)(b), 2003 United Kingdom–United States of America Extradition Treaty: *Treaty Series* No. 13 (2007); art. IV(1), Australia–Chile Extradition Treaty [1996] ATS 7.

⁵¹⁶ See *VerwRspr*, Bd. 20, S. 332 (OVG Münster, 1968). A Belgian was sentenced to 12

years' imprisonment for having served in the *Wehrmacht* during the Second World War. Released on parole, he was subsequently sentenced to serve the remainder of his sentence. He fled to the Federal Republic of Germany where the Court upheld his appeal against expulsion and noted that he would in any event be immune from extradition by reason of the political character of his offence. Cf. *In re Pohle*, 46 BVerfGE, 214, noted (1979) 73 AJIL 305, where the Federal Constitutional Court, in an appeal by a convicted member of the Baader-Meinhof group subsequently extradited from Greece, maintained the traditional rule that extradition treaties confer no rights on individuals, save if expressly mentioned. It construed the treaty with Greece as neither conferring rights on political offenders nor as barring a request for surrender of an offender who might be covered by an exception clause. It further held that membership in a 'criminal organization', even if politically motivated, did not constitute a political offence from the perspective of the German legal system.

⁵¹⁷ See, for example, debates in the United Kingdom, summarized in 6 *British Digest of International Law*, 661 ff.

⁵¹⁸ In the leading cases, *Re Castioni* [1891] 1 QB 149 and *Re Meunier* [1894] 2 QB 415, the Court emphasized that, to qualify for non-extradition, the offences in question must be 'incidental to and ... part of political disturbances', involving two or more parties. In *R v Governor of Brixton Prison, ex p. Schtraks* [1964] AC 556, it was suggested that the word 'political', 'indicate[s] ... that the requesting State is after [the fugitive] for reasons other than the enforcement of the criminal law in its ordinary, ... common or international aspect'. In each case, the fundamental requirement was that of political disturbance and opposition. See also *Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, at 209; Lord Diplock said that an offence could not be considered political 'unless the only purpose sought to be achieved by the offender ... were to change the government of the state in which it was committed' (emphasis added); and *T v Secretary of State for the Home Department* ([n 26](#)), discussed in [Ch. 4](#), s. 5.3.1.2.

⁵¹⁹ Provided that the person is being pursued for these crimes or has been sentenced. See s. 6, *Gesetz über die internationale Rechtshilfe in Strafsachen* (IRG) 1994, as amended in 2017 (provisions of international treaties only take precedence over the law if transposed as directly applicable national law: see s. 1(3)).

⁵²⁰ Code de procédure pénale, art. 696–4. The same wording was found in the now abrogated loi du 10 mars 1927, art. 5(2).

⁵²¹ *Gardai*, 2.800 (7 fév. 1958), cited in Tiberghien ([n 4](#)) 104.468. See also Conseil D'Etat, N° 254882 (9 Nov. 2005), affirming the exclusion of the applicant under art. 1F(b) of the Refugee Convention due to his leadership role in the PKK, given its practice of attacks against civilian populations. In CE 13 novembre 2020 M. V. n° 428582 B *Recueil* 2020 148, the Conseil d'Etat ruled that the CNDA was not bound by the qualifications in the penal code, and that 'un délit selon ce code peut être qualifié de « crime grave » au sens des dispositions de l'article L. 712-2 b) du CESEDA'.

⁵²² Cf. *McMullen v INS* 788 F.2d 591, 597 (9th Cir., 1986): 'There is a meaningful

distinction between terrorist acts directed at the military or official agencies of the State, and random acts of violence against ordinary citizens that are intended only “to promote social chaos”.’ *McMullen* was overruled on other grounds by *Barapind v Enomoto*, 400 F.3d 744, 751 n 7 (9th Cir., 2005). The finding in *McMullen* that ‘random acts of violence’ against ‘ordinary citizens’ were insufficiently linked to political objectives was affirmed in *Singh v Holder* 533 Fed. Appx. 712 (11 Jul. 2013). See also, *T v Secretary of State for the Home Department* (n 26) 120–2; *Ordinola v Hackman*, 478 F.3d 588 (4th Cir., 2007).

⁵²³ Cf. *Giovanni Gatti* (n 514).

⁵²⁴ *McMullen* (n 522) 597.

⁵²⁵ At 60–1; see now Ch. 4, s. 5.3.1.2.

⁵²⁶ *McMullen* (n 522) was overruled on other grounds by *Barapind* (n 522), as noted above. *Guan v Barr* 925 F.3d 1022, 1031 (9th Cir., 2019) cites *McMullen* for the proposition that a “serious non-political crime” is a crime that was not committed out of “genuine political motives,” was not directed toward the “modification of the political organization or ... structure of the state,” and in which there is no direct, “causal link between the crime committed and its alleged political purpose and object.”’.

⁵²⁷ See, for example, *Nezirovic v Holt* 779 F.3d 233 (4th Cir., 2015), affirming that the political offence exception did not apply to the alleged actions of a prison guard in beating, degrading, and humiliating unarmed civilian prisoners. The conclusion in *Eain v Wilkes*, 641 F.2d 504, 521 (7th Cir., 1981) that ‘the indiscriminate bombing of a civilian population is not recognized as a protected political act’ was not taken up *Quinn v Robinson*, 783 F.2d 776, 810 (9th Cir., 1986), which found that ‘there is no justification for distinguishing ... between attacks on military and civilian targets’. *Quinn*’s findings on this point were in turn disputed by *Ordinola* (n 522) 602–3 (see discussion below).

⁵²⁸ *Ordinola* (n 522).

⁵²⁹ The incidence test asks ‘whether (1) there was a violent political disturbance or uprising in the requesting country at the time of the alleged offense, and if so, (2) whether the alleged offense was incidental to or in the furtherance of the uprising’: *ibid.*, 597, citing *Vo v Benov*, 445 F.3d 1235 (9th Cir., 2006) 1241.

⁵³⁰ *Ordinola* (n 522) 604, disagreeing with the conclusion in *Quinn* (n 527) that ‘there is no justification for distinguishing ... between attacks on military and civilian targets’: see *Ordinola*, 602–3.

⁵³¹ The facts are set out in full in 658 F.2d 1312 (1981).

⁵³² In a 1989 extradition case, the Court ruled that an act properly punishable even in the context of declared war, or in the heat of open military conflict, cannot fall within the political offence exception: *Mahmoud Abed Atta*, 706 F. Supp. 1032 (D. Ct., EDNY, 1989). The case involved an attack in Israel on a bus, in which the driver was killed and a passenger wounded. The Court opted for a qualitative standard, that takes account of ‘our own notions of civilised strife’. It also ruled that, even if one or more of the passengers might have been a non-civilian, this did not make the bus a military vehicle at the time of the attack, so

exposing it to indiscriminate attack. Cf. *Gonzalez v Minister of Employment and Immigration* [1994] FCJ No. 765; *McGlinchey v Wren* [1982] IR 154; *Shannon v Fanning* [1984] IR 569; Connelly, A., ‘Ireland and the Political Offence: Exception to Extradition’ (1985) 12 *Journal of Law and Society* 153.

⁵³³ *T v Secretary of State for the Home Department* ([n 26](#)) 769.

⁵³⁴ *Ibid.*, 770.

⁵³⁵ *Ibid.*, 762, 773.

⁵³⁶ *Ibid.*, 786–7.

⁵³⁷ The 1977 European Convention on the Suppression of Terrorism (ETS No. 090), for example, provides that the following offences, *inter alia*, shall not be considered as political offences: offences against internationally protected persons; kidnapping; hostage-taking; the use of explosives or automatic firearms, if such use endangers persons; and attempts to commit any of the above. Other offences may also be excluded if they involve collective danger to the life, physical integrity, or liberty of persons; if those affected are foreign to the motives of those responsible; and if cruel or vicious means are employed. At 30 April 2021, 46 States were party to the 1977 Convention. A 2003 Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190) adds three new terrorism-related offences; at 30 April 2021, 35 States were party. See also 2005 European Convention on the Prevention of Terrorism: CETS No. 196, which creates three new offences which may be ‘preparatory’ to the terrorist offences defined in existing conventions; see ‘Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism’ (16 May 2005) paras. 32–3 and Convention arts. 5 (public provocation to commit a terrorist offence); 6 (recruitment); and 7 (training); at 30 April 2021, 41 States and the European Union were parties to the 2005 Convention.

⁵³⁸ The recent cases of Julian Assange and Edward Snowden provide some insight into the issues involved; see Kielsgard, M., ‘The Political Offense Exception: Punishing Whistleblowers Abroad’ (14 Nov. 2013): <https://www.ejiltalk.org/>; <https://whistleblowingnetwork.org>; <https://blueprintforfreespeech.net>; and on aspects of the general question, see Khoday, A., ‘Resisting Criminal Organizations: Reconceptualizing the “Political” in International Refugee Law’ (2016) 61 *McGill Law Journal* 461; also, Dauvergne, C., ‘Toward a New Framework for Understanding Political Opinion’ (2016) 37 *Michigan Journal of International Law* 243, 271–7 (citing recent ECtHR cases on whistleblowers and European Parliament Resolution 1729 on the protection of whistleblowers (2010)).

⁵³⁹ Many earlier treaties, however, were intended precisely to ensure the survival of rulers. See examples in the third edition of this work, 123.

⁵⁴⁰ Cf. Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’, in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 199.

⁵⁴¹ The political offence to extradition may be on the way out, as developments described

above suggest. This may be balanced by the wider acceptance of the principle of protection against discrimination and prejudice in the conduct of criminal proceedings; see, for example, s. 81 of the 2003 UK Extradition Act, which bars surrender in the case of ‘extraneous considerations’, such as prosecution or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions, or if the person concerned might be prejudiced at trial or punished, detained or restricted in their personal liberty by reason of race, religion, nationality, gender, sexual orientation or political opinions. Nevertheless, whether loss of the ‘political offence’ is a good thing is debatable.

⁵⁴² In *Acosta* (n 33), however, the US Board of Immigration Appeals saw the requirement of international protection as inherent in the refugee concept, because the claimant’s country of origin was no longer safe. The criterion of inability or unwillingness to return to a particular ‘country’ implied further that the claimant ‘must do more than show a well-founded fear of persecution in a particular place ... within a country; he must show that the threat of persecution exists for him country-wide’.

⁵⁴³ Cf. art. I(2) OAU 69; see generally *UNHCR Handbook* (n 3) para. 91; Hathaway & Foster (n 4) 332–61; Schultz, J., *The Internal Protection Alternative in Refugee Law: Treaty Basis and Scope of Application under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (2019); Schultz, J. & Einarsen, T., ‘The Right to Refugee Status and the Internal Protection Alternative: What Does the Law Say?’, in Burson, B. & Cantor, D. J., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 274; Ní Ghráinne, B., ‘The Internal Protection Alternative Inquiry and Human Rights Considerations—Irrelevant or Indispensable?’ (2015) 27 *IJRL* 29; Mathew, P., ‘The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited’, in Juss, S. S., ed., *The Ashgate Research Companion to Migration Law, Theory and Policy* (2013) 189; Kelley, N., ‘Internal Flight/Relocation/Protection Alternative: Is it Reasonable?’ (2002) 14 *IJRL* 4; Marx, R., ‘The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures’ (2002) 14 *IJRL* 179; Storey, H., ‘The Internal Flight Alternative Test: The Jurisprudence Re-examined’ (1998) 10 *IJRL* 499; Marx, *Kommentar zum Asylverfahrensgesetz* (n 4); Köfner, G. & Nicolaus, P., *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* (1986) 360–84.

⁵⁴⁴ For early examples, see the third edition of this work, 123–6. The United States Asylum Regulations provide: ‘An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country ... if under all the circumstances it would be reasonable to expect the applicant to do so’: 8 CFR § 208.13(b)(2)(ii). See further Anker (n 4) §§ 2:13–15.

⁵⁴⁵ UNHCR uses the term ‘internal flight or relocation alternative’: see UNHCR, ‘Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions’: HCR/GIP/16/12 (2 Dec. 2016); UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention

and/or 1967 Protocol relating to the Status of Refugees': HCR/GIP/03/04 (23 Jul. 2003). Hathaway and Foster prefer 'internal protection': (n 4) 334–5. See also Schultz's discussion of terminology: (n 543) 15–17.

⁵⁴⁶ For an early decision, see Bundesverfassungsgericht (Federal Constitutional Court) (10 Jul. 1989) *BVerfGE* 2 BvR 502/86, 2 BvR 1000/86, 2 BvR 961/86, noting that an internal flight alternative presupposes that the territory in question offers the asylum seeker reasonable protection against persecution: Case Abstract No. *IJRL/0084* (1991) 3 *IJRL* 343. See also Schultz's discussion of current approaches to the internal protection alternative, characterizing the various tests as Returnability ('Effective protection against persecution'); Reasonableness ('Relevant (safely accessible and safe) and reasonable'); Refugee rights ('Safely accessible and safe, plus affirmative protection inspired by Convention-based conception of refugee rights'); and Proportionality ('Impact of IPA application must be proportionate to the state interest in sustaining its protection capacities'): Schultz (n 543) 81, Table 2 and Ch. 3 generally.

⁵⁴⁷ According to art. 8 of the recast Qualification Directive, Member States may determine that there is no need for international protection if, in a part of his or her country of origin, the applicant (a) 'has no well-founded fear of being persecuted or is not at real risk of suffering serious harm' or (b) 'has access to protection against persecution or serious harm', and the applicant can safely and legally enter that part of the country and can reasonably be expected to stay there. Member States are to have regard to 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant', but questions of when a person may 'reasonably be expected' to stay in the particular location are left open. ECRE notes that the amendments to the recast Qualification Directive have the effect of 'further align[ing] this provision with ECtHR jurisprudence', notably *Salah Sheekh* (n 63): ECRE Information Note on Directive 2011/95/EU (n 60) 7. See also recast Qualification Directive, recital (27), which provides inter alia that '[w]here the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant'.

⁵⁴⁸ [1998] QB 929, [1997] 3 WLR 1162. See also Storey (n 543).

⁵⁴⁹ 109 DLR (4th) 682, 687. In the particular circumstances of the appellant, a Sri Lankan Tamil, the Court found that Colombo did not constitute an internal flight alternative, and he was declared to be a Convention refugee: paras. 14–15. See also *Rasaratnam v Minister of Employment and Immigration* [1992] 1 FC 706; Case Abstract No. *IJRL/0099* (1992) 3 *IJRL* 95.

⁵⁵⁰ *ex parte Robinson* (n 548) 1169–70, 1172–3.

⁵⁵¹ See recast Qualification Directive, art. 8(1), discussed in n 547 above; *Salah Sheekh* (n 63) para. 141; Eaton (n 63). Similar and no less difficult assessments can also be required when applying the criteria for complementary protection. In each case, the international law baseline is that no State should send or return an individual to another country in which he or she is at risk of serious harm.

⁵⁵² 8 CFR § 208.13(b)(3)—asylum: reasonableness of internal location. See also 8 CFR §208.16(b)(3)—withholding. The Regulations distinguish between harm caused by State and non-State actors in relation to the burden of proof. Where the applicant has not shown past persecution, then he or she has the burden of establishing that it would be unreasonable to relocate, unless the persecution is by a government or is government-sponsored; in the latter case, it is presumed that internal relocation would be unreasonable, ‘unless [the Department of Homeland Security] establishes, by a preponderance of the evidence that, under all the circumstances’ relocation would be reasonable. There is a presumption that internal relocation would be reasonable in all cases involving persecution by a private actor, regardless of whether past persecution has been established, ‘unless the applicant establishes, by a preponderance of the evidence’ that relocation would be unreasonable: 8 CFR § 208.13(b)(3)(i)–(iii). See further Anker ([n 4](#)) §§ 2:13–15.

⁵⁵³ [2006] UKHL 5, [2006] 2 AC 426.

⁵⁵⁴ Ibid., 457, para. 45 (Lord Hope), concurring with Lord Bingham, rejecting the ‘Hathaway/New Zealand rule’ (446–8, paras. 15 ff). The Court preferred the approach adopted by the Court of Appeal in *E v Secretary of State for the Home Department* [2004] QB 531.

⁵⁵⁵ *Januzi* ([n 553](#)) 440, para. 7 (Lord Bingham).

⁵⁵⁶ Ibid., 446–7, paras. 15–16.

⁵⁵⁷ Ibid., 447–8, paras. 17–19.

⁵⁵⁸ Ibid., 448–50, paras. 20–1; UNHCR Guidelines on Internal Flight or Relocation Alternative ([n 545](#)) paras. 7, 28–30.

⁵⁵⁹ *Januzi* ([n 553](#)) 457, para. 47. According to the Canadian Federal Court of Appeal in *Ranganathan v Minister of Citizenship and Immigration* [2001] 2 FC 164, para. 15, this is a ‘very high threshold’; cited in *Januzi* ([n 553](#)) 444, para. 12 (Lord Bingham). Cf. the jurisprudence on expulsion and art. 3 ECHR 50, for example, *Sufi and Elmi v United Kingdom*, App. Nos. 8319/07 and 11449/07 (ECtHR, 28 Jun. 2011) paras. 282–3, 291–3 (finding, inter alia, ‘the situation of general violence in Mogadishu ... sufficiently intense to enable [the Court] to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection’: at para. 293); *Salah Sheekh* ([n 63](#)) para. 141 (specifically considering the conditions necessary to avoid a possible breach of art. 3 when proposing an internal flight alternative); *SHH v United Kingdom* (2013) 57 EHRR (finding no violation of art. 3 in the return of a disabled man to Afghanistan who ‘failed to adduce any additional substantive evidence to support his claim that disabled persons are per se at greater risk of violence, as opposed to other difficulties such as discrimination and poor humanitarian conditions, than the general Afghan population’: at para. 86); *Bensaid v United Kingdom* (2001) 33 EHRR 205 paras. 37–40; *Arcila Henao v The Netherlands*, App. No. 13669/03 (ECtHR, 24 Jun. 2003); *MSS v Belgium and Greece*, App. No. 30696/09 (ECtHR, Grand Chamber, 21 Jan. 2011); *N v The*

United Kingdom [2008] ECHR 453; *D v United Kingdom* (1997) 24 EHRR 423. See further discussion on article 3 jurisprudence in Ch. 12, s. 4.2.

⁵⁶⁰ *Januzi* ([n 553](#)) 459–60, para. 54.

⁵⁶¹ *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678. The respondents in the case were three of the four appellants in *Januzi* ([n 553](#)). Their cases had been referred for reconsideration, the Tribunal upheld the Secretary of State's refusal of asylum, the Court of Appeal allowed their appeals, and the Secretary of State then appealed to the House of Lords: 681–2, para. 1 (Lord Bingham).

⁵⁶² *AH (Sudan)* ([n 561](#)) 686, para. 9. See also 689, para. 22 (Lady Hale).

⁵⁶³ Ibid., 687, para. 13. See also Lord Brown, 693, para. 36.

⁵⁶⁴ Ibid., 683, para. 5.

⁵⁶⁵ *Refugee Appeal No. 76044* (11 Sep. 2008) paras. 141–62; 177–8; see *Schultz* ([n 543](#)) 110, n 112. Notwithstanding the search for one true meaning in the interpretation of treaties, individual States necessarily have some room for manoeuvre in applying their international obligations; there is no general rule preventing them from doing more than what they have formally committed to when ratifying the 1951 Convention/1967 Protocol; cf. art. 5, CSR 51.

⁵⁶⁶ *SZATV v Minister for Immigration and Citizenship and Another* [2007] HCA 40, (2007) 233 CLR 18, finding that '[w]hat is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality': at 27, para. 24 (Gummow, Hayne, and Crennan JJ). The Court maintained its position that 'protection' in art. 1A(2) refers to diplomatic or consular protection abroad: at 24–5, para. 16 (per Gummow, Hayne, and Crennan JJ), though Kirby J called for reconsideration of this position: at 37, para. 60. See also *SZFDV v Minister for Immigration and Citizenship* [2007] HCA 41, (2007) 233 CLR 51. In *Minister for Immigration and Border Protection v SZSCA* [2004] HCA 45, (2014) 254 CLR 317, the High Court found that the *Januzi* approach (see [n 553](#)) applied, by analogy, to a situation in which an applicant would be safe in a place of previous residence, 'so long as he or she remains there': 326–7, paras. 20–5 (French CJ, Hayne, Kiefel, and Keane JJ). See also *CRI026 v The Republic of Nauru* [2018] HCA 19, (2018) 92 AJLR 529, 539–40, para. 39 (on appeal from the Supreme Court of Nauru), in which the High Court (Kiefel CJ, Gageler, and Nettle JJ) accepted the application of a 'reasonable internal relocation' test in complementary protection cases and recalled the earlier statement in *SZATV* at 27, para. 24 (cited above).

⁵⁶⁷ Migration Act 1958, s. 5J(1)(c) (emphasis added). The Explanatory Memorandum noted the Government's 'intention that this statutory implementation of the "internal relocation" principle not encompass a "reasonableness" test which assesses whether it is reasonable for an asylum seeker to relocate to another area of the receiving country': House of Representatives, 'Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Bill 2014: Explanatory Memorandum', 10–11, see also 171–2. The Explanatory Memorandum states that decision-makers should, in determining whether a

person can relocate, ‘take into account whether the person can safely and legally access the area upon returning to the receiving country’, but no such language is included in the amendment itself: at 10; discussed in Schultz ([n 543](#)) 89–90.

[568](#) See further Foster, M. & McAdam, J., ‘Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Submission 167’ (31 Oct. 2014) 15–16.

[569](#) *FCS17 v Minister for Home Affairs* [2020] FCAFC 68, para. 80 (White and Colvin JJ). See also Allsop CJ, ‘generally agree[ing]’ with the reasons of White and Colvin JJ (at para. 1) while using the language ‘inhabited or habitable, and safe areas to which the person can lawfully go’: para. 21. Chief Justice Allsop considers that this construction derives from ‘the notion of safety immanent within the core obligation of protection in the Refugees Convention as an humanitarian instrument concerned with the protection of the persecuted in a society’: para. 20. See further discussion in Migration and Refugee Division Legal Services, Administrative Appeals Tribunal ([n 118](#)) Ch. 3 (updated Nov. 2020) 27.

[570](#) See *FCS17* ([n 569](#)) para. 82 (White and Colvin JJ), referring to the ‘“viable or realistic alternative” relocation requirement approved in *Januzi* and *CRI026*’.

[571](#) For alternative approaches and a variety of emphases, see Hathaway & Foster ([n 4](#)) 332–61; Mathew ([n 543](#)) 196–204; Ní Ghráinne ([n 543](#)) 48, 50; Schultz ([n 543](#)) 104–6; Schultz & Einarsen ([n 543](#)) 288–98, 315–16.

[572](#) See, generally, *UNHCR Handbook* ([n 3](#)) paras. 164–6; UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence ([n 545](#)); also Hathaway & Foster ([n 4](#)) 177–81; Zimmermann & Mahler ([n 101](#)) 370–2; Holzer, V., ‘The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence’, in Türk, V., Edwards, A., & Wouters, C., eds., *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection* (2017); Cantor, D. J. & Durieux, J.-F., eds., *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (2014); Wouters, C., ‘Conflict Refugees’, in Costello, Foster, & McAdam ([n 12](#)); Lülf, C., *Conflict displacement and legal protection: understanding asylum, human rights and refugee law* (2019); Kälin, W., ‘Flight in times of war’ (2001) 83 *International Review of the Red Cross* 629; Bodart, S., ‘Les réfugiés apolitiques: guerre civile et persécution de groupe au regard de la Convention de Genève’ (1995) 7 *IJRL* 39; von Sternberg, M. R., *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (2002); von Sternberg, M. R., ‘Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns,’ (1993) 5 *IJRL* 153; Kälin, W., ‘Refugees and Civil Wars: Only a Matter of Interpretation?’ (1991) 3 *IJRL* 435. In the context of subsidiary protection, see Garlick, M., ‘Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict: Article 15(c) of the EU Qualification Directive’, in Türk, V., Edwards, A., & Wouters, C., eds., *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection* (2017).

⁵⁷³ For early references, see CRR (21 fev. 1984) *Waked*, 21.951, doc. réf., no. 7, 15/24 juillet 1987, Supp., CJ., 2—‘les faits ainsi allégués sont des conséquences de la guerre civile qui déchire le Liban depuis de longue années et ne constituent pas des persécutions émanant directement des autorités publiques ou exercées par des particuliers avec l’encouragement ou la tolérance volontaires de ces autorités’ CRR (15 sept. 1986) *Chahine*, 33.958, doc. réf., no. 7 (15/24 juillet 1987) Supp., CJ., 4—‘la requérante décrit une situation générale d’insécurité et ne fait état d’aucun mauvais traitement dont elle aurait été victime personnellement’.

⁵⁷⁴ *Salibian v Minister for Employment and Immigration* ([n 47](#)) 258; also, Conseil d’Etat (26 mai 1993) No. 43.082 (3ème ch.) *Muric c/ Etat belge*; see (1993) 74 *RDDE* 336; Hathaway & Foster ([n 4](#)) 179–80; Shoyele, O., ‘Armed Conflicts and Canadian Refugee Law and Policy’ (2004) 16 *IJRL* 547.

⁵⁷⁵ UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict and Violence ([n 545](#)) para. 17 (citations omitted, emphasis added). For UNHCR’s definition of ‘situations of armed conflict and violence’, see para. 5.

⁵⁷⁶ *Ibid.*, para. 12. See also para. 22.

⁵⁷⁷ *Ibid.*, paras. 32–9 (on the causal link, noting *inter alia* that while intent may be a relevant factor, ‘[a] causal link may also be established by the strategies, tactics or means and methods of warfare of the persecutor, by the inability or unwillingness of the state to provide protection, or by the effect(s) of the situation of armed conflict and violence’). Care is required in assessing the causal link in such circumstances. ‘Rarely are modern-day situations of armed conflict and violence characterised by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds’ (para. 33). See also *Isa v Canada (Secretary of State)* [1995] FCJ No. 254 (FC-TD); *Rizkallah v Minister of Employment and Immigration* [1992] FCJ No. 412 (FCA); *Zalzali* ([n 122](#)); *Ward* ([n 122](#)).

⁵⁷⁸ See for example, CRR (4 sept. 1991) *Freemans*; CRR (30 sept. 1991) *Togbah*, discussed in Tiberghien, F., ‘Les situations de guerre civile et la reconnaissance de la qualité de réfugié’, doc. réf., no. 181 (21/30 avr. 1992) Supp., CJ, 4. See also *Ahmed v Austria* (1996) 24 EHRR 278, finding that because of the civil war and disintegration of State authority in Somalia, ‘there was no indication that … any public authority would be able to protect’ the claimant: para. 44.

⁵⁷⁹ CRR, Sections réunies (26 nov. 1993) *Ahmed Abdullah*, 229.619, doc. réf., no. 237 (1er/14 mars 1994) Supp., CJ, 1. See also Hailbronner, K., ‘Rechtsfragen der Aufnahme von “Gewaltflüchtlingen” in Westeuropa—am Beispiel Jugoslawien’ (1993) *Asyl* 517, 527–9, citing decisions of the Federal Constitutional Court, and arguing that protection against violations of human rights in open civil war does not come within the scheme of protection of the 1951 Convention, unless a government responsible for the implementation of international obligations can still be identified.

⁵⁸⁰ [1999] 1 AC 293.

⁵⁸¹ Ibid., 311.

⁵⁸² Ibid., 312.

⁵⁸³ Lord Lloyd twice used the same word earlier in his judgment, first as a description in the passive voice: ‘the local clans are engaged in civil war’: ibid., 303; and secondly, in an adjectival phrase: ‘fighting between clans engaged in civil war is not what the framers of the Convention had in mind by the word persecution’: ibid., 308.

⁵⁸⁴ Presumably if the conflict had become genocidal, refugee status would also have been denied; which cannot be right. Compare the decision of the US Board of Immigration Appeals in *H-*, 21 I&N Dec. 337 (BIA, 1996), holding, first, that membership in a clan can constitute membership in a ‘particular social group’, and that the Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a group; and secondly, that while inter-clan violence may arise during the course of civil strife, such circumstances do not preclude the possibility that harm inflicted during the course of such strife may constitute persecution.

⁵⁸⁵ See Kagan, M. & Johnson, W. P., ‘Persecution in the Fog of War: The House of Lords’ Decision in *Adan*’ (2002) 23 *Michigan Journal of International Law* 247—the authors’ proposal for the alternative terminology of ‘differential victimization’ would seem to add little or anything to a common-sense assessment of the risk of harm. See also Shah, P., ‘Rewriting the Refugee Convention: The *Adan* Case in the House of Lords’ (1998) 12 *Immigration & Nationality Law & Practice* 100.

⁵⁸⁶ UNHCR Guidelines on Claims for Refugee Status related to Situations of Armed Conflict (ⁿ 545) para. 22 (noting that an applicant fleeing such situations ‘is not required to establish a risk of harm over and above that of others similarly situated (sometimes called a “differential test”)’ (citations omitted)). See also, in the context of the European Court of Human Rights’ jurisprudence on art. 3, *Salah Sheekh* (ⁿ 63) para. 148 (noting that ‘the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally [beyond the fact of his belonging to the Ashraf] in order to show that he was, and continues to be, personally at risk’).

⁵⁸⁷ A point made succinctly by the Court in the Australian case, *Minister for Immigration and Multicultural Affairs v Abdi* [1999] FCA 299 (Full Court, 26 Mar. 1999) para. 37, adding at para. 39: ‘It is difficult ... to see the basis on which a superadded requirement of “greater risk”, “differential risk” or “risk over and above that arising from clan warfare” can be derived as a criterion for application of the Convention definition where the war is based on race or religion rather than for example a quest for property, power or resources. ... Given the purpose of the Convention and the well-settled principle that a broad, liberal and purposive interpretation must be given to the language, it is difficult to see the reason why a “second tier” of “differential” or superadded persecution should be imposed on an applicant for refugee status.’ But see also *Ibrahim* (ⁿ 118), in which Gummow J stated that ‘[t]he notions of “civil war”, “differential operation” and “object” or “motivation” of that “civil war” are distractions from applying the text of the Convention definition. In so far as *Adan*

and the decision of the Full Court in *Abdi* and the present case expound or apply them, those decisions should not be followed' (51, para. 147); see also, Gleeson CJ: '[d]epending upon the factual issues raised for examination, it may be helpful to consider whether conduct of a certain kind is "systematic", or whether treatment of a certain kind is discriminatory, or "differential". In the end, however, it is the language of the Convention which has to be applied.' (4, para. 5); see also Hayne J (73, paras. 205–7).

⁵⁸⁸ Storey, H., 'Armed Conflict in Asylum Law: The "War Flaw"' (2012) 31(2) *RSQ* 1, 15 (emphasis on 'starting point' in original). See also Durieux, J.-F., 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) *RSQ* 161; Juss, S. S., 'Problematizing the Protection of "War Refugees": A Rejoinder to Hugo Storey and Jean-François Durieux' (2013) 32(1) *RSQ* 122; and Storey, H., 'The War Flaw and Why it Matters', in Cantor & Durieux ([n 572](#)) 40, 45.

⁵⁸⁹ Zimmermann & Mahler ([n 101](#)) 371.

⁵⁹⁰ Durieux ([n 588](#)) 163.

⁵⁹¹ *Ibid.*, 164. See also Hathaway & Foster ([n 4](#)) 209, n 148. See further Fripp, E., 'International Humanitarian Law and the Interpretation of 'Persecution' in Article 1A(2) CSR51' (2014) 26 *IJRL* 382, 400–1, 403; Durieux, J.-F. & Cantor, D. J., 'Refuge from Inhumanity? Canvassing the Issues', in Cantor & Durieux ([n 572](#)) 3. On subsidiary protection, see also Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (CJEU, Fourth Chamber, 30 Jan. 2014) para. 35—in the context of subsidiary protection and the meaning of 'internal armed conflict' in art. 15(c) of the original Qualification Directive, there is no requirement that a conflict 'be categorised as "armed conflict not of an international character" under international humanitarian law'); Garlick ([n 572](#)) 259–60; Bauloz, C., 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive', in Cantor, D. J. & Durieux, J.-F., eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014) 247; *Storey 2014* ([n 588](#)) 49–55; and [Ch. 7](#), s. 6.

⁵⁹² See Crawford, J. & Hyndman, P., 'Three Heresies in the Application of the Refugee Convention' (1989) 1 *IJRL* 152; Zimmermann & Mahler ([n 101](#)) 369–70; Hathaway & Foster ([n 4](#)) 174–81.

⁵⁹³ Grahl-Madsen ([n 3](#)) 213. In *R v Secretary of State for the Home Department, ex p. Jeyakumaran*, No. CO/290/84, QBD, unreported (28 Jun. 1985), Taylor J referred to the singling out requirement as a 'startling proposition. It can be little comfort to a Tamil family to know that they are being persecuted simply as Tamils rather than as individuals. How can this dismal distinction bear upon whether the applicant has a well-founded fear of persecution?' The Court held that 'the evidence clearly shows the reason for oppression to have been simply membership of the Tamil minority'.

⁵⁹⁴ Economic reasons or motivation alone will not entitle a person to refugee status; but a government's 'economic measures' may well be the cloak for action calculated to destroy the economic livelihood of specific groups; in such cases, a fear of persecution can be well

founded. Cf. Palley, C., *Constitutional Law and Minorities* (Minority Rights Group, Report No. 36, 1978) on the subject of laws and administrative action designed to remedy economic imbalances, at 10: ‘If the emphasis is on remedying disadvantage and lack of opportunity (such as special educational programmes, special technical assistance programmes, special loan programmes in setting up co-operatives) or is protective (protection of native land against sale to capitalist entrepreneurs) it can be more readily tolerated by non-recipients. If it becomes an instrument of economic attack on other communities by denial of the right to engage in their traditional occupations, then it is proper to describe the technique as one of domination.’

⁵⁹⁵ See 8 CFR § 208.13(b)(2)(iii)(A)–(B)—asylum (emphasis added); see also § 208.16(b) (2)(i)–(ii)—withholding.

⁵⁹⁶ See also Ch. 7, s. 5 (on best interests of the child); Ch. 9, s. 3.2 (on child refugees); Ch. 12, s. 4.2.1 (on children’s claims for protection from inhuman or degrading treatment).

⁵⁹⁷ Executive Committee Conclusion No. 107 (2007) para. (g) recommends collaboration between States, UNHCR and other agencies to, inter alia, ‘[d]evelop child and gender-sensitive national asylum procedures, where feasible, and UNHCR status determination procedures with adapted procedures including ... prioritized processing of unaccompanied and separated child asylum-seekers’ and ‘qualified free legal or other representation for unaccompanied and separated children’. Cf. art. 22(1), 1989 Convention on the Rights of the Child (CRC 89): ‘States Parties shall take appropriate measures to ensure that a child who is seeking refugee status ... 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.’ See generally, UNHCR, ‘Children on the Move: Background Paper’, High Commissioner’s Dialogue on Protection Challenges (28 Nov. 2016); Lelliott, J., ‘Smuggled and Trafficked Unaccompanied Minors: Towards a Coherent, Protection-Based Approach in International Law’ (2017) 29 *IJRL* 238; Wilding, J., ‘Unaccompanied Children Seeking Asylum in the UK: From Centres of Concentration to a Better Holding Environment’ (2017) 29 *IJRL* 270; Touzenis, K., *Unaccompanied Minors: Rights and Protection* (2006); Bhabha, J., *Child Migration and Human Rights in a Global Age* (2014) Ch. 6; Bhabha, J. & Young, W., ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and The New U.S. Guidelines’ (1999) 11 *IJRL* 84; Russell, S., ‘Unaccompanied Refugee Children in the United Kingdom’ (1999) 11 *IJRL* 126. See also, Smyth, C., *European Asylum Law and the Rights of the Child* (2014).

⁵⁹⁸ Provided, for example, that the defendant is not excludable, or a citizen having the protection of another country. Note, however, that a change in the relationship can amount to a change of circumstances leading to cessation of refugee status under art. 1F(c); see CE 29 novembre 2019 M. K. n° 421523 B *Recueil* 2019 164.

⁵⁹⁹ UNHCR *Handbook* (n 3) paras. 181–8, 184.

⁶⁰⁰ Ibid. The *Handbook* nevertheless leaves open the possibility of individual entitlement:

‘the principle of family unity operates in favour of dependants, and *not against them*’: ibid., para. 185 (emphasis added). See further Pobjoy, J., *The Child in International Refugee Law* (2017) 53–4. See also Executive Committee Conclusion No. 107 (2007) para. (h), recommending ‘a flexible approach to family unity, including through consideration of concurrent processing of family members in different locations, as well as to the definition of family members in recognition of the preference to protect children within a family environment with both parents’.

⁶⁰¹ UNHCR Guidelines on Child Asylum Claims ([n 285](#)) paras. 6–9. See further Pobjoy ([n 600](#)) 62–9.

⁶⁰² UNHCR *Handbook* ([n 3](#)) para. 214. Cf. para. 215: ‘It can be assumed that—in the absence of indications to the contrary—a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature.’

⁶⁰³ For critique in the third edition of this work, see 130–1.

⁶⁰⁴ See [n 285](#).

⁶⁰⁵ Ibid., para. 5. See also paras. 3–4.

⁶⁰⁶ Ibid., para. 11, citing UNHCR *Handbook* ([n 3](#)) paras. 40–43. Although the Guidelines cite paras. 217–19 of the *Handbook* in [n 26](#), it is in the context of a decision-maker’s obligation to make an objective assessment of a child’s risk in cases where the child ‘is unable to express fear when this would be expected or, conversely, exaggerates the fear’: at para. 11. The Guidelines do note that a child’s age and ‘by implication, level of maturity, psychological development, and ability to articulate certain views or opinions will be an important factor in a decision maker’s assessment’ (para. 8), but the concept of ‘mental development and maturity’ is not specifically adverted to. See also Pobjoy ([n 600](#)) 83, [n 23](#), supporting our critique of the *Handbook*’s ‘maturity’ analysis in the previous edition and noting that ‘[t]he invocation of 16 years as a developmental sign-post has not been restated in any of the key material on refugee children subsequently published by UNHCR’.

⁶⁰⁷ UNHCR Guidelines on Child Asylum Claims ([n 285](#)) para. 65 (citation omitted). The Guidelines also note that ‘[a]longside age, factors such as rights specific to children, a child’s stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status’: para. 4 (citations omitted). See further Pobjoy ([n 600](#)) 25–6.

⁶⁰⁸ See, for example, Hathaway & Foster ([n 4](#)) 103–4; and Pobjoy ([n 600](#)) 84–9. See further s. 5.1.

⁶⁰⁹ UNHCR *Handbook* ([n 3](#)) paras. 217–18. The UK Immigration Rules, para. 351, provide that ‘account should be taken of the applicant’s maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child’s state of mind and understanding of their situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand their situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of

the child at all times.’ See also Hathaway & Foster (n 4) 103–4; Pobjoy (n 600) 84–9; UNHCR Guidelines on Child Asylum Claims (n 285) para. 11; UNHCR, ‘Guidance Note on Refugee Claims relating to Female Genital Mutilation’ (n 327) para. 10.

⁶¹⁰ See discussion in Hathaway & Foster (n 4) 103–4; Pobjoy (n 600) 86–7.

⁶¹¹ UNHCR Guidelines on Child Asylum Claims (n 285) para. 10 (citations omitted).

⁶¹² CRC 89, art. 3(1); Goodwin-Gill, G. S., ‘Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions’, (1995) 3 *International Journal of Children’s Rights* 405; see also Pobjoy, J., ‘Refugee Children’, in Costello, Foster, & McAdam (n 12) 753–6. The New York Declaration for Refugees and Migrants, UNGA res. 71/1 (19 Sep. 2016), para. 32, provides that ‘[w]e will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child.’ See further the Global Compact on Refugees, paras. 13, 76; and further Ch. 7, s. 5.

⁶¹³ See also Pobjoy’s analysis of the CRC 89 as a ‘procedural guarantee’, arguing that ‘[i]n promoting a construction of the child as an independent social actor, the CRC provides a solid legal basis for developing a participatory framework to ensure that children are not rendered invisible in domestic asylum processes’: Pobjoy (n 600) 28.

⁶¹⁴ In the New York Declaration (n 612), States commit to referring unaccompanied children and those separated from their families ‘to the relevant national child protection authorities and other relevant authorities’: para. 32. See also Global Compact on Refugees, para. 60, citing UNGA res. 64/142 (18 Dec. 2009), to which is annexed the Guidelines for the Alternative Care of Children.

⁶¹⁵ UK Immigration Rules, paras. 350–2. See also para. 352ZA, and paras. 352ZC–E, which provide that ‘limited leave to remain’ for 30 months or until the child is 17 ½ years old (whichever is shorter) should be granted to an unaccompanied child whose asylum application has been rejected, where there are ‘no adequate reception arrangements in the country to which they would be returned’, provided that certain other circumstances are met.

⁶¹⁶ See Committee on the Rights of the Child, ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin’: UN doc. CRC/GC/2005/6 (adopted at 39th sess., 17 May–3 Jun. 2005) para. 84: ‘Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child’, and related discussion in Pobjoy (n 600) 200–01. Some two-thirds of the ‘best interests’ decisions by the Special Committees established under the CPA were for reunion with family members still in Vietnam; see UNHCR, ‘Programming for the Benefit of Refugee Children’, EC/1993/SC.2/CRP.15 (25 Aug. 1993) para. 15; cf. O’Donnell, D., ‘Resettlement or Repatriation: Screened-out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child’ (1994) 6 *IJRL* 382.

⁶¹⁷ See further Ch. 8, s. 8. In a recent joint comment, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child noted that ‘[e]very child, at all times, has a fundamental right to liberty

and freedom from immigration detention’: ‘Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the context of International Migration in Countries of Origin, Transit, Destination and Return’: UN doc. CMW/C/GC/4-CRC/C/GC/23 (16 Nov. 2017) para. 5 (citations omitted).

⁶¹⁸ For details of ‘ethnic cleansing’ and other events in former Yugoslavia, see the reports by Tadeusz Mazowiecki, Special Rapporteur of the UN Commission on Human Rights: UN docs. E/CN.4/1992/S-1/9 (28 Aug. 1992); E/CN.4/1992/S-1/10 (27 Oct. 1992). The following historical examples provide illustrations of persecution: the treatment accorded to those returned to the USSR after the Second World War: Bethell, N., *The Last Secret* (1974); Tolstoy, N., *Victims of Yalta* (rev. edn., 1979); relocation of national minorities in the USSR: *The Crimean Tatars, Volga Germans and Meskhetians* (Minority Rights Group, Report No. 6, rev. edn., 1980); mob and institutionalized attacks on members of the Baha’I faith in Iran: *The Baha’is in Iran* (Baha’i International Community, June 1981 and updates); measures taken against ethnic minorities: McCarthy, J., *Death and Exile: The Ethnic Cleansing of Ottoman Muslims, 1821–1922* (1995); *Selective Genocide in Burundi* (Minority Rights Group, Report No. 20, 1974); *What future for the Amerindians of South America?* (Minority Rights Group, Report No. 15, rev. edn., 1977); institutional and individual measures of repression against religious groups: *Religious Minorities in the Soviet Union* (Minority Rights Group, Report No. 1, rev. edn., 1977); *Jehovah’s Witnesses in Central Africa* (Minority Rights Group, Report No. 29, 1976); economic measures affecting Asians in East and Central Africa: *The Asian Minorities of East and Central Africa* (Minority Rights Group, Report No. 4, 1971); *Problems of a Displaced Minority: The new position of East Africa’s Asians* (Minority Rights Group, Report No. 16, rev. edn., 1978); the complex of measures aimed or calculated to deny self-determination: *The Kurds* (Minority Rights Group, Report No. 23, rev. edn., 1981); *The Namibians of South West Africa* (Minority Rights Group, Report No. 19, rev. edn., 1978); *The Palestinians* (Minority Rights Group, Report No. 24, rev. edn., 1979).

⁶¹⁹ Adopted by UNGA res. 3068(XXVIII) (30 Nov. 1973); at 30 April 2021, 109 States were parties to the Convention. Text in Brownlie & Goodwin-Gill ([n 112](#)) 412. The crime of apartheid is also included as a crime against humanity under art. 7 of the Rome Statute of the International Criminal Court ([n 101](#)).

⁶²⁰ See UNHCR, ‘Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status’: HCR/GIP/15/11 (24 Jun. 2015), and generally, Batchelor, C. & Edwards, A., ‘Introductory Note to UNHCR’s Guidelines on International Protection on Prima Facie Recognition of Refugee Status’ (2016) 28 *IJRL* 318; Durieux, J.-F., ‘The Many Faces of “Prima Facie”’ (2008) 25(2) *Refugee* 151; Durieux, J.-F. & Hurwitz, A., ‘How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees’ (2005) 47 *German Yearbook of International Law* 105, 120; Albert, M., ‘Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection’, Group

Determination, and Mass Influx' (2010) 29(1) *RSQ* 61; Albert, M., 'Prima facie determination of refugee status: An overview and its legal foundation' (Refugee Studies Centre, Working Paper Series No. 55, 2010); Hyndman, J. & Nylund, B. V., 'UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 *IJRL* 21. See further Ch. 5, s. 7.

⁶²¹ UNHCR Guidelines on Prima Facie Recognition of Refugee Status ([n 620](#)) para. 3. Prima facie approaches may only be applied to recognize refugee status, not to reject claims: para. 6.

⁶²² Ibid., para. 7. The Guidelines note that '[r]efugee status may be recognized on a prima facie basis pursuant to any of the applicable refugee definitions'. Accordingly, the CSR 51, regional refugee instruments, and UNHCR's Statute and mandate can all be the basis for prima facie recognition: see para. 5.

⁶²³ Ibid., para. 10, giving the examples of 'ethnicity, place of former habitual residence, religion, gender, political background or age, or a combination thereof, which exposes them to risk'. See also paras. 12–17.

⁶²⁴ UNHCR's Guidelines note the relevance of country information in identifying 'readily apparent circumstances', as well as UNHCR's 'long established practice of recommending to governments the application of a prima facie approach to given situation': *ibid.*, para. 17. On potential steps where information is uncertain, see *ibid.*, paras. 17, 26–7.

⁶²⁵ See *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600, paras. 28–31; also, Lord Justice Laws, 'Asylum—a Branch of Human Rights Law?' Paper presented at the Asylum and Immigration Tribunal Conference (June 2006); *Januzi* ([n 553](#)) paras. 4–6 (Lord Bingham).

⁶²⁶ Both the protection due to certain rights and the circumstances of permitted derogation are of course subject to development in international law. See, for example, the 1994 OAS Inter-American Convention on the Forced Disappearance of Persons: (1994) 22 *ILM* 1529; the preamble characterizes the act as a crime against humanity; art. II links the concept to 'agents of the State or ... persons or groups of persons acting with the authorization, support, or acquiescence of the State', and art. X provides that exceptional circumstances do not justify forced disappearance, and that effective judicial procedures must be retained. Also, Inter-American Court of Human Rights, Advisory Opinion, *Habeas Corpus in Emergency Situations* (30 Jan. 1987) AO OC-8/87: (1988) 27 *ILM* 512, noting that 'essential judicial remedies' should remain in force: paras. 27–30.

⁶²⁷ For general discussion of socio-economic rights, see Foster ([n 106](#)).

Loss and Denial of Refugee Status and Its Benefits

Most international instruments not only define refugees, but also provide for the termination or denial of refugee status and the withdrawal of protection.¹ The IRO Constitution, for example, described the circumstances in which refugees and the displaced would ‘cease to be the concern’ of the organization, and excluded various others, including ‘war criminals, quislings and traitors’, and ‘ordinary criminals … extraditable by treaty’.² Article 14 of the Universal Declaration of Human Rights prohibits invocation of the right to seek asylum ‘in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’. These categories have been expanded in other instruments and in State practice so that, in general, refugee status may be lost or denied because of voluntary acts of the individual; a change of circumstances; where protection is accorded by other States or international agencies; and in the case of criminals or other ‘undeserving’ cases.

1. ‘Revocation’, cessation, and exclusion

Overall, the structure of article 1 of the Refugee Convention is reasonably straightforward. It sets out to whom ‘the term “refugee” *shall* apply’, the circumstances in which the Convention ‘*shall* cease to apply’, and then that it ‘*shall not* apply’ to three categories—those who are receiving protection and assistance from a UN agency other than UNHCR, those who enjoy the effective nationality of another State, and those whom there are reasonable grounds to believe have committed or been guilty of certain acts. In principle (and leaving aside the provision for contingent inclusion in the second paragraph of article 1D), those falling within these categories are outwith the protection of the Refugee Convention; in common parlance, they are said to be ‘excluded’.³

State and UNHCR practice confirm this approach, and also clarify some of the confusion that can arise regarding when someone ‘becomes’ a refugee, and the legal implications of that ‘juridical moment’.⁴ Put simply, a person will be a refugee when he or she fulfils the criteria of article 1A(2), that is, essentially, when crossing an international frontier with a well-founded fear of persecution.

However, that person is only able effectively to claim the benefit of the Convention protection regime once their status has been recognized. In this sense, refugee determination is *declaratory* of an existing factual condition,⁵ but also and essentially *constitutive* of Convention rights; the Convention is not self-applying.⁶

The object and purpose of the Convention, however, include providing a recognized *legal status* for the refugee who satisfies certain factual and other criteria.⁷ From the perspective of international law, this necessarily implies a consequential obligation to determine refugee status and, in practice, to follow-up a favourable determination by the issue of ‘documentation certifying ... refugee status’.⁸ This also implies that, should these criteria no longer apply, refugee status may be lost, and article 1C sets out an exclusive set of circumstances in which the Convention ‘shall cease to apply’.⁹ As demonstrated below, it does not provide that criminal or other conduct by a *recognized refugee* may be grounds for terminating or ‘revoking’ status.

Although the Convention makes no such reference, the 1951 Conference of Plenipotentiaries did consider a proposed amendment to article 2,¹⁰ which would have provided for forfeiture.¹¹ The French representative, Mr Rochefort, explained that this was intended for ‘extremely serious—and, incidentally, rare—cases, and came within the category of counter-espionage operations’.¹² To the suggestion that such a provision should be included in article 1, rather than article 2, the Belgian representative, Mr Herment, replied that this would be undesirable; article 1 ‘was designed to define the term “refugee”, whereas the French amendment was designed to punish persons whose status as refugees had already been recognized’.¹³ Mr Rochefort agreed, stating that the French amendment ‘should certainly not be inserted in the definition of the term “refugee”, since the individuals to whom it referred would still retain the status of refugee’.¹⁴ Speaking for the United Kingdom, Mr Hoare accepted that it might be necessary to deal with refugees who threatened national security, but disagreed with the French proposal: ‘So far as criminal offences were concerned ... it was the sense of the draft Convention that the refugee should be given the same treatment as foreigners’, and careful consideration should be given ‘to the dangers of allowing States to deprive any person of the status of refugee’.¹⁵

In the event, the concerns of States at the time were duly met precisely by adoption of a joint France/United Kingdom amendment to what was to become article 33(2), and France withdrew its proposal.¹⁶ Mr Hoare later remarked that

he ‘could not imagine that those who had drafted it had intended that Article 14(2) [of the Universal Declaration of Human Rights] should apply to a person who, having been granted asylum, subsequently committed a crime in the country of refuge’. Mr Rochefort, too, observed that, ‘whenever reference was made to a person already enjoying refugee status, the matter ceased to be a question of definition and became one of the application of the Convention’.¹⁷ The *travaux préparatoires* clearly show that States intended precisely to exclude certain categories from recognition and status at the ‘point of entry’ (and by reference to an arguably lower threshold of proof), but nevertheless to accord a higher level of protection to the recognized refugee who might subsequently be considered a danger to the community or to security.¹⁸ In extreme circumstances such as these, the drafters were prepared to accept that they might well *refoule* a refugee, irrespective of any well-founded fear of persecution.

For several decades, this was not an issue and neither cessation nor exclusion played a significant role in law or practice.¹⁹ That began to change, however, as the number of people in search of protection grew, refugee situations became increasingly protracted, and terrorism added to the apprehensions of States.²⁰ Two other factors may also have had an indirect role on the tightening or ‘adjustment’ of the cessation and exclusion regime—the strengthening of human rights protection against removal with resulting policy challenges for States,²¹ and the EU move to greater regional harmonization.

Although article 11 of the 2004 version of the Qualification Directive accurately transposed the substantive elements of article 1C of the Convention into EU law, UNHCR was concerned that article 14 risked ‘introducing substantive modifications to the exclusion clauses of the 1951 Convention’. Unfortunately, and despite this not being what the drafters intended, UNHCR had already accepted that refugee status might indeed be ‘revoked’ under article 1F(a) and 1F(b), where the refugee committed a relevant offence subsequent to recognition, ‘as neither of these clauses contain a geographical or temporal limitation’.²² UNHCR’s further concern, however, was that article 14(4) departed even more radically from the text of the Convention by bringing in the article 33(2) exceptions to *non-refoulement* as a basis for exclusion, contrary to their intended purpose. In its July 2010 comments on the proposal for a revised Directive, UNHCR maintained its endorsement of ‘revocation’,²³ while emphasizing the uncertain scope and meaning of the additional security-based criteria for exclusion. It noted that Member States had very different views on

what constituted either a ‘serious non-political crime’ or a ‘particularly serious crime’, as its own study demonstrated.²⁴ Recalling the ‘declaratory’ nature of refugee status and the primacy of the Convention, it therefore recommended that, where a Member State decided not to grant status on national security grounds, this should be understood in a ‘local’ sense, rather than in the sense of article 1A(2). UNHCR reiterated this position in its 2018 comments on the European Commission’s proposal to replace the Directive with a Regulation on qualification, adding in its concern as to the possible negative effects of the EU example, ‘in regions with less stringent human rights and rule of law safeguards in place’.²⁵

In the meantime, the CJEU has ruled on the compatibility of these aspects of the Qualification Directive (recast) with article 78(1) TFEU, article 18 of the Charter, and, indirectly, the 1951 Convention,²⁶ as well as in several other matters bearing on the ‘status’ of refugees. According to the Court, a consistent interpretation was both possible and required, because article 14(4) is not about ending ‘refugee status’, but about ending ‘the status granted to the refugee’; that, says the Court, flows from the fact that the Directive confers far more than the Convention alone.²⁷ Thus, an individual affected by this provision does *not* cease to be a refugee; he or she merely ceases to have the status of a refugee within the legal framework of the Directive.²⁸ This, in turn, explains the purport of the otherwise somewhat perplexing content of article 14(6), according to which such ‘persons … are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33’ of the Convention, ‘in so far as they are present in the Member State’.²⁹

The result is hardly consistent with a literal reading of the Convention³⁰—the creation for European public order/*ordre public* reasons of a sub-category of Convention refugees, tolerated because of the *facts* that declare the well-foundedness of their fear of persecution and hence their entitlement to protection, but held, as a matter of EU law, beyond the pale of that degree of stability and treatment required by the treaty and considered essential for successful integration.³¹ The Court recognized that this situation of limbo will be further compounded by their having been distanced from a or any residence permit, and all that this entails.³² It is not clear that either this interpretation or its consequences were understood when the Directive was first adopted in 2004, and the Court itself noted that the French version was not sensitive to the distinction.³³ France’s law transposing the Qualification Directive refers simply

to ‘le statut de réfugié’, both in relation to cessation strictly so-called, and to the other circumstances in which such status is refused or ended (‘le statut de réfugié est refusé ou il est mis fin à ce statut’).³⁴

As interpreted and applied by the CJEU, however, the net result is likely to be a small but marginalized group of Convention refugees, who have no evident way back into the community. It remains to be seen when or if the European Court of Human Rights will link these consequences for refugees and their families to the human rights obligations of Member States.

2. Cessation: voluntary acts of the individual

As indicated above, both the UNHCR Statute and the 1951 Convention provide for loss of refugee status where the individual, by his or her own actions, indicates that a well-founded fear of persecution no longer exists or that international protection is no longer required.³⁵ The circumstances include voluntary reavainment of the protection of the country of origin, voluntary reacquisition of nationality, acquisition of a new nationality and the protection which derives therefrom, and voluntary re-establishment in the country of origin.³⁶

For the purposes of *reavainment of protection*, the refugee must not only act voluntarily, but must also intend to and actually obtain protection.³⁷ Protection comprises all such actions by the refugee as indicate the establishment of normal relations with the authorities of the country of origin, such as registration at consulates or application for and renewal of passports or certificates of nationality. Sometimes, however, a refugee may be unwillingly obliged to seek a measure of protection from those authorities, as where a passport or travel document is essential to obtain the issue of a residence permit in the country of asylum.³⁸ Being involuntary, the protection obtained should not bring refugee status to an end and needs to be assessed in context.

In other cases of application for and obtaining a national passport or the renewal of a passport, it may be presumed, in the absence of evidence to the contrary, that reavainment of protection is intended. The presumption may be strengthened where the refugee in fact makes use of the passport for travel, or for return to the country of origin, or in order to obtain some advantage in the country of asylum that is dependent on nationality.³⁹ Possession of a national passport and a visit to the country of origin would seem conclusive as to

cessation of refugee status, but again, context is what counts.⁴⁰ Grahl-Madsen suggests that ‘physical presence in the territory of the home country does not per se constitute reavainment of protection … it is the conscious subjection under the government of that country … the normalization of the relationship between State and individual which matters’.⁴¹ Indeed, on leaving the country of origin for the second time, the individual in question may well be able to show that he or she, still or once again, has a well-founded fear of persecution within the Convention.⁴²

All the circumstances of the contact between the individual and the authorities of the country of origin must be taken into account. It is therefore relevant to consider the age of the refugee, the object to be attained by the contact, whether the contact was successful, whether it was repeated, and what advantages were actually obtained.⁴³ In cases involving passports, it will be relevant if the refugee’s country of residence is a party to the 1951 Convention and/or the 1967 Protocol, and so bound under article 28 to issue travel documents to refugees lawfully staying in its territory.⁴⁴ If not a party, that State may yet issue aliens passports or certificates of identity which enable the refugee to avoid recourse to his or her national authorities. In addition, it will be necessary to determine whether the national passport which the refugee obtains in fact reflects the full measure of national protection, for example, by enabling him or her to return freely to the country of issue.

These various issues were illustrated in the late 1970s when many Chilean refugees were found to be obtaining and renewing national passports, apparently without difficulty. In 1976, the Chilean Government had decided that passports might be issued or renewed for citizens abroad, even if they had refugee status and asylum in their country of residence. However, under a 1973 legislative decree,⁴⁵ those who had left Chile to seek asylum, who had left illegally or been expelled or forced to leave, were prohibited from returning without express authorization by the Minister of the Interior; in addition, those returning without such permission were liable to prosecution.⁴⁶ Holding a Chilean passport could thus still be compatible with refugee status, although the holder might reasonably be required to explain why alternative documentation had not been obtained.⁴⁷

Voluntary action is also explicitly required in respect of *reacquisition of nationality*.⁴⁸ Such an act is more immediately verifiable than the notion of reavainment of protection, yet perhaps constitutes the supreme manifestation of the latter. There is less scope for explanation of extenuating circumstances: the

intention of the individual and the effectiveness of the act will suffice in most cases.⁴⁹

In the case of *acquisition of a new nationality*,⁵⁰ however, the individual must also enjoy protection in virtue of that status. The new nationality must be effective, in that at least the fundamental incidents of nationality should be recognized, including the right of return and residence in the State.⁵¹

Finally, refugee status may be lost by *voluntary re-establishment in the country of origin*.⁵² Something more than a visit or mere presence is required,⁵³ and in general, the individual must have settlement on a permanent basis in view. The facts may not always be straightforward. One case, for example, involved the return of an Iraqi of Kurdish origin to the autonomous region of Kurdistan when it was under international protection following the 1991 Gulf War. He had gone back at the request of the Institut Kurde de Paris and remained for eight years. Although intending to return, he found himself blocked by the closure of the Syrian border and because of other obstacles also, he was unable to contact the French Embassy in Damascus. In the meantime, he taught at the university in Erbil, ran a cultural centre, got married, and had two children. He did not seek the protection of the Iraqi authorities, to which he remained opposed, but sought to retain his refugee status, given the continuing political instability. The court concluded, however, that he had voluntarily re-established himself in his country of origin which, initially under international protection, was now assured of its autonomy under the 2005 Iraqi constitution. The court also noted that the appellant had not expressed any present fear of returning to Iraq.⁵⁴

3. Cessation: change of circumstances

Article 1C of the 1951 Convention provides that it shall cease to apply if, because the circumstances in connection with which the refugee was recognized have ceased to exist, he or she can no longer continue to refuse to avail themselves of the protection of the country of nationality.⁵⁵ However, cessation is not to apply to a refugee under article 1(A)(1)—so-called ‘statutory refugees’—who is able to invoke ‘compelling reasons arising out of previous persecution’ for refusing to avail themselves of the protection of their country of nationality.⁵⁶

3.1 Personal circumstances

One dimension to cessation of status not considered by the drafters arises in the

case of family members who are ‘recognized’ as refugees, not in their own right, but on the basis of the principle of family unity.⁵⁷ The family structure is not immutable, and there is a certain logic to the proposition that, absent an individual well-founded fear, separation from the family unit warrants cessation. This has come up in a number of French decisions involving divorce, decease of the ‘principal’ refugee, and the attainment of majority, although not always with consistent results. The Conseil d’Etat, for example, has held that divorce constitutes just such a change of circumstances as would justify cessation,⁵⁸ although it has also taken account of the impact on minor children and the fact that cessation of status did not necessarily imply removal from France.⁵⁹ By contrast, a minor’s attaining the age of majority was held not to result in cessation, particularly as no other grounds for termination were at issue.⁶⁰

Such changes in personal circumstances are not formally mentioned in the Qualification Directive (recast), or in UNHCR’s guidance, or in national regulations and practice, such as the UK’s immigration rules or asylum policy instruction.⁶¹ Invoking cessation in these and similar cases may satisfy a certain logic, but will often be of doubtful value, given the protection otherwise due to family members, for example, under article 8 ECHR.⁶² However, where the State is minded to deport or remove the family member for public order reasons, then it may well seek to argue that its discretion is not limited by the 1951 Convention.⁶³

3.2 Change of circumstances in the country of origin

The ‘change of circumstances’ generally anticipated by article 1C(5) and (6) are those fundamental changes in the country which remove the basis of any fear of persecution. The replacement of a tyrannical by a democratic regime is an obvious example,⁶⁴ but the process of change may well not be immediate, but more subtle and reflected over a number of years in legal reforms and gradual improvements in human rights.

Cessation, however, involves loss of status and the rights that accompany that status; it may also result in the return of persons to their countries of origin. Refugee status is essentially an individualized status, and the principle of case-by-case assessment is as essential to the proper determination of claims, as it is to procedures and due process in the matter of cessation. Cessation may have a collective or group dimension, but it is described in individual terms; article 1C(5) refers not to general political or human rights conditions, but to ‘the

circumstances in connection with which [the individual] has been recognized as a refugee', and to whether he or she 'can no longer ... refuse to avail [themselves] of the protection' of their State of origin.

In a cessation proceeding, therefore, the central questions will be related to the causes of the individual's flight, whether later changes have removed the risk of persecution, whether effective protection is now available in fact from the State of origin, and whether the individual is able to access such protection, for only if such conditions exist will it be 'unreasonable' for the refugee to continue to refuse national protection. The individualized approach also enables the decision-maker to determine whether the refugee is eligible for an exemption from cessation.⁶⁴

A UNHCR paper on change of circumstances, presented to the Sub-Committee on International Protection in January 1992, noted that the cessation clauses were exhaustive, and that a strict approach to their application was called for.⁶⁵ This was endorsed by the Executive Committee later that year, when it emphasized that,

[a] careful approach to the application of the cessation clauses using clearly established procedures is necessary so as to provide refugees with the assurance that their status will not be subject to unnecessary review in the light of temporary changes, not of a fundamental character, in the situation prevailing in the country of origin,

- (a) States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation that justified the granting of refugee status has ceased to exist;
- (b) [A]n essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available in this respect, *inter alia*, from relevant specialized bodies, including particularly UNHCR.⁶⁶

UNHCR had argued that special weight should be attached to 'the level of democratic development in the country, its adherence to international human rights (including refugee) instruments and access allowed for independent

national or international organizations freely to verify and supervise the respect for human rights'. Other, more specific factors might include declarations of amnesty, the repeal of repressive legislation, the annulment of judgments against political opponents and the general re-establishment of legal protection and guarantees. UNHCR emphasized 'that a minimum period of 12 to 18 months (always depending on the circumstances) should normally elapse before a judgment ... can be considered reliable'.

Executive Committee Conclusion No. 69, however, emphasizes that application of the cessation clauses is a matter 'exclusively' for States, although the High Commissioner should be involved as appropriate.⁶⁷ States also considered that no particular time frame could be laid down as a condition of durable change,⁶⁸ but they accepted that every refugee affected by a cessation decision should be able 'to have such application in their cases reconsidered on grounds relevant to their individual case'.⁶⁹ UNHCR noted that voluntary repatriation, as a matter of fact, often does away with the need for formal decisions by the Office on cessation, which had anyway been relatively rare.⁷⁰ At the same time, however, the Executive Committee acknowledged that a declaration by UNHCR that its statutory competence with regard to certain refugees had ceased to apply might be useful to States in applying the clauses.⁷¹

UNHCR's 2003 Guidelines reaffirm and develop its position, emphasizing that, for cessation to apply, the changes in the conditions in the country of origin need to be of a fundamental nature, such that the refugee 'can no longer ... continue to refuse to avail himself of the protection of' his country of origin; that is, the changes themselves must have addressed the causes of displacement and thus the decision to recognize the individual as a refugee. As examples, the guidelines suggest, 'an end to hostilities, a complete political change and return to a situation of peace and stability'.⁷² Developments which appear to evidence significant and profound changes should be given time to consolidate. The question is whether protection, considered in this broader sense, is now available:

15. [S]uch protection must ... be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood ...

16. An important indicator in this respect is the general human rights situation in the country ... There is no requirement that the standards of human rights achieved must be exemplary. What matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts: as well as protection amongst others of the fundamental rights to freedom of expression, association and religion.⁷³

In the past, States rarely had recourse to cessation, particularly if recognition of refugee status had exhausted itself in the grant of permanent or indefinite residence, but provision for termination is often included in municipal legislation and the policy realignment in some States towards refugee protection as a *temporary* mechanism indicates a greater inclination to invoke this basis for the termination of status.

Swiss law, for example, incorporates article 1C by reference,⁷⁴ while Canadian law expressly includes the substance of that article as a basis both for rejection of an application and for later cessation; with regard to ‘changed circumstances’, it declares that a person ceases to be a refugee when ‘the reasons for which the person sought refugee protection have ceased to exist’, and authorizes the Minister to apply for a determination to that effect.⁷⁵ The legislative approach locates the issue firmly in a *procedural* context.

Cessation is not just about the State and the individual, but frequently involves UNHCR directly, with operational dimensions in the context of large-scale movements. The Guidelines on cessation recognize that different considerations may apply with regard to particular sub-groups of refugees, and depend on the nature and scope of political developments. It has also argued that changes in part only of a country of origin, ‘should not, in principle, lead to a cessation of status’, particularly because of the doubts inherently generated by limited change.⁷⁶

Where refugees have been recognized on a group basis, such as on the

occasion of a large influx, then ‘declarations of cessation’ may be appropriate,⁷⁷ although they are often overtaken by spontaneous voluntary repatriation. Such declarations, and the termination of temporary protection where no formal determination of status has been made, require thorough and careful evaluation of change, and also that provision be made for exceptions.⁷⁸ The same obligation falls on both States and UNHCR—to ‘make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist’.⁷⁹ Operationally, cessation may shade into the promotion or facilitation of repatriation, which in turn may give rise, if not to conflicts of interest, then to the confusion of priorities along the protection–solutions spectrum. Close attention is required, therefore, not only to conditions generally in the country of origin, but also to credible exception provisions that factor in the needs of mixed and disparate groups.⁸⁰

Comprehensive solutions will necessarily involve a mix of elements, particularly in the case of protracted refugee situations in which cessation is but one part of the strategic mix and a single-issue focus can be misleading. The complexities of flight, settlement, and various or fluctuating levels of integration will often call for calibrated responses in a dynamic environment over many years; these may well include alternative stay arrangements, long-term residence options, naturalization, tri- or multipartite inter-State agreements, voluntary repatriation, and related initiatives. The trite observation that States have a ‘right’ to repatriate those who are no longer refugees tends to ignore the richness of refugee and community interactions, and contributes nothing to the attainment of durable solutions overall.⁸¹

3.3 The cessation inquiry

In reviewing a possible change of circumstances, the question frequently asked is whether there is a *prescriptive* sense to adjectives such as ‘significant’, ‘effective’, and ‘durable’ so that cessation is contingent on their existence; or whether they are merely *illustrative*.⁸² In practice, the problem is one of evidence and procedure, and goes to the burden and standard of proof: Who must prove what, and when? The burden of proof concerning a fundamental change of circumstances is on the authority which seeks to bring refugee status to an end. Cessation or change of circumstances acquires meaning only in context, that is, firstly, where the claimant seeks to show today that he or she has a well-founded fear of persecution; or secondly, where the appropriate authority seeks to show

that a previously recognized refugee should no longer be considered as such.

In the first instance, the burden of proof is on the claimant, and the standard of proof remains that of showing that the changes in question nevertheless leave open the existence of a serious risk or possibility of persecution. In the second instance, the burden is on the authority concerned, and the standard of proof for bringing refugee status to an end is the balance of probabilities: Is the nature of the changes such that it is more likely than not that the pre-existing basis for fear of persecution has been removed? In either case, change alone may be insufficient; it is relevant only in relation to the claim, as part of the evidence of the existence or non-existence of risk. The central issue remains that of risk, the assessment of which is a matter of fact; no other *legal* condition is required, such as any degree of permanence, or the holding of elections.⁸³ Whether the change is significant, effective, durable, or substantial is merely another way of describing its evidential weight.

In 2019, for example, the *Cour national du droit d'asile* (CNDA) maintained its jurisprudence on the non-durable nature of developments in Sri Lanka, taking account of reports from the Office of the United Nations High Commissioner for Human Rights, Amnesty International, Human Rights Watch, and Freedom House. The court was of the view that the transitional justice inquiry lacked credibility, and even though the overall situation of the Tamil minority had improved, the military and police continued to make arbitrary arrests and to threaten and ill-treat those suspected, rightly or wrongly, of working to rebuild the LTTE. Only sporadic measures had been taken to deal with the impunity of the security forces, and cessation could not be justified.⁸⁴

By contrast, the court upheld cessation in the case of a former refugee from Kosovo, taking into account events since 1985, including significant developments, such as the 2008 declaration of independence and the establishment of democratic institutions and the rule of law, assisted by international organizations and the EU. The reasons underlying recognition of refugee status, namely, militating for the rights of the Albanian community, no longer existed. The court considered that the Convention had neither the object nor the effect of fixing the issue of nationality for ever as that held by the refugee at the date of recognition, and that it was competent to take account of changes, including the appellant's links with Kosovo and his present entitlement to Kosovar nationality.⁸⁵

A number of judgments have suggested that cessation is the mirror image of

inclusion, but the analogy is unnecessary and potentially misleading.⁸⁶ Mirrors commonly distort and rarely provide an accurate reverse image; on the contrary, article 1C is framed more widely than by reference simply to the absence of well-founded fear, requiring consideration of whether there has been a relevant change in ‘the circumstances in connection with which’ a person has been recognized. These ‘are likely to be a combination of the general political conditions in [the] person’s home country and some aspect of that person’s personal characteristics’.⁸⁷

As interpreted and applied by the CJEU, article 11 of the Qualification Directive, unchanged in the recast version, makes clear the necessary differences in approach. Not only must there be a change of circumstances of a significant and non-temporary nature, such that the refugee’s well-founded fear no longer exists, but the factual basis must have been ‘permanently eradicated’.⁸⁸ In his opinion in *Case-255/19*, Advocate General Hogan suggested that the ‘grant and cessation of international protection are essentially symmetrical’,⁸⁹ but the Court itself has underlined the higher evidential standard falling on the authority arguing for the end of refugee status and its duty to ‘verify’, in relation to the individual, that any actor or putative actor of protection has ‘taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status’.⁹⁰

Recognition of refugee status is not a one-off act of protection, but an intrinsic part of a process through time, the goal of which is a solution, one way or the other. As decades of experience have shown, security and stability are central to this process, as are the rights and equities that may strengthen the protection of life and livelihood.

To suggest that ‘the protection inquiry in both instances is essentially the same’,⁹¹ risks overlooking important elements, including the passage of time, changes personal to the individual, and in the focus of a later inquiry in which the refugee is likely to be disadvantaged at the point of knowledge.⁹² A refugee claimant needs only to show that he or she faces a serious possibility of persecution for a Convention reason, but an authority asserting cessation must do much more, and to a degree that may be undermined when decision-makers are overly attentive to symmetry, rather than protection. The risk here is less likely to be obviated by rhetorical reminders of the need for caution, and for a strict or

restrictive approach to cessation,⁹³ than by closer attention to evidential responsibilities and to the fact that, in relation to fear, article 1C(5) is writ more widely than article 1A(2).⁹⁴ UNHCR captured some of this difference in its 2008 statement on issues arising in the *Abdulla* case,⁹⁵ when it stressed that the absence of ‘a present risk of persecution is necessary but not sufficient’; effective protection must also be available, additional to any change of circumstances.⁹⁶

In brief, therefore, (1) the *burden* of proof is on the State of refuge to show that there has been a fundamental, stable, and durable change in the country of origin, that there is no longer a basis for the individual concerned to fear persecution, that effective protection is available, and that cessation is appropriate; (2) the *standard* of proof is the balance of probabilities, that is, in assessing the situation the country of origin, the State or its decision-making authority must ‘make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist’;⁹⁷ and (3) given the potential impact of cessation on individuals and families, the person concerned should be given an opportunity to show why, either generally or in his or her particular situation, cessation should not apply.

3.4 Continuing status in exceptional circumstances

The UNHCR Statute and the 1951 Convention deal somewhat differently with those who, having fled, may still be considered as having valid reasons for continuing to enjoy the status of refugee, any change in their country of origin notwithstanding. The Convention expressly acknowledges the weight to be accorded to ‘compelling reasons arising out of previous persecution’,⁹⁸ yet limits the right to invoke such reasons to refugees recognized under earlier agreements.⁹⁹ The Statute refers to ‘grounds other than those of personal convenience’ as justifying a refusal to have recourse to the protection of the country of origin, but without otherwise limiting their scope.¹⁰⁰ One early commentator on the Convention suggested that the provision is ‘mainly intended to cover the case of victims of racial persecution where, unlike political persecution, the population as well as the government often took an active part’.¹⁰¹

The rationale for restricting application of the limited exception is not entirely clear from the *travaux préparatoires*, but can best be understood in the light of a summary account of the drafting history. As noted already, many States participating in negotiations for the new convention in 1950–51 were unwilling

to assume obligations towards unknown numbers of future refugees. In discussing the limits of the refugee definition, it was accepted that a refugee might have grounds for retaining status after a change of circumstances, but some States were concerned at how that entitlement should be worded. To express the refugee's unwillingness to avail him- or herself of the protection of their State in terms of 'reasons other than personal convenience' was too vague, and also 'appeared to oblige governments to accept the possibility of receiving an unknown number of persons who might become refugees after 1 January 1951 as a result of events occurring before that date'.¹⁰² The Israeli delegate suggested the phrase, 'compelling family reasons or reasons arising out of previous persecution', which had been used by the IRO, and also that it should be limited in application to statutory refugees, 'where to all intents and purposes the obligations were known'.¹⁰³ The French delegate continued to have reservations, particularly in regard to the 'burden' of assistance to such refugees which, he said, should be borne by the country of nationality.¹⁰⁴ The proposal was subject to further amendment, and the exception was reduced to the single ground of 'compelling reasons arising out of previous persecution'. The UK delegate, Mr Hoare, regretted that the proposal was to be limited to so-called statutory refugees, while the equivalent provision in the UNHCR Statute was of general application;¹⁰⁵ he therefore proposed to abstain.¹⁰⁶

Since the adoption of the 1951 Convention, both UNHCR and its Executive Committee have set out their position on interpretation of the exception to article 1C(5). In its 1979 *Handbook*, for example, UNHCR noted that when the Convention was drafted, the majority of refugees were statutory refugees, but that the exception reflects 'a more general humanitarian principle' which could be applied to other refugees.¹⁰⁷ In Executive Committee Conclusion No. 69, referred to above, the Committee,

- (e) Recommend[ed], so as to avoid hardship cases, that States seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country, and recommends also that appropriate arrangements, which would not put into jeopardy their established situation, be similarly considered by relevant authorities for those persons who cannot be expected to leave the country of asylum, owing to a long stay in that country resulting in strong family, social and economic links there;¹⁰⁸

Many States have also either legislated or otherwise adapted their practice to avoid the arbitrary distinction between refugees which would flow from the literal application of the second paragraph of article 1C(5). For example, in the area of legislative practice, the Canadian Immigration and Refugee Protection Act extends the continuing protection first incorporated for the benefit of *all* refugees by the earlier legislation.¹⁰⁹ Taking account of practice and particularly of the need to ensure the full implementation of obligations assumed under other international instruments, such as article 7 ICCPR 66 and article 3 CAT 84, as well as the widely recognized prohibition on cruel and inhuman treatment, cessation now does not apply when the reasons for which the person sought refugee protection have ceased to exist, but where that person,

[e]stablishes that there are compelling reasons arising out of *previous persecution, torture, treatment or punishment* for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.¹¹⁰

United States law provides that asylum may be granted in the exercise of discretion to an applicant who, although able to show past persecution, does not have a well-founded fear of future persecution, if he or she ‘has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or ... has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country’.¹¹¹

The European Commission’s original Qualification Directive proposal would have included a similar provision;¹¹² it was omitted from the final text, but included in the 2011 recast version without limitation.¹¹³ The essentials of this ‘humanitarian principle’ are also included in article 22 of the EU Temporary Protection Directive, which provides that, in cases of forced return following the end of such measures, ‘Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases’.¹¹⁴ Even before the adoption of the recast Directive, however, the case law in Europe and elsewhere was moving towards the general application of this principles.¹¹⁵ National decisions thus provide a substantial measure of consistent guidance on how the ‘compelling reasons’ requirement is to be applied, and those in Canada, applying nevertheless a clear and undifferentiated legislative intent, are particularly instructive. In the leading case of *Obstoj*, the

Federal Court of Appeal held that the exception was to be read as requiring the recognition of refugee status on humanitarian grounds in the case of those who have suffered such appalling persecution that they ought not to be returned, even though there was no reason to fear further persecution.¹¹⁶

Thus, the benefit of article 1C(5) of the Convention is capable of extending to *all* Convention refugees, notwithstanding the express limitation to so-called ‘statutory’ refugees. Both the 1951 Convention and the recast Qualification Directive permit States to apply more favourable standards, but whether they ought now to do so as a matter of treaty interpretation is perhaps less clear. The selected practice reviewed above is driven by, among others, the essentially humanitarian and necessary nature of the provision, by recognition that to all intents and purposes, the class of refugees within article 1A(1) of the Convention is largely obsolete, by Recommendation E of the Final Act adopted the Conference of Plenipotentiaries, expressing ‘the hope that the Convention ... will have value as an example exceeding its contractual scope ...’, and by the need to ensure fulfillment of international obligations prohibiting cruel and inhuman treatment.¹¹⁷

The proposed interpretation might be said to fall within that provision of the law of treaties that allows account to be taken of, ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.¹¹⁸ Both legislation and judicial decisions constitute ‘State practice’, but it is a moot point whether the agreement of *all* the parties must be established; certainly, the evidential weight of such practice needs to factor in its extent, uniformity and consistency, but also the States parties that are involved. For present purposes, the practice of major asylum and refugee resettlement countries is particularly important, and Canada, the United States of America, France, Belgium, and other EU Member States that have accepted the recast Qualification Directive are significant actors in the field. Universal, as opposed to substantial agreement may not be required,¹¹⁹ but this interpretation was not accepted when the issue came up in the case of *Hoxha* in the United Kingdom House of Lords in 2005. The Court held that the evidence ‘does not establish a clear and widespread state practice sufficient to override the express words’, and that to hold otherwise would be ‘to create a new entitlement to refugee status’.¹²⁰ In our view, however, it is open to States, consistently with their treaty obligations, to apply the humanitarian exception to all Convention refugees; this does not create a ‘new entitlement’ to refugee status, but reflects a sound legal

basis on which to continue to treat someone as if they were still a refugee, where the humanitarian considerations are particularly strong.

4. Protection or assistance by other States or United Nations agencies

4.1 The country of first asylum principle

At the universal level, States have so far not accepted an obligation to grant asylum to refugees, and, otherwise than on a regional basis, have likewise failed to agree upon principles which would establish the appropriate State to consider applications in any given case.¹²¹ Article 31 of the 1951 Convention requires refugees present or entering illegally not to be penalized, but is limited to those ‘coming directly from a territory where their life or freedom was threatened’. In discussions on this issue at the 1951 Conference, the then High Commissioner for Refugees, Mr van Heuven Goedhart, expressed his concern about the occasions when transit was necessary. Recalling that he himself had fled the Netherlands in 1944 to escape persecution, he told how, still at risk, he had been helped by the resistance to move on from Belgium to France, then Spain, and finally to safety in Gibraltar. It would be unfortunate, said the High Commissioner, if refugees in similar circumstances were penalized for not proceeding ‘directly’ to a country of refuge.¹²² At the time, however, a number of States were concerned that refugees ‘who had settled temporarily in a receiving country’ or ‘found asylum’, should not be accorded a ‘right of immigration’ that might be exercised for reasons of mere personal convenience. The final wording of article 31 is in fact something of a compromise, limiting the benefits of non-penalization to refugees ‘coming directly’, but without further restricting its application to the country of origin.¹²³

With the background of this somewhat ambiguous reference, a practice developed in certain States of excluding from consideration the cases of those who have found or are deemed to have found asylum or protection elsewhere, or who are considered to have spent too long in transit.¹²⁴ Asylum and resettlement policy tends to concentrate on refugees ‘still in need of protection’. Consequently, a refugee formally recognized by one State, or who holds an identity certificate or travel document issued under the 1951 Convention, generally has no claim to transfer residence to another State, otherwise than in accordance with normal immigration policies.¹²⁵ Much the same approach has also been applied to refugees and asylum seekers who, though not formally

recognized, have found protection in another State.¹²⁶ Eligibility for resettlement can also be conditional upon the refugee not otherwise having found a durable solution. Under United States law, for example, a refugee has long been liable to refusal of admission if already established in another State.¹²⁷ A temporary refuge may not prejudice the claim to resettlement, but this will depend on all the circumstances, including whether the individual has established any business, or held an official position inconsistent with status, and the duration of stay.¹²⁸

Article 31 contains an obligation of essentially negative scope, prescribing what States shall *not* do with respect to certain refugees. Today, the problem of non-penalization is compounded by that of identifying which State is ‘responsible’ for determining a claim to asylum and ensuring protection for those found eligible.¹²⁹ The 1951 Convention as a whole is silent with respect to such positive obligations, save so far as article 31 has come to be seen by some States parties as implicitly endorsing a concept of ‘first country of asylum’ and various legal consequences.

Problems arise where the candidate for refugee status has not been formally recognized, has no asylum or protection elsewhere, but is nevertheless unilaterally considered by the State in which application is made to be some other State’s responsibility.¹³⁰ Individuals can end up in limbo, unable to return to the alleged country of first asylum or to pursue an application and regularize status in the country in which they now find themselves. The absence of any treaty or customary rule on responsibility in such cases, the variety of procedural limitations governing applications for refugee status and asylum, as well as the tendency of States to interpret their own and other States’ duties in the light of sovereign self-interest, all contribute to a negative situation potentially capable of leading to breach of the fundamental principle of *non-refoulement*.¹³¹

At the abortive 1977 United Nations Conference on Territorial Asylum, States reached a measure of agreement on the principle that asylum should not be refused solely on the ground that it could be sought from another State, but left open the question of how to determine which other State might have a sufficient connection or close links.¹³² The Executive Committee’s 1979 Conclusion No. 15 on refugees without an asylum country stressed the need for agreement on criteria to allow positive identification of the responsible State, taking account of the duration and nature of stay and the asylum seeker’s intentions; again, however, it offered nothing concrete by which to determine responsibility or resolve disputes.¹³³

4.2 Refugees receiving United Nations protection and assistance

4.2.1 Historical background

Palestinians, or more accurately, Palestine refugees, are the only group effectively placed outside the protection regime established by the UNHCR Statute and the 1951 Convention.¹³⁴ At the risk of over-simplification, a distinction can be made between the Palestinian people, whose rights to self-determination and permanent sovereignty over their natural resources in the Occupied Palestinian Territory are regularly reaffirmed by the General Assembly,¹³⁵ and Palestine refugees, who are the subject of UNRWA's mandate, who require protection and assistance, and who remain in principle entitled to their property and the income deriving therefrom.¹³⁶

Palestine was a British mandate during the time of the League of Nations, up until 15 May 1948.¹³⁷ Under Ottoman rule, the inhabitants of Palestine were considered Turkish nationals; under the mandates system, the local inhabitants were not to be considered as nationals of the administering powers, although they might benefit from the exercise of diplomatic protection.¹³⁸ Palestinian citizenship was regulated by UK statutory instrument,¹³⁹ and included acquisition by birth, but a Palestinian citizen was not a British subject,¹⁴⁰ and Palestinian citizens were treated in Great Britain as British Protected Persons.¹⁴¹ Palestinian citizens were eligible for a British passport issued by the government of Palestine, which referred to the national status of its holder as 'Palestinian citizen under Article One or Three of the Palestinian Citizenship Order, 1925–41'.

As a result of the Arab–Israeli conflict which began in 1948, Palestinian refugees were not only barred from returning to their homes but were also effectively and retroactively deprived of their citizenship. Palestinian citizenship, as a product of the mandatory's authority, terminated with the mandate and with the proclamation of the State of Israel, even though there is some authority in international law for the continuance of certain internal laws upon the cession or abandonment of territory.¹⁴² Israel had no nationality legislation until 1952.

Nationality falls, *prima facie*, within the reserved domain of domestic jurisdiction; that is, international law recognizes that each State determines who are its citizens, and how such citizenship shall be obtained or transmitted.¹⁴³ International law is not indifferent to those claimed or disclaimed, but the amount of positive guidance is limited, and much depends upon the context. For international law purposes, States do not enjoy the freedom to denationalize their

nationals in order to expel them as ‘non-citizens’; however, if the effects of such denationalization are internal only, for example, the denial of civic rights, international law traditionally has had little to say on the matter.¹⁴⁴ There is likewise no obligation in international law to naturalize a resident non-citizen, even though such non-citizen may over time and for certain international law purposes acquire the effective nationality of the State of residence.

In early decisions, however, Israeli courts held that with the termination of the Palestine mandate, former Palestine citizens had lost their citizenship without acquiring any other.¹⁴⁵ This view was rejected in one case only, where the fact of residence and the international law governing succession of States were invoked,¹⁴⁶ but for the purposes of Israeli municipal law, the issue was resolved by the Supreme Court in *Hussein v Governor of Acre Prison*, and by the 1952 Nationality Law.

In *Hussein*’s case, the Court agreed that Palestinian citizenship had come to an end, and that former Palestine citizens had not become Israeli citizens.¹⁴⁷ The Nationality Law confirmed the repeal of the Palestine Citizenship Orders 1925–42, retroactively to the day of the establishment of the State of Israel. It declared itself the exclusive law on citizenship, which was available by way of return,¹⁴⁸ residence, birth, and naturalization.¹⁴⁹ Former Palestinian citizens of Arab origin might be incorporated in the body of Israeli citizens, provided they met certain strict requirements, but the majority of those displaced by the conflict in 1948 were effectively denied Israeli citizenship. If international law raised a presumption of entitlement to local citizenship for residents at the moment of establishment of the State, subsequent developments have made any such claims redundant.

In fact, many of the Palestinians who fled, at least initially during the conflict of 1947–49, were citizens of Palestine under British mandate and, as ‘British protected persons’, entitled to the protection of the Crown. With the termination of the British mandate on 14/15 May 1948, their nationality status may have become uncertain from a *municipal law* perspective, but from that of international law, their ‘link’ to the territory remained. Palestinian refugees were admitted to neighbouring countries on what was expected to be a temporary basis; local citizenship, for the most part, was not available, other than in Jordan. In these circumstances, many Palestinians, not being recognized as a citizen or national of any State, were clearly stateless. Today, the formal legal situation remains problematic, notwithstanding the recognition of Palestine by the General

Assembly and many States and notwithstanding the United Nations recognition of the Palestine Liberation Organization as the legitimate representative of the Palestinian people.¹⁵⁰ The status of Palestinians will therefore continue to raise difficulties, and looking further ahead, Palestinians who, for any reason, are not included in the peace settlement (for example, if they do not or cannot return to Palestinian territory, or otherwise obtain protection from the Palestinian authorities), may well come within the terms of the 1951 Convention. If required to leave their countries of habitual residence in the future, then their situation not having been ‘definitively settled in accordance with the relevant resolutions adopted by the General Assembly’, they will be entitled to international protection as refugees or stateless persons.

4.2.2 The UNHCR Statute and the 1951 Convention

UNHCR’s competence under paragraph 6 of its Statute is limited by paragraph 7(1), which provides that such competence shall not extend to a person, ‘who continues to receive from other organs or agencies of the United Nations protection or assistance’.¹⁵¹ At the 1951 Conference it was likewise decided to disqualify Palestinians from the application of the Convention, as persons who are ‘at present receiving from organs of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance’.¹⁵²

The Third Committee drafted both the UNHCR Statute and a refugee definition for the 1951 Conference,¹⁵³ but for reasons which are not clear (but which may have been dictated by time constraints), the draft Convention refugee definition was not amended to bring it into line with the UNHCR Statute before being sent on to the Conference of Plenipotentiaries. In Geneva, however, the Palestine refugee issue was raised almost at once, when the Egyptian delegate remarked that his Government,

considered that *so long as the problem of the Palestine refugees continued to be a United Nations responsibility*, the Convention should not be applicable to them. Once United Nations assistance ceased, the Palestine refugees should automatically enjoy the benefits of the Convention. The Egyptian Government had no doubt at all that such refugees came under the terms of article 1.¹⁵⁴

He therefore proposed an amendment, the aim being ‘to grant to all refugees the status for which the Convention provided’.¹⁵⁵ The goal, he said, ‘was to make sure that Arab refugees from Palestine who were still refugees when the organs

or agencies of the United Nations at present providing them with protection or assistance ceased to function, would automatically come within the scope of the Convention'. The representative of Iraq added 'that the amendment represented an agreed proposal on the part of all the Arab States ... It was obvious that, if the Egyptian amendment was rejected, the refugees it was designed to protect might eventually find themselves deprived of any status whatsoever'.¹⁵⁶

The *travaux préparatoires* of paragraph 7(c) of the UNHCR Statute and article 1D of the 1951 Convention confirm the agreement of participating States that Palestine refugees were in need of international protection, and that there was no intention to *exclude* them from the regime of international protection.¹⁵⁷ What was important was continuity of protection; the non-applicability of the 1951 Convention was intended to be temporary and contingent, postponing or deferring the incorporation of Palestine refugees until certain preconditions were satisfied.¹⁵⁸ Those to whom the Convention is not to apply are those 'at present receiving ... protection or assistance'/'qui bénéficient actuellement d'une protection ou d'une assistance', and only until such time as protection or assistance shall have ceased 'for any reason', without their position having been definitively settled in accordance with the relevant General Assembly resolutions. In those circumstances, these persons 'shall *ipso facto* be entitled to the benefits of this Convention'/'bénéficieront de plein droit du régime de cette Convention'.

States expected that the Palestine refugee problem would be resolved on the basis of the principles laid down in UNGA resolution 194 (III), particularly through repatriation and compensation in accordance with paragraph 11, and that protection under the 1951 Convention would ultimately be unnecessary.¹⁵⁹ However, they also sought to provide for a situation of no settlement, and to avoid a lacuna in the provision of international protection. The refugee character of the protected constituency was never in dispute; in the absence of settlement in accordance with relevant General Assembly resolutions, no new determination of eligibility for Convention protection would be required, and Palestinians would '*ipso facto/de plein droit*' benefit from the Convention regime. A solution to the 'question of Palestine' has proven elusive, but the principle of continuing protection may prove to be sufficiently flexible in accommodating the interests of both States and Palestine refugees.

In the meantime, article 1D continues to raise interpretative challenges. It provides as follows:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.¹⁶⁰

On the one hand, article 1D premises disqualification from the Convention regime on the continuing receipt of protection *or* assistance; on the other hand, it premises entitlement to the benefits of the Convention on the cessation *ipso facto* of protection *or* assistance, without the situation of such persons having been resolved, for example, through legal provision for and recognition of an independent State with its own nationality. For States party to the 1951 Convention, one question is whether article 1D is limited to those Palestinian refugees who were receiving protection or assistance on 28 July 1951 (the date on which the 1951 Convention was opened for signature), or some other contemporaneous date; or whether it also includes the descendants of such Palestinian refugees and Palestinians displaced by later events; and, if it does so apply, with what legal consequences.¹⁶¹

Palestinian refugees who leave UNRWA's area of operations, being without protection and no longer in receipt of assistance, would seem to fall by that fact alone within the Convention,¹⁶² irrespective of any determination that they qualify independently as refugees with a well-founded fear of persecution. In practice, however, many States have resisted providing automatic Convention protection, and consider that the key issue is not so much the status of Palestinians as refugees, but whether they are able to return to their (former) State of residence, or are, as stateless persons, claiming to be refugees as against that country. Article 1D, however, is not so much an 'exclusion' clause, as a contingent inclusion clause; it recognizes the refugee character of Palestinian refugees as a group, but makes their inclusion within the Convention regime contingent upon certain events and ensures that such protection or assistance will continue automatically, although in what circumstances is not entirely clear.¹⁶³

4.2.3 Protection under the 1951 Convention

It is against the historical background to the UN's institutional arrangements, programmes and policies¹⁶⁴ that the various provisions touching on Palestinian

refugees in the UNHCR Statute, the 1951 Convention and the 1954 Convention relating to the Status of Stateless Persons have to be understood,¹⁶⁵ each being drafted at a time when the Palestine refugee problem was high on the international agenda and an early solution was still expected. The primary consideration was the desire of Arab States, concurred in by other States, to maintain the special status of Palestinian refugees for whom the UN was seen to bear a particular responsibility.¹⁶⁶ A secondary consideration, confirmed in the drafting of the relevant international instruments, was to provide a protection safety net for such refugees, should protection or assistance otherwise cease. Representatives of Arab States were nevertheless concerned that the protection of the High Commissioner *should* be available if the other relevant UN agencies ceased to function; it was essential that the *continuity* of protection be ensured.¹⁶⁷

Flexibility in that regard is essential, for in practice, article 1D continues to give rise to problems of interpretation and application, particularly when individual Palestinians seek refuge outside UNRWA's operational area; these are well illustrated by the *El-Ali* case in the United Kingdom and in judgments of the CJEU and other courts.¹⁶⁸ In *El Ali*, the court held that the first paragraph of article 1D applied only to those Palestinians receiving protection or assistance on 28 July 1951 (the date on which the Convention was opened for signature),¹⁶⁹ and that the ceasing of protection or assistance could only mean the end of UNRWA itself.

The extent of UNRWA's mandate is in fact central to understanding the personal scope of article 1D.¹⁷⁰ The endorsement or extension of UNRWA mandate activity by the UN General Assembly over the years has necessarily involved all the Member States of the United Nations, and therefore also the States party to the 1951 Convention. The relevant General Assembly resolutions are therefore evidence of a policy and practice indicating, on the part of Member States, how the notion of Palestinian refugee and the scope of UNRWA's mandate are to be understood. Indeed, on any interpretation, it would not be possible to ascertain the reach of article 1D *without* examining the practice of UNRWA in general and in specific instances, such as registration.¹⁷¹

Secondly, the background described above and, in particular, the object and purpose of the 1951 Convention in its application to Palestinian refugees, require that the phrase 'at present receiving' be interpreted in historical context, with due regard to the fact that States in 1951 did not anticipate a protracted refugee situation, but also with a view to adopting the interpretation most likely to result

in effective protection for the one group of refugees which the United Nations and its Member States have consistently recognized over time as their special responsibility. Against this approach, Hathaway and Foster argue for an ‘historically bounded interpretation’ of the words ‘at present receiving’, which they claim will result in fewer Palestinian refugees being denied protection.¹⁷² How this will happen is not clearly explained, particularly given the categoric impact of article 1D’s linking of loss of protection or assistance ‘*ipso facto*’ to the benefits of the Convention. This approach, too, is ultimately ahistorical, detached from both the institutional history and the currency of Palestinian displacement and the continuing need for protection.

The words ‘persons at present receiving’ should therefore be understood to mean ‘persons who were and/or are now receiving’ protection or assistance. With some qualification, this approach appears now to have a solid foundation in Europe and in other jurisdictions; in the felicitous phrasing adopted by the New Zealand Immigration and Protection Tribunal, considered alongside article 1A(2), article 1D is simply ‘another pathway’ to being a refugee.¹⁷³ This interpretation, which is descriptive rather than definitive, effectively reconciles any apparent discrepancy between the first and second paragraphs of article 1D, minimizes ambiguity, avoids arbitrary distinctions, and is most consistent with the original intentions of States and with later General Assembly resolutions.

Thirdly, the reference in article 1D to protection or assistance ceasing ‘for any reason’ is capable of bearing many meanings beyond the ‘end’ of UNRWA itself, as events have demonstrated. In fact, the first significant occurrence terminating protection was the ‘winding up’ of UNCCP’s role in the early 1950s, with its consequential implications for UNRWA.¹⁷⁴ Subsequent events have included the interruption of UNRWA programmes because of military occupation of the territory in which it operates, international and non-international armed conflict and inter-communal conflict, and further flight because of well-founded fear of persecution, violation of human rights, or violence. In such circumstances, those Palestine refugees who flee UNRWA’s area of operations in search of refuge ought to enjoy the protection and the benefits of the Convention, without being required to establish a well-founded fear of being persecuted. This does *not* mean that the individual Palestinian refugee arriving in a Contracting State is thereupon entitled to asylum and residence; it does mean, however, that he or she should be treated as a refugee, and that the State is required to provide protection and to seek an appropriate solution in light of that status, and in cooperation with

UNHCR and UNRWA.

4.2.4 Subsequent developments

UNHCR's 2017 guidelines on the interpretation and application of article 1D reflect later developments and the international practice developed through its collaboration with UNRWA and in its dealings with States. The guidelines confirm that 'Palestine refugees' include: (1) those within the terms of General Assembly resolution 194 (III), whose normal place of residence was Palestine, who were displaced as a result of the 1948 conflict, and who lost both home and livelihood; (2) those within the terms of General Assembly resolution 2252 (ES-V) and subsequent resolutions, who were displaced as a result of the 1967 conflict and are unable to return;¹⁷⁵ and (3) their descendants.¹⁷⁶

UNRWA's 2009 Consolidated Registration and Eligibility instructions present a partial picture but are not the equivalent of a refugee 'definition'. As Feldman explains, they were developed for operational reasons, to identify those eligible for UNRWA services, and they have evolved 'along a spectrum rather than according to a single criterion'.¹⁷⁷ Not all Palestinian refugees reside in UNRWA's area of operations, or are in need of or receiving UNRWA protection or assistance, so that the constituency entitled to the benefit of article 1D is necessarily somewhat limited, not least by obstacles in the way of further flight. The original intent—continuity of protection—was to ease the way to Convention benefits by avoiding the necessity for certain Palestinians to overcome the status determination hurdle of article 1A(2)—after all, they were already accepted as refugees. However, as Palestinians continued to seek solutions outside the region or were barred from re-entry, other obstacles began to emerge.

The European Union has incorporated article 1D almost verbatim into article 12 of both the 2004 and the recast 2011 versions of the Qualification Directive. Not surprisingly, given the article's ambiguities, the passage of time, continuing instability and insecurity in the region, and the elusiveness of a solution to the question of Palestine, the CJEU has been asked for guidance, and the jurisprudence to emerge has established a legal framework for the assessment of claims to protection under article 1D/article 12 which is closely modelled on that which governs article 1A(2) claims—individual, case-by-case assessment, taking account of all the circumstances, determining whether the individual is an 'eligible' UNRWA refugees, whether protection or assistance has ceased in

accordance with relevant ‘criteria’, whether the refugee’s departure from or inability to return to UNRWA’s area of operations is ‘involuntary’, and whether there is, or may be, an alternative provider of protection. The net result is a considerable reading down of the text, but if the claimant meets the CJEU’s criteria, then he or she will be entitled, *ipso facto*, to the benefits of the Directive/Convention. It is a moot point, however, which decision-making framework is better oriented to that continuity of protection that the drafters were aiming for; and to what extent this evolutive interpretation is consistent with the terms of the Convention.

In *Bolbol*, the first reference on article 12 of the Qualification Directive put several questions to the Court. First, it was asked whether ‘receiving protection or assistance’ required that the refugee actually take the benefit, or needed only to be *entitled* to receive it; secondly, whether the ceasing of protection or assistance for any reason included the consequences of residing outside UNRWA’s area of operations, or the end of the agency itself, or the possibility of protection or assistance, or any other ‘objective obstacle’.¹⁷⁸ The Court acknowledged the importance of ensuring continuity of protection to Palestinians, and rejected the conclusion as to the applicable date adopted by the Court of Appeal in the *El Ali* case.¹⁷⁹ However, the Court limited the coverage of article 12/article 1D, and therefore the *ipso facto* applicability of the Directive/Convention, to those who had actually availed themselves of UNRWA protection or assistance. Palestinians who were merely eligible for UNRWA services did not qualify, although the fact of registration was accepted as sufficient evidence of receiving protection or assistance.¹⁸⁰

As Ms Bolbol had not received protection or assistance before leaving to seek asylum in Hungary, the Court did not consider it necessary to deal with the key issue of when and how protection or assistance can be said to have ceased for any reason. A further reference on these questions followed in the *El Kott* case, when the Court was also asked whether, in EU terms, the ‘benefit of the Directive’ meant recognition as a refugee or, for example, the grant of refugee status or subsidiary protection at the choice of the Member State.¹⁸¹ On this last point, the Court was adamant: refugee status was called for—article 12 was based on the Convention and *ipso facto* meant ‘as of right’.¹⁸²

In her opinion, Advocate General Sharpston was no less clear in emphasizing, as she had done also in *Bolbol*,¹⁸³ that the reason why the refugee was no longer receiving protection or assistance was crucial, requiring a distinction between

those ‘who remove themselves voluntarily from the UNRWA zone and thereby from UNRWA’s assistance and those who find that external events beyond their control have meant that UNRWA ceases to continue to provide assistance to them’.¹⁸⁴ The Court agreed, rejecting the argument that simple residence outside UNRWA’s area of operations was enough, or that UNRWA itself would have to come to an end. Instead, and in-between, the Court held that protection or assistance to an ‘eligible’ Palestinian refugee would need to have ceased for a reason beyond the control and independently of the volition of the individual concerned, for example, when he or she was forced to leave UNRWA’s area of operations because their personal safety was at risk.¹⁸⁵

The Court went further, however, underlining that Palestine refugees did not have an ‘unconditional right to refugee status’. Rather, they needed still to submit an application for refugee status, which the national authorities should consider with regard, not to whether the applicant had a well-founded fear of persecution, but to whether (a) he or she had actually sought assistance from UNRWA; (b) that assistance had ceased for reasons beyond the applicant’s control or volition; and (c) the applicant was not otherwise to be refused protection, for example, by reference to articles 1C, 1E, or 1F of the Convention.

A further reference concerned a Palestinian who had been refused asylum in Bulgaria on the ground that she had failed to establish a well-founded fear of persecution within the meaning of article 2 of the Qualification Directive/article 1A(2) of the Convention. The CJEU confirmed that this was not necessary, and that Member States are obliged to transpose article 12/article 1D of the Qualification Directive into national law, both sentences in article 12(1)(a) having direct effect and constituting a *lex specialis*.¹⁸⁶ Unless otherwise disqualified, a Palestinian registered with UNRWA will be entitled *ipso facto* to the benefit of the Convention without having to demonstrate a well-founded fear if, following an assessment of all the relevant evidence, it is found that their personal safety is at serious risk, that UNRWA is unable to guarantee living conditions compatible with its mission, and that the refugee has been compelled to leave its area of operation owing to circumstances beyond their control.¹⁸⁷ However, the Court also considered whether such a refugee might be sufficiently protected in a third State, other than that in which they were registered with UNRWA,¹⁸⁸ by analogous application of article 35 (first country of asylum) or article 38 (safe third country) of the 2013 Asylum Procedures Directive (recast).¹⁸⁹ The Court was prepared to accept that UNRWA might, ‘be able to

provide a person registered with it with living conditions in Jordan that meet the requirements of its mission after that person has fled the Gaza Strip'. If the requirements of article 35 and/or article 38 were satisfied, then an application for protection in the EU could be refused.¹⁹⁰ However, even if UNRWA-registered refugees could, in the language of the Court, be said to have the status of 'Palestine refugees in the Near East', this status was not necessarily 'linked' to the Hashemite Kingdom of Jordan and the mere fact of registration with UNRWA was not a sufficient guarantee of protection or assistance.¹⁹¹ For article 35 of the Asylum Procedures Directive to be satisfied, it must be shown that the refugee will be readmitted to the country in question; that he or she benefits there from effective protection or assistance from UNRWA; that UNRWA is recognized or regulated by the third State; and that the competent Member State authorities where protection is sought are certain that the third State supports the principle of *non-refoulement* and that the refugee will be able to stay 'in safety under dignified living conditions for as long as necessary in view of the risks' in the area in which the refugee was formerly resident.¹⁹²

4.2.5 Looking ahead

There are thus many reasons why Palestinian refugees may be unable or unwilling to return to that area of UNRWA operations where they were formerly resident. In a frequently volatile situation, they may be exposed to threats to physical safety or freedom, or other serious protection-related problems; or they may be refused re-admission or the renewal of travel documents by the authorities of the country controlling access to territory.¹⁹³

The developing interpretation of article 1D is generally consistent with the ordinary meaning of the words and with the intentions of the drafters, as disclosed in the *travaux préparatoires*. Its construction tends to conform to the object and purpose of the Convention and with the complementary measures undertaken to ensure the protection of Palestinian refugees, pending a definitive settlement of their situation. Such a purposive approach is both possible and justified by the goal of protection and assistance pending a lasting solution. The non-applicability of article 1D might at first seem an attractive proposition for many Palestinian refugees, opening up to them the possibility of applying for refugee status or asylum on the basis of a well-founded fear of persecution within the meaning of article 1A(2). This might indeed be the case for certain groups of Palestinians, such as members of the diaspora outside UNRWA's area

of operations who were targeted for persecution or expelled from and denied re-entry to their State of former habitual residence. For reasons explained above, however, even for the Palestinian refugee twice over, the necessity to go through the article 1A(2) gateway can and should be avoided by the correct interpretation and application of article 1D.

In many respects, the legal situation of Palestinians with respect to the 1951 Convention continues to become more complex, first, as a result of the 1993 Declaration of Principles on Interim Self-Government Arrangements in the West Bank and Gaza;¹⁹⁴ secondly, because of the withdrawal from Gaza and the continuing uncertainty regarding the international standing of that territory, the West Bank, and the inhabitants; and thirdly, by reason of the evident lack of progress towards statehood and an effective Palestinian nationality. Notwithstanding the changed and changing political situation, the General Assembly has continued to reaffirm UNRWA's competence with respect to those who left Palestine as a result of the 1948 conflict, their dependants and descendants, as well as those who fled by reason of later conflicts.¹⁹⁵ UNHCR also continues to have protection responsibilities for Palestinians outside UNRWA's operational area, and article 1D and the extent of State obligations under the 1951 Convention will likely raise further problems of interpretation and application.

In the meantime, a potential protection gap is opening up between those Palestinians who actually avail themselves of UNRWA protection or assistance, and those who are simply 'eligible'.¹⁹⁶ Palestinians also may have reasons other than personal security for leaving UNRWA's area of operations, but because of decisions taken by the occupying power in particular, can find themselves unable to return to Gaza or the West Bank and thus in need of international protection, if they are to avoid immigration detention, for example, or a precarious existence in limbo.¹⁹⁷

From another perspective, it might be argued that refugee status was never meant to be permanent, or to be handed down to the Nth generation.¹⁹⁸ The cessation clauses, reviewed above, and the duty under the 1951 Convention to facilitate the naturalization of refugees provide some support for the general idea, and commentators may be tempted to apply Convention concepts backwards, to political issues predating the treaty, and for which it was not designed.¹⁹⁹ The practice of States is also very much to the contrary. There is no consensus on a finite notion of 'temporary', let alone on the modalities by which a durable

solution ‘shall’ be brought about; hence, the number of protracted refugee situations. States of refuge do not tend to see themselves as unilaterally responsible for solving problems that are international by definition, and Palestinian and other refugees must commonly turn to the Convention if they are to find a minimum of protection.²⁰⁰

4.3 Other refugees not considered to require international protection

Finally, the UNHCR Statute and the 1951 Convention disqualify from any entitlement to protection those who, in their country of residence, are considered by the competent authorities ‘as having the rights and obligations which are attached to the possession of the nationality of that country’.²⁰¹ The drafters had one particular group in mind at the time, namely, members of the German ethnic minorities expelled from certain Eastern European countries following the end of the Second World War, in accordance with the Potsdam Agreement between the United States of America, the United Kingdom, and the Soviet Union.²⁰² The constitution of the IRO excluded Germans by name,²⁰³ but the *Ad hoc* Committee preferred to omit any express reference to nationality, ethnicity, transfers or expulsions.²⁰⁴ In that context, article 1E is clearly intended to take account of an effective nationality, which the *Volksdeutsche*, or ethnic Germans, enjoyed under article 116 of the Constitution of the Federal Republic of Germany.²⁰⁵ Nevertheless, the provision as adopted is capable of extending to many other groups.

Section 1(2) of the British Nationality Act 1948, for example, declared the citizens of independent Commonwealth countries to be British subjects or Commonwealth citizens, the expressions having the same meaning. The assimilation of Commonwealth citizens to United Kingdom nationals strictly so-called was most fully realized in the years up to 1962, when all British subjects (Commonwealth citizens) had the unrestricted right of entry into the United Kingdom, whatever their country of origin. They were free to settle, they enjoyed the right to work and the right to vote, and they were not subject to removal; they also enjoyed the right after twelve months of residence to register as citizens of the United Kingdom. However, the most important of these indices of nationality have now been specifically removed, namely, the right to enter freely and the right not to be expelled.²⁰⁶ In 1981, a new ‘British citizenship’ was introduced, which became the sole criterion for the right of entry and residence in the United Kingdom.²⁰⁷

Article 1E of the Convention and the corresponding provision in the UNHCR Statute do not require that the individuals in question should enjoy the full range of rights incidental to citizenship. The right to vote, for example, may not be required, but given the fundamental objective of protection and that the purpose is to exclude those who possess an ‘effective nationality’, the right of entry to the State and freedom from removal are considered essential;²⁰⁸ by necessary implication, therefore, neither expulsion from that State, nor the risk of *refoulement* will arise. Article 1E does not deal with ‘loss’ of refugee status, and neither is it about effecting change following recognition of refugee status; although such an approach is conceivable, historically the practice was otherwise and the principal target group had not only moved, but had also been accepted by the State in question. Put simply, article 1E is essentially a ‘first country of asylum’ clause; it entitles a third State to decline to consider a refugee status application by someone who has already found effective protection elsewhere and, as the German paradigm shows, that effective nationality itself will likely be established by law.²⁰⁹

5. Exclusion from refugee status

Like articles 1D and 1E,²¹⁰ article 1F employs mandatory language ('shall not apply') when identifying a further three categories excluded from the protection of the 1951 Convention.²¹¹ Article 1F, however, also makes exclusion conditional on there being ‘serious reasons for considering’ that the applicant has committed certain crimes or is guilty of certain acts. The ‘sufficiency of evidence’ question has encouraged decision-makers to consider at some length the substantive law relevant to criminal liability, including individual responsibility and complicity, and they have also looked at proportionality, rehabilitation, and expiation, although generally with less enthusiasm.

As shown below, the scope and inter-relationship of article 1F(b) and 1F(c) have been significantly affected by the question of terrorism, and by States’ heightened concerns regarding ‘security’.²¹² Traditionally, States applied article 1F during the initial determination procedure and relied on articles 32 or 33(2) in cases involving serious security or criminality concerns arising after admission. UNHCR’s 2003 Guidelines, however, recognize that conduct falling within article 1F(a) and 1F(c) can trigger revocation of refugee status,²¹³ and State legislation and practice have embraced these possibilities with alacrity,

notwithstanding underlying protection issues.

5.1 '[S]erious reasons for considering'

The practical implications of the article 1F evidential standard and the degree of confidence it demands of decision-makers have been debated against the widely accepted premise that the ‘exclusion clauses’ should be carefully, but also restrictively, interpreted and applied.²¹⁴ In UNHCR’s words, ‘In order to satisfy the standard of proof under Article 1F, clear and credible evidence is required’, and proof of guilt is not needed.²¹⁵ In Canada, the article 1F ‘serious reasons’ standard has been equated with ‘reasonable grounds to believe’,²¹⁶ the Supreme Court stating that this

requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities ... In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.²¹⁷

The Federal Court of Appeal also emphasized that this ‘requires more than suspicions ... more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person placed in similar circumstances would have believed that reasonable grounds existed’. ²¹⁸ In *JS (Sri Lanka)*, however, Lord Brown observed that, ‘serious reasons for considering’ obviously imports a higher test for exclusion than would, say, an expression like ‘reasonable grounds for suspecting’, and that ‘considering’ approximates rather to ‘believing’ than to ‘suspecting’. Drawing on Lord Justice Sedley’s characterization in *Al-Sirri*, he agreed that the phrase, ‘sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.’²¹⁹ In *Al-Sirri*, Lord Justice Sedley had also recalled that ground rule which is the presumption of innocence:

[u]ntil the Home Secretary has produced evidence capable of amounting to serious reasons for considering that an individual comes within one of the art. 1F categories, there can be no foundation for denying him such protection as the Convention would otherwise afford. In this simple sense ... there will be a presumption of innocence in art. 1F proceedings.²²⁰

The Supreme Court in turn considered that comparative jurisprudence on these issues tended to require exclusion decisions to be based on ‘clear, credible evidence’, and it agreed with UNHCR’s position on restrictive interpretation and cautious application.²²¹ In its conclusions, the court recalled that ‘serious reasons’ is stronger than ‘reasonable grounds’, that the evidence supporting these reasons must be ‘clear and credible’, that ‘considering’ is stronger than ‘suspecting’ or ‘believing’, that ‘considered judgment’ is called for, and that even if the decision-maker does not need to be satisfied beyond reasonable doubt, in reality ‘there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is’.²²²

The approach of the Court of Justice of the European Union, in contrast, tends to avoid linguistic analysis in favour of a focus on those facts which may, or may not, meet the serious reasons requirement; on procedural obligations, such as case-by-case assessment; and on the attribution of individual responsibility.²²³ Considered together, the two approaches offer a reasonably coherent and practical framework of analysis for determining whether there are indeed serious reasons for considering that a claimant falls within the terms of article 1F.

The evidence supporting such a finding will be especially important insofar as it also establishes a sufficient degree of individual responsibility. UNHCR’s view is that the person concerned should have

committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice ... Criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent.²²⁴

Decisions across jurisdictions indicate considerable support for this position. In *JS (Sri Lanka)*, Lord Brown referred to the individual having ‘contributed in a significant way’ to the organization’s ability to commit war crimes, and to their being aware that such assistance would further its purpose.²²⁵ The Supreme Court of Canada, concerned about the extent to which the previously accepted ‘personal and knowing’ test had been over-extended to capture ‘complicity by association’, substituted ‘voluntary, knowing and significant’ contribution in its

2013 judgment in *Ezokola*.²²⁶

The CJEU has similarly stressed the importance of assessing the ‘true role’ of the individual, including by reference to their position in a particular organization, their knowledge, and any pressure to which they may have been subject.²²⁷ An individual may nevertheless still be excluded, even if it is not established they committed, attempted, or threatened to commit, a terrorist act.²²⁸ The fact of a conviction may nevertheless help to establish the case for exclusion, provided that it assists in showing the individual’s personal involvement in criminal activity, or clarifies his or her ‘true role’.²²⁹

5.2 Crimes against peace, war crimes, and crimes against humanity

5.2.1 The drafting history of article 1F(a)

The Constitution of the International Refugee Organization explicitly excluded ‘war criminals, quislings and traitors’, those who had assisted the enemy in persecuting civilian populations, ordinary criminals extraditable by treaty, and those who had participated in any organization having the purpose of overthrowing by force the government of a UN Member State, or who had participated in any terrorist organization.²³⁰ The exclusion of war criminals from the benefits of the 1951 Convention was first considered by the *Ad hoc* Committee on Statelessness and Related Problems at its initial session in January–February 1950, when article 14(2) of the Universal Declaration of Human Rights was cited.²³¹

France submitted an alternative draft convention which would have denied recognition as a refugee to any person to whom article 14(2) applied.²³² ‘War criminals’, noted the French representative, ‘would naturally be excluded’.²³³ The representative for the United States, on the other hand, thought that as there were no longer any unpunished war criminals, there was no need to exclude them; common law criminals subject to extradition, however, should be excepted.²³⁴ Not surprisingly, the US position was challenged as premature by the Israeli delegate, who suggested that those guilty of persecuting others should also be expressly mentioned.²³⁵ The draft duly prepared by an *Ad hoc* Committee Working Group proposed to frame exclusion by reference to the commission of crimes ‘specified in Article VI of the London Charter of the International Military Tribunal (IMT) or any other act contrary to the purposes and principles of the United Nations’.²³⁶ Again, the United States had reservations regarding

mandatory exclusion, preferring that each receiving State retain discretion in the matter.²³⁷ This also produced a reaction,²³⁸ leading France to counter with an amendment confirming an *obligation* not to apply the Convention to war criminals.²³⁹

In August 1950, the Economic and Social Council and the Third Committee each revised the exclusion provisions of the refugee definition, which now included references both to the International Military Tribunal (IMT) Charter and the Universal Declaration:

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 specified in article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.²⁴⁰

In December 1950, this was duly recommended by the General Assembly to the Conference of Plenipotentiaries scheduled to meet in July 1951.²⁴¹

At the 1951 Conference, the representative of the Federal Republic of Germany suggested referring to the 1949 Geneva Conventions as an alternative to the IMT Charter. ‘By associating the Geneva Conventions with the work of the Conference, the humanitarian aims which should govern the Convention would be stressed.’²⁴² He emphasized nonetheless that all war criminals should be excluded from the Convention, and objected essentially to the *source* of the applicable rules.²⁴³

The issue was referred to a working group,²⁴⁴ which recommended the phrasing now found in article 1F(a).²⁴⁵ It was adopted by twenty votes to one against, with two abstentions, the Israeli representative explaining that his negative vote was due to the omission of all reference to the London Charter, and to its possible political and moral implications.²⁴⁶

5.2.2 The scope of article 1F(a)

Even though the final text of article 1F(a) omitted all mention of the IMT Charter, the participating States clearly saw it as an appropriate and relevant source of international law,²⁴⁷ and as providing justification for the exclusion of those considered to have committed a crime against peace, a war crime or a crime against humanity.²⁴⁸ Arguably also the crimes mentioned in article 1F(a)

are necessarily extremely serious, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct which amounts to a war crime, a crime against peace, or a crime against humanity. Being integral to the refugee definition, if the exclusion applies, the claimant cannot be a Convention refugee, whatever the other merits of his or her claim.²⁴⁹

5.2.2.1 Crimes against peace

Article VI of the IMT Charter provided for individual responsibility in the case of crimes against peace, defined to include ‘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’.²⁵⁰ Control Council Law No. 10, from which the Allied Military Tribunals in Germany derived their jurisdiction to try other war criminals, similarly provided that crimes against peace included the ‘initiation of invasions of other countries and wars of aggression in violation of international law and treaties’. Here and in domestic war crimes trials, as in the trials of the major war criminals, those accused were ‘almost exclusively leading members of the governments and High Commands of the Axis States and those convicted on such charges were principally the “policy-makers”’.²⁵¹ Brownlie notes that neither the soldier in the field, nor the civilian who supported the war effort, were intended to be punished under these provisions.²⁵²

Article 5 of the Statute of the International Criminal Court includes the ‘crime of aggression’ within the jurisdiction of the Court, subject to the adoption of a provision in accordance with articles 121 and 123, defining the crime and setting out the conditions under which jurisdiction is to be exercised.²⁵³ The 2010 Kampala Review Conference of States Parties to the Statute adopted the necessary provisions,²⁵⁴ and in 2017, the Assembly of States Parties decided to activate jurisdiction with effect from 17 July 2018.²⁵⁵

5.2.2.2 War crimes

‘War crimes’ are defined as violations of the laws or customs of war, including ‘murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation

not justified by military necessity'. Just as the International Military Tribunal succeeded to an existing body of law, so article 1F(a) today must be interpreted in the light of more recent developments and the 'relevant international instruments' referred to have been considerably supplemented since 1951. The principles of the IMT Charter have been strengthened by the 1949 Geneva Conventions and the 1977 Additional Protocols, through the jurisprudence of the international tribunals for former Yugoslavia and Rwanda, and by the adoption of the Statute of the International Criminal Court (ICC).

'War crimes' thus encompass the 'grave breaches' of the Geneva Conventions,²⁵⁶ now summarized in the ICC Statute to include any of the following acts: 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 protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person or the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking hostages.²⁵⁷

Like the 1993 Statute of the International Criminal Tribunal on Yugoslavia, the ICC Statute also provides for jurisdiction to prosecute persons who have committed other 'serious violations of the laws and customs applicable in international armed conflict';²⁵⁸ and following the Statute of the International Criminal Tribunal for Rwanda, it includes jurisdiction with regard to 'serious violations of article 3 common to the four Geneva Conventions of 12 August 1949'.²⁵⁹

5.2.2.3 Crimes against humanity

Crimes against humanity, as is clear from the definition provided by the IMT Charter, are akin to war crimes, save on a larger scale; the concept led directly to the 1948 Genocide Convention,²⁶⁰ and inspired the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.²⁶¹ The crime of genocide is expressly included within the jurisdiction of the ICC,²⁶² while crimes against humanity are defined extensively in article 7 to include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution against any identifiable group or collectivity, on 'political, racial, national, ethnic, cultural, religious, gender ... or other grounds ... universally

recognized as impermissible’, enforced disappearance, apartheid, and other inhumane acts.²⁶³ Article 7 further clarifies some of the terminology, providing among others that persecution. ‘means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’²⁶⁴

The International Law Commission included crimes against humanity in its work programme in 2014 and appointed Sean Murphy as Special Rapporteur. He submitted four reports and draft articles on prevention and prosecution were presented to the General Assembly in 2019.²⁶⁵ The proposed text builds on article 7 of the ICC Statute but aims also to end impunity and promote effective prosecution.²⁶⁶ It also contributes to the sum of protection by re-affirming the principle of *non-refoulement* in any case where ‘there are substantial grounds for believing’ that an individual would be in danger of being subjected to a crime against humanity;²⁶⁷ guaranteeing fair treatment of the alleged offender;²⁶⁸ and, while ‘de-politicising’ any offence covered by the draft articles in an extradition context,²⁶⁹ nevertheless providing for non-extradition where the requested State has substantial grounds for believing,

[t]hat the request has been made for the purpose of prosecuting or punishing a person on account of that person’s gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.²⁷⁰

5.2.3 Individual responsibility

The International Military Tribunal had no hesitation on the issue of individual criminal responsibility; that a soldier was ordered to kill or torture in violation of the international law of war had never been recognized as a defence.²⁷¹ This responsibility derives ultimately from international law, whether it is established by an international tribunal, or by a domestic court whose competence itself is based on international law. The Tribunal rejected the argument that international law was concerned only with the actions of sovereign States, and that those who carried out such actions might be protected by the doctrine of State sovereignty:

individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence under international law.²⁷²

The 1949 Geneva Conventions specifically provide for individual responsibility. Each Convention, for example, requires of each party that it search out persons, regardless of nationality, who are alleged to have committed, or ordered to be committed, a grave breach of a Convention, and to prosecute them.²⁷³ The applicability of the principle of individual responsibility is also widely recognized in the manuals of military law issued by States to their armed forces.²⁷⁴ The ICC Statute further confirms 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, nor shall it, in and of itself, constitute a ground for reduction of sentence’.²⁷⁵ A superior may also be responsible for the actions of a subordinate,²⁷⁶ but the orders of a superior may relieve the individual of responsibility if:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

However, orders to commit genocide or crimes against humanity are manifestly unlawful.²⁷⁷

Working within this framework of international humanitarian law, duress and other defences excluding criminal liability will also need to be taken into account, with a view not to determining guilt as such, but to ensuring consistent interpretation of article 1F(a) in light of the object and purpose of the 1951 Convention. Article 31 of the ICC Statute thus provides that a person shall not be criminally responsible if the conduct in question results,

from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.²⁷⁸

The defence is only available, 'in respect of the threat of imminent death or continuing or imminent serious bodily harm. A merely abstract danger or simply an elevated probability that a dangerous situation might occur would not suffice and the threat relied on must be objectively given and not merely exist in the perpetrator's mind'.²⁷⁹

Criminal law conceptions of duress drawn from national legislation and judicial practice may be of some assistance, but the ICC Statute and customary international law provide the relevant guidance.²⁸⁰ The five elements of the duress defence are cumulative, and all must be satisfied to the appropriate standard.²⁸¹ The claimant needs to raise duress in response to the argument that there are serious reasons for considering that he or she has committed an excludable offence; and it then falls to the competent authority to show serious reasons to the contrary, that is, that the claimant did not act under duress. A full contextual analysis is required,²⁸² and the starting point is the presumption of innocence.²⁸³

Contrary to what might be assumed, the claimant is not required to establish each of the five elements of the duress standard 'by a preponderance of the evidence', that is, on a balance of probabilities.²⁸⁴ The claimant needs only to meet the same 'serious reasons' standard, and any 'evidential equivalence' is to be resolved in favour of the claimant, who is not to be prejudiced by unreasonable standards of proof.²⁸⁵ Article 1F may reflect a 'unique evidentiary standard', but this does not justify 'a relaxed application of fundamental criminal law principles'.²⁸⁶

In the case of complicity also, a distinction must always be drawn between 'mere' membership of an organization which engages in international crimes,²⁸⁷ and actual complicity. The International Military Tribunal accepted that such membership was not sufficient to establish liability; even in the case of organizations declared to be criminal, evidence of personal involvement in

criminal acts was also required.²⁸⁸ Article 25 of the ICC Statute brings within the Court's jurisdiction not only those who commit, order, solicit, or induce the commission of a relevant crime, but also one who 'aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.²⁸⁹

'Complicity' may be relevant and applicable across the broad spectrum of excludable acts and offences covered by article 1F, but it requires evidence of a 'voluntary, significant and knowing contribution', to borrow the words of the Supreme Court of Canada.²⁹⁰ Complicity, if it is to be consistent with criminal law principles of liability, must go beyond association with or passive acquiescence in prohibited conduct. The Supreme Court highlighted six factors that it considered relevant to the evaluation,²⁹¹ and other courts in other jurisdictions have also emphasized that every assessment must be contextual.²⁹²

A different approach will be called for, however, with regard to crimes alleged to have been committed by child soldiers.²⁹³ Although the recruitment and use in combat of those under fifteen is a war crime in itself,²⁹⁴ and although the 2000 Optional Protocol to the Convention on the Rights of the Child raises the permissible age of recruitment and conscription to eighteen,²⁹⁵ the participation of children and young people in armed conflict continues to be a major problem.²⁹⁶ Some of the issues relating to criminal liability are discussed in the Secretary-General's 2002 Report on the establishment of a Special Court for Sierra Leone, where the possibility of responsibility at age fifteen is suggested, but with an attempt also to achieve a working balance with child rehabilitation and other programmes.²⁹⁷

5.3 Serious non-political crimes

Article 1F(b) is the only paragraph to apply expressly to offences committed *outside* the country of refuge, and prior to admission to that country as a refugee. This requirement has not always been followed in the practice of States, and earlier French jurisprudence sought also to apply it to resident refugees. The High Court of Australia, while recognizing that the qualification describes both where and when the offence in question should have been committed, nevertheless was prepared to interpret 'admission' also to include 'putative admission'.²⁹⁸ The EU Qualification Directive takes a similar approach.²⁹⁹

5.3.1 The drafting history of article 1F(b)

Criminal and other undesirable refugees received little attention in the instruments and arrangements of the inter-war and immediate post-war period.³⁰⁰ The IRO Constitution excluded refugees who were ‘ordinary criminals ... extraditable by treaty’,³⁰¹ in terms to be recalled by the UNHCR Statute,³⁰² and article 14(2) of the Universal Declaration of Human Rights seems to rule out asylum ‘in the case of prosecutions genuinely arising from non-political crimes’. Apart from the immediate concern of States with the exclusion of war criminals and their surrender to prosecution, the *travaux préparatoires* of the 1951 Convention disclose many unanswered questions relating to the general exclusion of criminals from the benefits of refugee status. The Convention finally uses the deceptively simple phrase, ‘serious non-political crime’,³⁰³ as the basis, and limits such crimes to those committed ‘outside the country of refuge prior to ... admission ... as a refugee’.

The British representative at the 1951 Conference objected to article 14(2) of the Universal Declaration as a reference for exclusion, arguing that it was arbitrary and unjust to place beyond protection all who might be caught by the notion of ‘prosecutions genuinely arising from non-political crimes’.³⁰⁴ France in turn objected that it was impossible to drop the limiting clause with respect to common law criminals, who should be eliminated from the definition.³⁰⁵ The British concern remained not to prejudice those guilty of minor crimes; that of France, to retain discretion to grant asylum to minor criminals, but without being obliged to recognize refugee status; and that of other States, to avoid a clash of obligations between the Convention and extradition treaties.³⁰⁶ One representative also suggested that it would be necessary to balance the seriousness of the crime against the degree of inconvenience or persecution feared.³⁰⁷

In later debate, the British representative expressed his concern that such a provision might be used to revoke the refugee status or asylum of one who committed a crime *after* entry, in circumstances in which the exceptional limitations on *non-refoulement* did not apply.³⁰⁸ The Conference eventually agreed that crimes committed before entry were at issue, and that the word ‘crime’ should be qualified by the word ‘serious’,³⁰⁹ thus moving the exclusion clause nearer to the *non-refoulement* exception.³¹⁰

5.3.1.1 The relation to extradition

Although the drafters elected to make no formal connection, it is perhaps unclear whether this exclusion clause was intended to have any more than an incidental role in the extradition process, or whether the ‘doctrine’ of extradition was to play some role in the interpretation of the Convention.³¹¹ In addition, the *travaux préparatoires* do not reveal whether the commission of a serious crime outside the country of refuge was to be a permanent bar to refugee status; or whether the exclusion might be expunged by the lapse of time, by prosecution and conviction, by the serving of a sentence duly imposed, or by amnesty or pardon. The *UNHCR Handbook* notes:

In evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances—must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant’s criminal character still predominates.³¹²

This statement of position also is unclear. Its foundation on a principle of liberal interpretation is unexceptional in a commentary on a humanitarian instrument such as the 1951 Convention.³¹³ On the one hand, however, it seems to confirm that the role of article 1F(b) is not confined to extradition and prosecution as an immediate, or present process; on the other hand, it suggests that continuing exclusion may be justified by continuing criminal character, in a manner reminiscent of article 33(2). Today, exclusion under article 1F(b) appears to be increasingly employed for those considered to have committed crimes that are politically or ideologically motivated, but which now fall under the rubric of terrorism, terrorist activities, or terrorist acts.³¹⁴

Referring to the IRO Constitution, the Universal Declaration of Human Rights and the UNHCR Statute, Grahl-Madsen emphasized the objective of exclusion as ensuring that international instruments are not abused by ‘fugitives from justice’, and do not interfere with the law of extradition.³¹⁵ This led him to conclude that, given the non-applicability of extradition where the individual has already been convicted and punished, pardoned, or amnestied, or has benefited from a statute of limitations, any such crimes as may have been committed ‘should not be held against persons seeking recognition as refugees’.³¹⁶ This is not what the words of

article 1F(b) actually say, and it has also never been very clear exactly what role the extradition analogy is supposed to play. It might be argued that evidence of any extradition crime as defined in the relations between the parties would be a proper basis for exclusion, irrespective of individual circumstances; or that the range of ‘excludable crimes’ should develop as extradition practice also develops; or that States should be guided by their extradition laws and agreements when applying the notions of ‘serious’ and ‘non-political’.

Extradition practice has indeed developed over the last one-and-a-half centuries or so; the range of offences has broadened, but so too has the scope of protection.³¹⁷ It might be argued that the numbers of those to be excluded under article 1F(b) have also grown, but that potentially deprives the word ‘serious’ of any independent, ‘international’ content. Whereas an implied reference to extradition in the past might have helped to concentrate attention in matters of exclusion on only the most serious of crimes, the irony today is that this has led precisely in the opposite direction, namely, to a broadening by some States of the scope for exclusion, through the use of ever more expansive extradition provisions, increased use of ‘certification’ and warrants procedures between ‘like-minded’ States, and a very substantial diminution in the space to review the individual characteristics of the particular case. These developments are nowhere more clearly in evidence than in the practice of the United Kingdom—the original defender of the ‘minor’ criminal refugee.³¹⁸

Although legislative and executive challenges to the ordinary meaning of words seem likely to continue, the ‘fugitives from justice’ thesis appears to be on the wane, as being inconsistent with the ordinary meaning of the words. It is one thing to say that those seeking to escape prosecution for serious non-political crimes should not be recognized as refugees; but quite another to say that *only* such fugitives come within the scope of article 1F(b).³¹⁹ The primary emphasis is on ‘seriousness’, such as was illustrated, but not limited, by crimes associated with extradition.³²⁰

Although the *travaux préparatoires* provide no hard answers, a more principled approach is in order. Historically, States were determined to limit the discretion to accord refugee status to war criminals.³²¹ Since the Convention was drafted, they have also acted, both internationally and regionally,³²² to ensure that statutes of limitation shall not run in favour of war criminals, and the notion of serious non-political crime has increasingly come to be associated with many offences against the laws of war, and with the emerging concept of ‘terrorism’.

Although it needs careful oversight, the related concept of ‘security’ now also occupies a more dominant place in controlling the movement of people between States, whether refugees or not; provided it can be kept within a framework of accountability,³²³ security may offer the necessary theoretical basis for the application of article 1F(b) in a context which also ensures the integrity of the international system of protection. The commission of a serious non-political crime may be sufficient reason for exclusion because it is indicative of some future danger to the community of the State of refuge; or because the very nature and circumstances of the crime render it a basis for exclusion in itself, regardless of extradition, prosecution, punishment, or non-justiciability.

5.3.1.2 ‘Serious’ and ‘non-political’

That the individual who had committed a political crime was to be distinguished from the ‘common criminal’³²⁴ is illustrated well by the equally authoritative French text of article 1F(b): ‘Les dispositions de cette convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser ... (b) Qu’elles ont commis *un crime grave de droit commun*’ (emphasis added). Each State must decide what constitutes a serious crime, according to its own standards up to a point, but on the basis of the ordinary meaning of the words considered in context and in light of the object and purpose of the 1951 Convention.³²⁵ Given that the words are not self-applying, each party then has some discretion in determining whether the criminal character of the applicant for refugee status in fact outweighs his or her character as *bona fide* refugee, and so constitutes a threat to its internal order.³²⁶ Just as the 1951 Conference rejected ‘extradition crimes’ as an a priori excludable category, so *ad hoc* approaches founded on length of sentence are of little help,³²⁷ unless related to the nature and circumstances of the offence.³²⁸ Commentators and jurisprudence seem to agree, however, that serious crimes, above all, are those against physical integrity, life, and liberty.³²⁹

The problem of determining whether a crime is political has already been considered.³³⁰ The nature and purpose of the offence require examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organization or the very structure of the State, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object.³³¹ The political element should in principle outweigh the

common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.³³² The tendency to ‘depoliticize’ certain offences, such as hijacking, hostage-taking, offences against diplomats, and terrorism, is a potential source of difficulties³³³ which are not entirely resolved by inclusion in some of the conventions of the principle, *aut dedere aut judicare*.³³⁴ Although certain States have been prepared to prosecute the ‘extra-territorial criminal’ or suspected terrorist, the possibility of *refoulement* to persecution can rarely be excluded.³³⁵

The political aspect apart, the phrase ‘serious non-political crime’ is not easy to define given the different connotations of the term ‘crime’ in different legal systems.³³⁶ The standard finally to be applied is an international standard, in that a provision of a multilateral treaty is involved, but standards relating to criminal prosecution and treatment of offenders current in the potential country of asylum are also relevant. Each case will require examination on its merits, with regard paid to both mitigating and aggravating factors, and to the level of individual responsibility. This point is commonly overlooked by advocates against ‘balancing’—that in any criminal process, justice requires consideration of more than the particular label which the legislature or the executive may attach to an offence.³³⁷

Article 1F excludes ‘persons’, rather than ‘refugees’, from the benefits of the Convention, suggesting that the issue of a well-founded fear of persecution is irrelevant and need not be examined at all if there are ‘serious reasons for considering’ that an individual comes within its terms. In practice, the claim to be a refugee can rarely be ignored, for account must be taken of the nature of the offence presumed to have been committed, the context in which it is alleged to have occurred, and the surrounding circumstances, including the treatment likely to be faced on return. This is implicit in the regime of international protection, whether refugee or human rights law is concerned, and is also required by the standards now applicable in extradition.

There are three points at which assessments have to be made when deciding exclusion under article 1F(b): first, whether there are serious reasons for considering that the individual in question has committed the offence; secondly, whether the crime is serious, considered with due regard to context and individual circumstances; and thirdly, whether it is non-political. None of these points of assessment is sealed off from any other, and each impacts on every

other, for no serious non-political crime exists in a vacuum, whatever national legislation or executive certification may provide. This is why it is relevant to consider not only the nature of the crime or crimes in question, but also the persecution feared, and whether criminal character in fact outweighs the applicant's character as a *bona fide* refugee.³³⁸

In a joint exercise with the US State Department following the arrival in 1980 of some 125,000 Cuban asylum seekers, and with a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery.³³⁹ However, that presumption should be capable of rebuttal by evidence of mitigating factors, some of which are set out below. The following offences might also be considered to constitute serious crimes, provided other factors were present: breaking and entering (burglary); stealing (theft and simple robbery); receiving stolen property; embezzlement; possession of drugs in quantities exceeding that required for personal use; and assault. Factors to support a finding of seriousness included: use of weapons; injury to persons; value of property involved; type of drugs involved;³⁴⁰ evidence of habitual criminal conduct. With respect to all cases, the following elements were suggested as tending to rebut a presumption or finding of serious crime: minority of the offender; parole; elapse of five years since conviction or completion of sentence; general good character (for example, one offence only); offender was merely accomplice; other circumstances surrounding commission of the offence (for example, provocation and self-defence).³⁴¹

These criteria may still be of general value in the interpretation of the Convention and the Statute, bearing in mind that the objective of such provisions is to obtain a humanitarian balance between a potential threat to the community of refuge and the interests of the individual who has a well-founded fear of persecution.

5.3.2 Context, proportionality, and security

In its 2003 *Guidelines* on exclusion, UNHCR argues that, 'As with any exception to a human rights guarantee, the exclusion clauses must ... be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion.' It suggests that, given the implicit gravity of the offences, such an approach would not normally

be required with regard to article 1F(a) or 1F(c), but that it is appropriate for article 1F(b) and ‘less serious’ war crimes.³⁴² There is nothing in the words of the exclusion clause to rule out such an approach, which found favour with certain delegates at the 1951 Conference,³⁴³ and which also has some support in the jurisprudence. In *Pushpanathan*, for example, the Supreme Court of Canada noted specifically that:

Article 1F(b) contains a balancing mechanism in so far as the specific adjectives ‘serious’ and ‘non-political’ must be satisfied, while Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution on the one hand, and the legitimate concern of states to sanction criminal activity on the other.³⁴⁴

There seems to have been little rational explanation for why courts in several jurisdictions have resisted the principle of individualized determination,³⁴⁵ even as ‘extradition law’ itself has evolved, particularly at the regional level, precisely to incorporate ‘refugee’ protection. Already in 1957 the European Convention on Extradition provided that extradition shall not be granted where the requested party had substantial grounds to believe that the request was made for the purpose of prosecuting or punishing a person, ‘on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons’.³⁴⁶ The UK’s 2003 legislation prohibits extradition for what it now calls ‘extraneous reasons’;³⁴⁷ it is also barred if incompatible with Convention rights within the meaning of the Human Rights Act 1998, and if the individual sought, ‘could be, will be or has been sentenced to death’.³⁴⁸ In the refugee and asylum context, however, UK legislation adopts another approach—presumptive exclusion. Section 72 of the Nationality, Immigration and Asylum Act 2002 purports to apply ‘for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)’.³⁴⁹ It provides that, ‘a person shall be presumed to have been convicted by a final judgment of a particularly serious crime *and* to constitute a danger to the community of the United Kingdom’ (emphasis supplied), if he or she has been convicted of an offence and sentenced to imprisonment for at least two years.³⁵⁰ While the presumption may be rebutted, section 72(8) extends and applies the obligation, when making the assessment, to disregard the gravity of fear or threat

of persecution, which was first introduced by section 34(1) of the Anti-Terrorism, Crime and Security Act 2001.³⁵¹ In 2004, the House of Commons/House of Lords Joint Committee on Human Rights concluded that section 72 was incompatible with the UK's obligations under the 1951 Convention,³⁵² and that the crimes included in the 2004 Order 'go far beyond what can be regarded as "particularly serious crimes" for the purposes of Article 33(2)'.³⁵³

In the United States, the 'aggravated felony' provisions make certain individuals ineligible for asylum or withholding of removal; certain conduct is considered too serious to justify exceptions, and no consideration is given to relief in the alternative.³⁵⁴ An aggravated felony is a 'particularly serious crime' which 'constitutes a danger to the community', and thus bars asylum.³⁵⁵ In the case of withholding, aggravated felony convictions which involve a sentence of more than five years are considered particularly serious crimes and are an automatic bar,³⁵⁶ while the Attorney General has also determined that drug trafficking offences are presumed to be particularly serious crimes, in the absence of specifically listed extraordinary and compelling circumstances.³⁵⁷

The Illegal Immigration and Immigrant Responsibility Act 1996 eliminated the two-part analysis which had previously conditioned denial of asylum on (a) involvement in terrorist activity, and (b) reasonable grounds to believe that the individual was a danger to the security of the United States.³⁵⁸ The statutory language now provides that the individual is ineligible for asylum if the Attorney General determines that 'there are reasonable grounds for regarding' him or her as such a danger, *or* if the individual meets the statutory criteria relating to terrorist activity.³⁵⁹ The political offence exception does not apply to 'terrorist activity', but only to the sections of the Immigration and Nationality Act in which it is specifically mentioned.³⁶⁰ In addition, where the Attorney General has determined that an individual has engaged in terrorist activities, then 'there are reasonable grounds for regarding [him or her] as a danger to the security of the United States'.³⁶¹

The problem with the dogmatic, mechanistic approach now required by some national legislation is precisely that it leaves that individual dimension to chance consideration in the country of potential refuge.³⁶² In our opinion, in a potential article 1F(b) exclusion case in which there *is* credible evidence of likely persecution, the court or reviewing authority should subject the other evidential requirements of article 1F to the most anxious scrutiny: Are there indeed 'serious

reasons to consider’ that the applicant has committed the crime? Is the seriousness of the offence not so much inherent, as a consequence of the circumstances in which it was committed or is alleged to have been committed, and how do those circumstances bear on the ‘guilt’ or liability of the applicant? An approach in terms of the individual will better serve the protection objectives of the Convention, ensure the restrictive application of an exception to the Convention, avoid mechanical application of pre-conceptions, do justice, and work no disservice to the potential State of refuge. The failure to incorporate these elements into the determination of excludability under article 1F(b) necessarily means that, as a matter of international obligation, they must nevertheless be examined at a later date, in another hearing. Although there may be scope for harmonizing and prioritizing extradition and refugee status procedures, there is no obvious reason why the latter should not deal both with the question of serious non-political crime, and with that of liability to persecution.

The rebuttable presumption and the process of ‘certification’ not only reverse the burden of proof in the withdrawal of protection, but also contradict the object and purpose of the 1951 Convention in general. Just as the Convention makes refugee status contingent upon the individual satisfying the well-founded fear of being persecuted test in article 1A(2), so it also requires that the Convention ‘shall not apply to any person with respect to whom there are serious reasons for considering’ that he or she, *individually*, has committed one or other of the acts mentioned in article 1F. Equally, the Convention makes the application of exceptions to the cardinal principle of *non-refoulement* contingent upon a finding that the *individual refugee* is someone ‘whom there are reasonable grounds for regarding as a danger to the security of the country’; or who, ‘having been convicted ... of a particularly serious crime, constitutes a danger to the community of that country’.

Whether a refugee is a danger to security or a danger to the community, or has committed a ‘serious non-political crime’, can only be determined on the basis of the evidence relating to that individual.³⁶³ In either case, presumptions based on legislative classification or executive certification will tend to disregard the nature and the circumstances of the offence and to distort the process of individual assessment. The failure to consider all the circumstances does an injustice to the words of article 1F(b), none of which is self-applying, to the object and purpose of the 1951 Convention, but also and most seriously, to the individual claimant.

In *B and D*, the CJEU nevertheless held that exclusion under article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned being a present danger to the State, or on an assessment of proportionality in relation to the particular case.³⁶⁴ This apparently straightforward injunction and its syllogistic equation of ‘conditions met’ with ‘exclusion required’ are difficult to square, at first glance, with the Court’s rejection of ‘automatic’ exclusion and its overall insistence that decisions require the fullest evaluation of individual circumstances. It can be justified only on the assumption that the requisite assessment *must* have taken place at some earlier stage of the proceedings.³⁶⁵

Some national courts still incline to the blunt approach, for example, when confronted with the argument that a criminal conviction should be disregarded or given less weight when sentence has been served and rehabilitation achieved (so far as the evidence can show).³⁶⁶ Lord Justice Laws rejected any such evaluative process, taking the view that, in exclusion matters, ‘the decision-maker is required to decide only matters of objective fact’.³⁶⁷ If only it were so easy ... The refugee status determination process is more accurately characterized as a series of evaluative steps—well-founded; fear; persecution; protection; serious crime; non-political crime; particularly serious crime; and danger to the community. The idea that there is something immutable in ‘the crime itself’ is,³⁶⁸ we suggest, out of step and inconsistent with the very process of the law.

In *AH (Algeria)*, the British court was strongly influenced by the majority decision of the Supreme Court of Canada in *Febles*,³⁶⁹ in which a refugee who had been convicted and served time for two assaults with a deadly weapon in the US, sought protection in Canada after his refugee status was revoked. Chief Justice McLachlin, giving the judgment of the Court, rejected UNHCR’s argument that the relevant question was whether the applicant was deserving of protection at the time of application, and that all the circumstances should be examined, including evidence relating to the seriousness of the offence, time passed, conduct since commission, regret, rehabilitation, and whether the individual presented a threat. In the view of the Court, ‘ordinary meaning’ offered no way in to such an interpretation,³⁷⁰ which would upset the balance between humane treatment and other interests. However, the Court’s suggestion that ‘serious criminals are by definition undeserving of refugee protection’ reflects precisely the sort of fallacy that judicial decision-makers are expected to avoid. By contrast, Justices Abella and Cromwell noted in dissent that, while article 1F(a) and 1F(c) might be ‘absolute barriers’,³⁷¹ there should be no

automatic exclusion under article 1F(b), where a human rights approach requires the full assessment of individual circumstances.

Clearly, there is nothing in the 1951 Convention which requires or obliges States to exclude for ever;³⁷² that is not what article 1F says, and neither does it necessarily flow from context or the object and purpose of the treaty. The ‘judicial’ position on this, as on the proportionality question, ill-framed as the rationale tends to be, is a gloss, such as often occurs in the interpretation and application of terms with uncertain content and implications. It is also convenient, insofar as it allows decision-makers to avoid the hard decisions that tend to accompany a thorough consideration of all the circumstances. While the integrity of the Convention regime may indeed be upheld by excluding the egregious war criminal, that goal can also be achieved by factoring in today’s deeper understanding of penology and experience with rehabilitation—the object and purpose of punishment, after all.³⁷³ In appropriate circumstances, the fundamental goal of the 1951 Convention—protection and security for the refugee with a view to a durable solution—may be better achieved by accommodating the potentially excludable, than by a blanket ban. Moreover, in the highly and often over-regulated immigration world of today, exclusion can have far-reaching and long-term prejudicial consequences; United Kingdom policy, for example, is to grant indefinite leave to remain only in exceptional circumstances to those excluded from refugee status, but who cannot be removed for human rights-related reasons.³⁷⁴ It will be right and proper and consistent with the object and purpose of the Convention to deny refugee status to those at the far end of the spectrum, who have persecuted others or committed crimes against humanity; the risk is, however, that so much emphasis on the exception will distort a properly evaluative assessment of all the circumstances and mark a step too far from the goal of protection.

5.4 Acts contrary to the purposes and principles of the United Nations

5.4.1 The drafting history of article 1F(c)

The principle of exclusion from the Convention by reason of acts contrary to the purposes and principles of the United Nations appears in embryonic form in the IRO Constitution, which excluded those who, since the end of the Second World War, had participated in any organization seeking the overthrow by armed force of a government of a UN member State, or in any terrorist organization; or who

were leaders of movements hostile to their government or sponsors of movements encouraging refugees not to return to their country of origin.³⁷⁵

The present text of article 1F(c) was adopted following a draft submitted by the Yugoslav representative,³⁷⁶ notwithstanding doubts about using the terminology of article 14(2) of the Universal Declaration as a basis for exclusion. The British representative supposed that ‘acts contrary to the purposes and principles of the United Nations’ covered ‘war crimes, genocide and the subversion or overthrow of democratic régimes’, with other possibilities being suggested by a number of States.³⁷⁷ At various points, both the British and Canadian representatives expressed concern that the proposed terminology was so vague as to be open to abuse by governments seeking to exclude refugees who should be protected.³⁷⁸

5.4.2 The ‘purposes and principles of the United Nations’

The purposes and principles of the United Nations are set out in the Preamble and articles 1 and 2 of the United Nations Charter.³⁷⁹ The main objectives are to prevent war, to reaffirm faith in fundamental human rights, to establish the conditions under which justice and respect for obligations can be maintained, and to promote social progress and better standards of life in larger freedom. To these ends, the purposes and principles include collective measures to prevent and remove threats to the peace and acts of aggression; the peaceful settlement of disputes; the development of friendly relations between States; respect for the equal rights and self-determination of peoples; international cooperation in economic, social, cultural, and humanitarian matters; and the promotion and encouragement of respect for human rights for all without distinction. Specifically, article 2 addresses both the Organization and its Members, laying down principles which should govern relations between them. These include recognition of the principle of sovereign equality of nations; the fulfilment in good faith of international obligations; the settlement of disputes by peaceful means; the obligation to refrain from the threat or use of force; and the duty of the United Nations not to intervene in the domestic jurisdiction of any State.

The statement of purposes and principles is essentially organizational, establishing what shall be done by States Members working together within the UN; and how they should conduct relations between themselves. But like most constituent documents, the UN Charter also has a dynamic aspect, and in certain areas the practical content of the declared purposes and principles must be

determined in the light of more general developments.

For example, the principle of respect for human rights has been developed through the Universal Declaration, the 1966 Covenants, regional treaty arrangements, and customary law. Thus, an individual who has denied or restricted the human rights of others arguably falls within the exception opened by article 1F(c). Those who had persecuted others were indeed expressly excluded from the IRO's mandate, and a similar provision was introduced by the United States Refugee Act³⁸⁰ and Canada's Immigration and Refugee Protection Act 2001.³⁸¹ Also relevant are the individual's duties to the community, and the limitations inherent in human rights. Article 17 of the European Convention on Human Rights, for example, provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.³⁸²

5.4.3 Individual responsibility

Although the purposes and principles focus on the conduct of, and the relations between, States, article 1F(c) clearly contemplates an area of individual responsibility. The question is, whether such responsibility is limited to those who control and implement the policies of States, or whether it also covers the relationship of one individual to another. The *UNHCR Handbook* sees article 1F(c) as overlapping with the preceding exclusion clauses, without introducing 'any specific new element'; it infers that for an individual to fall within this exclusion clause, he or she '*must* have been in a position of power ... and instrumental' in the State's violation of the principles.³⁸³

Many commentators long shared a similar view, and would limit this exclusion clause to heads of State and high officials, while reserving its exceptional application to individuals not necessarily connected with government, such as torturers and others guilty of flagrant violations of human rights.³⁸⁴ Up until the mid-1990s, the jurisprudence in different countries revealed two broad streams; one focused almost exclusively on State officials and those similarly situated, while the other sought to extend the scope of individual responsibility. In a prescient move, the individual dimension was upheld in a 1972 German decision, where the court held that bomb and terrorist attacks resulting in deaths in various

countries were contrary to the purposes and principles of the United Nations.³⁸⁵ In a 1973 case, the court found that continual terrorist and sabotage activities from Lebanese territory against Israel revealed a basis for exclusion under article 1F(c).³⁸⁶ Decisions after 1975, however, stressed that articles 1 and 2 of the UN Charter were concerned with international, not individual relations; and that only if inter-State peace or inter-State understanding is affected, will the exclusion clause apply.³⁸⁷

If German jurisprudence in this period tended to restrict the potential area of individual responsibility, decisions in France showed a different emphasis.³⁸⁸ This was exemplified in the *Duvalier* case, in which the former dictator of Haiti was excluded. The *Commission des recours* found that respect for human rights and fundamental freedoms was among the purposes and principles of the United Nations. It observed further that article 1F(c),

[s]e rapporte notamment à l'action contraire aux droits de l'homme et aux libertés fondamentales que la personne en cause a pu exercer dans son pays, ... que (M. Duvalier) a exercé ... les fonctions de président de la République de Haïti; ... que de graves violations des droits de l'homme ont été commises dans ce pays pendant ce période; ... que (M. Duvalier) était, en sa qualité de president ... le chef des forces armées, de la police, et des volontaires de la sécurité nationale qui se sont livrés à de graves violations des droits de l'homme; *qu'alors même qu'il ne résulte pas de l'instruction que le requérant ait personnellement commis de tels agissements, il les a nécessairement couverts de son autorité.*³⁸⁹

Later decisions, however, have looked for evidence of personal involvement in activities contrary to the purposes and principles of the United Nations.³⁹⁰ The exclusion of those who have persecuted others is justified, both historically and in the light of recent practice. In *Pushpanathan*, for example, the Supreme Court of Canada noted that

The rationale [of article 1F] of the Convention is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees ...

In the light of the general purposes of the Convention ... and the indications in the *travaux préparatoires* as to the relative ambit of Article 1F(a) and F(c), *the purpose of Article 1F(c) can be characterized in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting ...*

The guiding principle is that where there is *consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights* as to amount to persecution, or are explicitly recognized as contrary to the UN purposes and principles, then Article 1F(c) will be applicable.³⁹¹

This finding rightly emphasizes the importance, in international law, of agreement among States on what acts are sufficiently serious and sustained violations of human rights as to fall within the terms of article 1F(c).³⁹² Rather than allowing it to serve as an open-ended basis for exclusion, the interpretation and application of article 1F(c) need a principled framework, keyed to legality. The Supreme Court's approach provides the basic outline of such a framework by focussing, first, on 'serious, sustained or systemic violations of fundamental human rights'; and secondly, on there being 'consensus in international law' that such acts are sufficiently serious to be contrary to the UN's purposes and principles. Sivakumaran proposes a tighter framework of analysis, in which the act in question must be contrary to the purposes and principles of the UN; unlawful on the part of the individual who committed it; and both equivalent to article 1F(a) acts and of sufficient severity considering the situation as a whole.³⁹³ This makes good sense, but successive Security Council resolutions tend both to be expansive and to encourage interpretation accordingly. *Pushpanathan* was decided in 1998, after international anti-terrorism measures had begun to take root, but before the Security Council began to make itself heard. The above framework offers a useful basis for the analysis and assessment of serious human rights violations, but necessarily leaves out what the Security Council now requires with regard to terrorist activity. Here, the focus shifts first to the words used, and secondly, to such measures as may have been agreed internationally to deal with particular acts.

In an interpretative context, those words may be 'moderated' by due process requirements and general principles, but practice since 1998 demonstrates the risks inherent in inference and reveals a significant measure of creeping liability,

both with regard to those who may be caught by exclusion, and the types of act or activity for which they may be considered accountable. On the one hand, courts and tribunals still accept that, in principle, the relevant acts or activities need an international dimension as well as an element of personal responsibility;³⁹⁴ on the other hand, the nature of that responsibility evolves.³⁹⁵ For example, the Conseil d'Etat excluded the wife of an individual who had kidnapped a French UNHCR official, whom he kept hostage and tortured in their home, on the ground that she had contributed to what was both a serious non-political crime *and* an act contrary to the purposes and principles of the UN.³⁹⁶ The Rechtsbank den Haag relied on Security Council resolution 748 to exclude the former Libyan ambassador to Malta because of her knowing, personal participation in facilitating evasion of the arms embargo on Libya.³⁹⁷ From time to time, a court may simply add on an article 1F(c) characterization to a finding under article 1F(a) or (b),³⁹⁸ but without first establishing a clear link between the act impugned and the purposes and principles of the United Nations. Just because States have concluded a treaty in the field or the UN has included the subject-matter on its agenda is hardly sufficient justification when delineating what ought to be narrow exceptions to a general principle of protection.

The jurisprudence emerging in the mid-1990s supports the exclusion under article 1F(c) of individuals in their capacity as heads or high officials of State responsible for and able to influence policy and practice that results in serious violations of human rights. Secondly, it recognizes that article 1F(c) can extend to individuals at some remove from political responsibility, who are themselves personally responsible for serious violations of human rights, such as persecution or torture, and whether within or outside the organization of the State.³⁹⁹ Thirdly, as demonstrated below and following Security Council resolution 1373 (2001) and later resolutions, article 1F(c) may also apply to individuals who are considered to have committed ‘terrorism’ or ‘terrorist’ related acts. Given the extensive international regulation of terrorist acts and their ‘de-politicization’, article 1F(b)—serious non-political crimes—will often cover the same field, although article 1F(c) has been employed in cases having a significant international dimension.

Article 1F(c) of the Convention is thus potentially very wide. Besides the examples mentioned above, the United Nations has also taken action to combat the narcotics traffic, to promote self-determination and democratic and representative forms of government, to recognize the international standing of

certain liberation movements, to prohibit and combat people smuggling and trafficking, and to ensure the internationally protected status of diplomats and cognate categories. This may imply that those involved in the drugs trade, who displace or obstruct the democratic process, or who are responsible for maintaining colonial and colonial-style regimes should not subsequently be entitled to recognition of refugee status.⁴⁰⁰ Latterly, the exception is most frequently cited in relation to security and anti-terrorism, although clearly its interpretation and development retain considerable potential for expansion, given the disparate interests of States.

While many judicial decisions regarding the scope of ‘purposes and principles’ have been essays in inference from Security Council resolutions, complexities of a different order of magnitude can arise where the act under review not only has a more direct impact on UN interests, but is also regulated by one or more particular legal regimes.⁴⁰¹

5.4.4 Refugee status, security, and terrorism

There is nothing new about terrorism and the dangers it poses to human rights.⁴⁰² When States adopted the Universal Declaration of Human Rights in 1948, they agreed that nothing in it ‘may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein’.⁴⁰³ Following the lead of the Universal Declaration, the European Convention prohibits abuse of rights (‘any activity or ... act aimed at the destruction of any of the rights and freedoms ... or at their limitation to a greater extent than is provided for’),⁴⁰⁴ in an approach adopted also in article 5 of the 1966 International Covenant on Civil and Political Rights.⁴⁰⁵ Nevertheless, in June 2003, UN special rapporteurs and independent experts meeting in Geneva expressed their ‘alarm’ at the growing threats against human rights, their concern at the indiscriminate use of the term ‘terrorism’, and ‘at the multiplication of policies, legislation and practices being adopted by many countries in the name of the fight against terrorism which affect negatively the enjoyment of virtually all human rights—civil, cultural, economic, political and social’.⁴⁰⁶

The General Assembly’s 1994 Declaration on Measures to Eliminate International Terrorism described terrorism as including ‘criminal acts intended or calculated to provoke a state of terror in the general public’.⁴⁰⁷ This clearly left many questions unanswered, and the United Nations has since maintained its

focus on the issue and on what States can and should do to combat the threat. An agreed general definition of the phenomenon is still lacking,⁴⁰⁸ and although work on a comprehensive convention on international terrorism continues in the Sixth Committee, it remains stalled still on aspects of the definition.⁴⁰⁹ In the absence of international agreement, many States have adopted their own laws and definitions,⁴¹⁰ and have developed or consolidated, through regular law-making processes, a network of treaty regimes and obligations to deal with particular incidents or aspects of ‘terrorism’; these include hijacking, hostage-taking, bombing, financing, offences against diplomats, and ‘nuclear terrorism’.⁴¹¹ The regular law-making processes remain essential elements in the more precise identification of acts amounting to terrorism, and in the eventual development of a comprehensive legal framework, and while resolutions and declarations adopted by the General Assembly or the Security Council are relevant to understanding the sense of members regarding matters of international concern, there are clear Charter limitations on the extent to which either body can ‘legislate’ for States or determine the bounds of existing treaty relations.⁴¹²

There being as yet no definition of terrorism, the General Assembly ‘encourages’ States towards a comprehensive legal framework, and ‘urges’ them ‘to consider ... becoming parties to ... international conventions and protocols’.⁴¹³ It also emphasizes the need for States to ensure that, in combatting terrorism, they comply fully with their international obligations generally and in relation to human rights, including the 1951 Convention and the principle of *non-refoulement*.⁴¹⁴

The Security Council, which has primary responsibility for the maintenance of international peace and security,⁴¹⁵ is obliged itself to act in accordance with the purposes and principles of the Organization. Member States agree ‘to accept and carry out the decisions of the Security Council in accordance with the ... Charter’,⁴¹⁶ but not everything in a Security Council resolution is a decision having binding effect. Moreover, given the Charter’s constraints on the Security Council itself, there are obviously certain, if undefined, limitations on how far it can lawfully interfere with States’ international obligations generally.⁴¹⁷ In practice, however, the Security Council’s approach reflects recognition that it is not a legislative body as such, and it is usually careful to locate its actions within the existing legal environment.⁴¹⁸ Thus, while the Security Council may decide and indeed has decided that ‘terrorism, like aggression, is contrary to the

purposes and principles of the United Nations', it has not chosen to determine, at the 'legislative' level, the generally constituent elements of the act; nor has it at any time proclaimed that 'terrorism', as such and apart from the conventions making specific provision in particular respects, is an international crime.

Over the past two to three decades, in exercising its responsibilities under article 24 and Chapter VII, the Security Council's determinations of threats to international peace and security have taken account of factors beyond conflict between States in its simplest sense. They have included the overthrow of a democratically elected president in Haiti, the humanitarian crisis in Somalia, Libya's refusal to surrender suspects in the Lockerbie bombing, violations of the laws of war in Rwanda, refugee flows and population displacements in Kosovo and the Democratic Republic of the Congo. It has also increasingly factored terrorism into its assessments. In 1996, for example, it noted that the continuation of conflict in Afghanistan provided 'fertile ground for terrorism and drug trafficking which destabilize the region and beyond'.⁴¹⁹ Following the bombings in Nairobi and Dar-es-Salaam, it stressed the duty of every Member State 'to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts'.⁴²⁰

In October 1999, the Security Council adopted a general resolution on international terrorism, which appeared to identify refugees and asylum seekers as potential participants in terrorism.⁴²¹ A comprehensive agenda for 'all States' then followed the events of 11 September 2001 with the unanimous adoption by the Security Council, acting under Chapter VII, of resolution 1373.⁴²² To a significant extent, the language of this particular resolution is not exhortatory, but mandatory: the Security Council decides that 'all States *shall ...*', and the ends to be achieved will require an extensive legislative programme (see paragraphs 1 and 2, in particular). In other matters, some margin of appreciation is allowed, and following resolution 1269, the Security Council 'calls' upon all States to take 'appropriate measures' to ensure that asylum seekers have not 'planned, facilitated or participated in the commission of terrorist acts', and to 'ensure ... that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists'.⁴²³ It also declares that:

Acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.⁴²⁴

The issue of terrorism has remained on the agenda ever since, with certain basic propositions being repeated regularly, but with a tendency also to broaden the notion of terrorism and the personal scope of those who should be targeted by States' anti-terrorism measures. In resolution 2178 (2014), for example, the Security Council reminded States that counter-terrorism measures should comply fully with the UN Charter and with all their international obligations. It then identified the growing threat from those described as 'foreign terrorist fighters', who travel or attempt to travel

[t]o a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.⁴²⁵

This threat is international, affecting many States, and requires a response that goes beyond military force and comprehensively addresses underlying factors. In particular, the Security Council calls for urgent attention to 'international networks', and to terrorists' increased use of communications technology for the purposes of 'radicalizing', 'recruiting', and 'inciting', as well as financing and facilitating terrorism. Acting under Chapter VII, the Security Council reaffirms the obligation of all States to prevent the movement of terrorists, and to have in place effective border and identity checks. It also encourages the use of 'evidence-based traveller risk assessment ... without profiling based on stereotypes founded on grounds of discrimination prohibited by international law'.⁴²⁶ Consistently with international law, States are required, 'to prevent and suppress the recruiting, organizing, transporting or equipping' of individuals for the purposes of terrorism;⁴²⁷ and to prevent the entry of individuals, about whom the State 'has credible information that provides reasonable grounds to believe' that they are seeking entry or transit for terrorism-related purposes.⁴²⁸

Since then, the Security Council has maintained its focus on the need to combat 'financing, planning, facilitating, preparing ... perpetrating' or otherwise supporting terrorist acts or activities, sometimes in general and sometimes in reference to identified groups, such as ISIL (Da'esh) or Al-Qaida.⁴²⁹ In 2016, it

reiterated that States should ensure that refugee status is not ‘abused’ by those engaged in terrorism, and that extradition is not avoided on grounds of political motivation; and in 2017, that acts, methods and practices of terrorism, financing, planning and inciting terrorist acts, and supporting terrorist organizations are contrary to the purposes and principles of the UN.⁴³⁰ In addition, it has reminded member States of their obligation to prevent the movement of foreign terrorist fighters,⁴³¹ extended its range of concern to include family members,⁴³² and ‘decided’ that member States ‘shall’ develop the capability to collect and handle passenger name record data, with a view to detecting and investigating terrorist offences and related travel.⁴³³

In the *Lounani* case, Advocate General Sharpston relied on resolution 2718 and the ‘living instrument’ character of the 1951 Convention to support the inclusion of ‘instigating’ and ‘participating’ in terrorist acts within article 1F(c), which should not be limited to the actual perpetrators.⁴³⁴ She identified among the juridically relevant elements that Mr Lounani had been a ‘leading member’ of the relevant terrorist group; that, ‘logically’, he could ‘presumably influence’ the group; that he may well have ‘facilitated and enabled others’ to commit or participate in terrorist acts; and that he was involved in forging passports and assisting volunteers to travel to Iraq.⁴³⁵ The fact that he had also been convicted carried significant weight in the requisite assessment of his personal responsibility,⁴³⁶ but it was not necessary that he himself should have actually instigated or participated in a terrorist act.⁴³⁷ The Court agreed, adding that article 1F(c) conduct was not to be confined to the commission of terrorist acts specified in Security Council resolutions or the EU’s Framework Decision.⁴³⁸ As Security Council resolution 2178 (2014) emphasized, in addition to ‘foreign terrorist fighters’, networks and enablers had also to be targeted, and participation in the activities of terrorist groups falling short of commission, attempts, or threats could likewise justify exclusion.⁴³⁹

In 2019, the Security Council decided further that States *shall* ensure that their domestic legal systems both criminalize and are sufficient to prosecute and punish, ‘the wilful provision or collection of funds’ and similar resources with the intention that they be used, or knowing that they are to be used, for terrorist purposes, ‘including but not limited to recruitment, training or travel, even in the absence of a link to a specific terrorist act’.⁴⁴⁰

These and other resolutions disclose both an agenda which includes the promotion of an international legal and cooperative regime to combat terrorism,

linked in turn to various recent treaties, such as those on terrorist bombing and terrorist financing.⁴⁴¹ Given the premise that terrorism constitutes a threat to international peace and security, the measures required of States may appear unexceptional (though nonetheless innovative and far-reaching in light of earlier Security Council practice). Potential problems emerge, however, when this political organ assumes executive and legislative functions simultaneously, especially when its resolutions affect the legal rights of States,⁴⁴² are ‘incompatible with general international law or the normal application of multilateral standard-setting treaties’,⁴⁴³ and have an impact on the international protection of refugees.

International standards are well-established under the regime of the 1951 Convention/1967 Protocol and, as shown above, specific rules already govern the definition of a refugee and the circumstances in which an individual may be denied refugee status or the benefits of protection. Arguably, they were already adequate to the purpose of combatting terrorism and ensuring the exclusion from protection as refugees of those who had engaged in ‘terrorist acts’. Both the measures which States are now required to take and the Security Council’s executive pronouncements on the meaning of terms nevertheless have an impact, not only on the substantive content of international protection, but also on the ways in which individual States may deal with procedural entitlements hitherto recognized as essential to a fair regime and the effective implementation of international obligations.⁴⁴⁴

It is one thing to state as a matter of policy that terrorism is contrary to the purposes and principles of the United Nations, but quite another to translate that policy into a rule or rules of law, and to determine the legal content of the term to the point that it can be applied in the international legal context of exclusion under the 1951 Convention. Moreover, justifiable concerns remain about where to draw the line between political acts and protest, on the one hand, and ‘terror’, on the other. Too often, political acts themselves may be ‘criminalized’, and ‘counter-terrorism’ can be and often is used to consolidate political power, eliminate political opponents, and inhibit dissent.

The Security Council has consistently emphasized the necessity for anti-terrorist measures to conform with States’ obligations generally under international law and particularly under international human rights law, refugee law, and humanitarian law.⁴⁴⁵ While ‘terrorism’ may indeed be contrary to the purposes and principles of the United Nations and therefore a basis for exclusion

under article 1F(c), conformity with international obligations requires that decisions to exclude or subsequently to annul a decision on refugee status be taken in accordance with appropriate procedural and substantive guarantees. Article 1F(c) ought only to be applied, therefore, where there are serious reasons to consider that the individual concerned has committed an offence specifically identified by the international community, (for example, in widely ratified treaties), as one of such seriousness that it must be addressed in the fight against terrorism, and only by way of a procedure conforming to due process and the State's obligations generally in international law.

5.4.5 Terrorism, armed conflict, and the United Nations

Following the initial, post 9/11 attack on Afghanistan by the United States and the United Kingdom, the Security Council authorized the establishment of the International Security Assistance Force (ISAF). Its role was to assist in the maintenance of security in Kabul and surrounding areas, ‘so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment’.⁴⁴⁶ The mandate was extended at regular intervals,⁴⁴⁷ and its territorial scope was enlarged,⁴⁴⁸ until ISAF ceased operations in December 2014 and was disbanded. Initially, command rotated among lead nations on a six-monthly basis, but it was turned over to NATO in August 2003.

In 2002, the Security Council established the United Nations Assistance Mission in Afghanistan (UNAMA) to contribute to humanitarian assistance and reconstruction,⁴⁴⁹ and in 2003 UNAMA was requested, ‘with the support of the Office of the United Nations High Commissioner for Human Rights, to continue to assist the Afghan Independent Human Rights Commission in the full implementation of the human rights provisions of the Bonn Agreement and the National Human Rights Programme for Afghanistan, in order to support the protection and development of human rights in Afghanistan’.⁴⁵⁰

ISAF’s primary relationship was with the Government of Afghanistan, and none of the relevant Security Council resolutions indicated that the UN retained effective command and control.⁴⁵¹ UNAMA and the Special Representative of the Secretary-General, by contrast, were under the direction of the Security Council, which decided that they would ‘continue to lead the international civilian efforts’ (emphasis supplied), and ‘strengthen the cooperation with ISAF ... in accordance with their existing mandates, in order to improve civil-military coordination’.

Any armed attack on UNAMA could readily be characterized as contrary to the purposes and principles of the UN, for it was set up to operate under the full authority of the Special Representative of the Secretary-General to plan and conduct all UN activities in Afghanistan. ISAF, however, led and directed by NATO, was not under UN authority, but simply requested to ‘work in close consultation with the Secretary-General and his Special Representative’ and ‘to provide quarterly reports on the implementation of its mandate to the Security Council through the Secretary-General’.⁴⁵²

UNAMA, in consequence, was (and is) protected under the 1994 Convention and 2005 Protocol on the Safety of United Nations and Associated Personnel, but ISAF was not.⁴⁵³ The situation in international law was made more complex, however, by the fact that ISAF was authorized to engage in combat—in Security Council language, to use all necessary means to fulfil its mandate. A further layer of complexity was then added by the interaction of the legal regime protecting UN personnel with provisions of the ICC Statute.

Article 9 of the 1994 Convention⁴⁵⁴ requires each State party to make the intentional commission of certain crimes against UN or associated personnel, their premises, and vehicles an offence under national law, and article 10 provides for the establishment of jurisdiction. The Convention is limited in a number of ways, particularly with regard to the type of operations covered. Article 1(a)(i) defines ‘United Nations personnel’ so as to include, among others, those ‘engaged or deployed by the Secretary-General … as members of the military, police or civilian components of a United Nations operation … to carry out activities in support of the fulfilment of the mandate of a United Nations operation’. A ‘United Nations operation’, in turn, is defined in part to mean an operation established by the competent UN organ in accordance with the Charter, ‘and conducted under United Nations authority and control’, where it is for the purpose of ‘maintaining or restoring international peace and security’.⁴⁵⁵

The 2005 Protocol⁴⁵⁶ adds two further categories of operation, namely, those established under the Charter and conducted under United Nations authority and control for the purposes of delivering ‘humanitarian, political or development assistance in peacebuilding’, or ‘emergency humanitarian assistance’.⁴⁵⁷ However, the Convention is *not* to apply ‘to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII … in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies’.⁴⁵⁸ As

Roberts and Guelff note, this is ‘consistent with the broad principle that the laws of war apply to UN forces engaged in hostilities, and therefore such forces do not have immunity from attack ... UN operations involving combat against organized armed forces are covered by the laws of war, and it is a cardinal principle of the laws of war that combatant forces are treated equally’.⁴⁵⁹ They also point out that the 1994 Convention does not specifically address the issue of hybrid operations, combining both peacekeeping and enforcement mandates, as in Bosnia, Kosovo, and Afghanistan.

A further twist is provided by article 8 of the ICC Statute, which includes among the ‘other serious violations of the laws and customs’ applicable in international *and* non-international armed conflict,

[I]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, *as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.*⁴⁶⁰

In the international law of armed conflict, a civilian is entitled to protection so long as he or she takes no active part in the hostilities, that is, is a non-combatant.⁴⁶¹ These provisions imply that UN-authorized contingents engaging in enforcement operations involving the use of armed force are subject to the international law of armed conflict and, therefore, not immune from attack.⁴⁶²

Whereas deaths resulting from attacks on the forces of one State in the context of an international armed conflict are not considered criminal, in a non-international armed conflict it is assumed that national laws on unlawful killing may be engaged. The involvement of foreign contingents with Security Council authorization presents a new variation, on which both international humanitarian law and international policy are presently undecided.

In 2009, the Special Court for Sierra Leone handed down the first convictions for the war crime of attacking personnel involved in a peacekeeping operation, namely, members of the UN Assistance Mission in Sierra Leone (UNAMSIL). Whether the peacekeepers were or were not taking a direct part in hostilities at the time of the alleged offence was to be determined in light of the totality of the circumstances, including,

inter alia, the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.⁴⁶³

The court found that the accused had engaged in deliberate and concerted violence against UNAMSIL peacekeeping personnel, who were not taking a direct part in the hostilities.

Although the Security Council has mandated many military enforcement operations, it has never sought to characterize opposition, even armed opposition, as contrary to the purposes and principles of the UN. The international humanitarian law principle that combatant forces be treated equally is one reason to avoid characterization, as is the fact that Security Council mandates are often fluid, with effective command and control in the hands of troop-contributing nations or an international defence organization, rather than the UN. Moreover, the role and status of authorized forces is frequently uncertain, their role in combat and enforcement disputed, and their actual conduct sometimes unlawful.

In the particular circumstances prevailing in Afghanistan during the ISAF mandate, resistance to tribal or ethnically based violence, even if (perhaps mistakenly) supported by ISAF, was not obviously contrary to the purposes and principles of the United Nations.⁴⁶⁴ For example, one particular operation in 2006 has been described as, in one sense, a Taliban attack, ‘[B]ut it was also, to a greater or lesser degree, an Ishaqzai tribal vendetta, a drugs war hit and a popular uprising against a notably unpleasant local regime.’⁴⁶⁵ Other reports have suggested that ISAF forces may have been used to ‘settle’ inter-clan disputes,⁴⁶⁶ so that judgements as to consistency with UN purposes and principles will require an assessment of all the circumstances, rather than assumptions deriving from an initial authorization.

In its Advisory Opinion on *Namibia*,⁴⁶⁷ the International Court of Justice considered whether Security Council resolutions had binding effect. The Court stressed that regard should be had to the terms of the resolution being interpreted, the discussions leading to it, the UN Charter provision invoked and, in general,

all the circumstances which might assist in determining the legal consequences of the resolution.⁴⁶⁸ Forty years later, in its Advisory Opinion on Kosovo, the Court added that articles 31 and 32 of the Vienna Convention on the Law of Treaties were also to be used in conjunction with other factors reflecting the Security Council's operations.⁴⁶⁹

The Security Council's declaration in 2001 that 'terrorism' is contrary to the purposes and principles of the United Nations referenced a particular, well-regulated legal context—the 1951 Convention relating to the Status of Refugees, together with a body of law and practice. This, in turn, provides evidence of consensus as to the constituent elements of those crimes, and only those crimes, in international law which can be and are described as 'terrorist acts'.⁴⁷⁰ International humanitarian law also provides ample reason for caution in transposing the law of terrorist acts to situations of armed conflict. As Pejic astutely observes, there is a big difference between armed conflict and terrorism, and it is an error of law, whatever the politics, to elide the distinction between acts of violence committed in armed conflict and those committed outside it: 'International humanitarian law governs both permitted *and prohibited* violence, while the legal regime governing terrorism regulates acts that are always prohibited.'⁴⁷¹

Moreover, treaties dealing with terrorist acts already acknowledge their non-applicability in armed conflict. For example, article 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism provides that its scope shall extend to any act constituting an offence as defined in the treaties listed in the annex, and to 'any other act intended to cause death or serious bodily injury to a civilian, or to *any other person not taking active part in the hostilities in a situation of armed conflict*'.⁴⁷² The 1997 Terrorist Bombing Convention⁴⁷³ and the 2005 Nuclear Terrorism Convention⁴⁷⁴ each contain clauses which suggest strongly that situations of armed conflict are not covered, and that neither the activities of State nor those of non-State armed forces are to be considered as terrorist acts.⁴⁷⁵ Thus, article 19(2) of the 1997 Convention provides in part that: 'The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.'⁴⁷⁶ Significantly also, there is *no* agreement in the stalled negotiations on a United Nations Draft Convention on International Terrorism between those States which would like to label as 'terrorist' certain offences committed in armed conflict, notwithstanding

the existing law governing non-State armed groups in a non-international armed conflict (such as attacks on military installations), and those States which support the current legal position.⁴⁷⁷

Security Council resolutions may impose binding obligations on States, in accordance with article 25 of the United Nations Charter, and they may provide guidance to States on the interpretation and application of international law. The Security Council possesses no law-making authority as such, and the interpretation of its resolutions requires particularly close attention to the political context in which they were adopted.⁴⁷⁸ Exclusion from refugee status under the 1951 Convention is premised on there being evidence ('serious reasons for considering') that the individual is personally responsible for certain crimes or acts. International humanitarian law and international criminal law are the best guarantees of legal certainty in this context, while 'relevant rules of international law applicable in the relations between the parties' are a further important constraint on interpretation,⁴⁷⁹ particularly in the case of terms and phrases like 'the purposes and principles of the United Nations', which demand such a reference.

Individuals *can* act contrary to purposes and principles, but if they are to be denied refugee status, then they must also benefit from substantive and procedural due process. This requires, first, evidence of knowing personal responsibility for the conduct in question; and secondly, evidence that such conduct is contrary to the purposes and principles because, (1) it constitutes a crime in international law; or (2) there is consensus among States to that effect; or (3) the Security Council, acting within its competence, and in accordance with article 25 of the Charter and with due regard to international law, has clearly decided so. Moreover, the link to crime has solid historical provenance, recalling the terms of the Universal Declaration of Human Rights. Insistence on individual criminal responsibility is also essential, as the jurisprudence confirms,⁴⁸⁰ and is an important limitation to subjectivity and over-expansive interpretations.

In *DD v Secretary of State for the Home Department*, however, the UK Supreme Court accepted that ISAF was not a UN force as such or a UN mission, like the UN Assistance Mission for Afghanistan, and that the Security Council did not exercise 'command and control'. Nevertheless, given that its deployment and mandate had been authorized by the Security Council, the Court considered that the distinction was not material to the question of excluding a claimant whose military resistance to the Afghan Government had also included attacks

against ISAF.⁴⁸¹

Even if conduct is neither a war crime nor a terrorist act, it may be argued that it is still contrary to the purposes and principles of the United Nations. However, there are good policy reasons for not yielding to that temptation, as the case of Afghanistan demonstrates. Originally what was an international (inter-State) armed conflict acquired something of a non-international character following the election of the Afghan Government in 2004;⁴⁸² thereafter, the government and ISAF, among others, were opposed to various non-State armed groups, particularly the Taliban, and the conflict was regulated by common article 3 of the 1949 Geneva Conventions and other provisions of customary international law. The Security Council confined itself to deplored particular acts of violence, while calling on all parties, ‘to uphold international humanitarian law and human rights law and to ensure the protection of civilian life’.⁴⁸³

Although the Security Council has mandated many military enforcement operations, it avoids labelling opposition, even armed opposition, as contrary to the purposes and principles of the UN. Politically, this can help to avoid dissent among Member States, especially those who might wish to ensure that one or other party is not put beyond the pale of a future negotiated settlement.⁴⁸⁴ Experience shows that most serious internal armed conflicts are not solved by law, but through political processes, in which criminal proceedings, if any, are reserved for the most egregious crimes. The international humanitarian law principle that combatant forces be treated equally is further reason to avoid characterization, as is the fact that Security Council mandates are often fluid, with effective command and control in the hands of troop-contributing nations or an international defence organization, rather than the UN itself. If authorized forces are subject only to periodic reporting to the Security Council, then there may be even less reason to assume that their conduct in combat and enforcement is beyond reproach, and that opposition is necessarily contrary to the purposes and principles of the United Nations.

¹ See, generally, Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 1 (1966) 262–304, 367–412; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979; reissued 2019), paras. 111–63; Fitzpatrick, J. & Bonoan, R., ‘Cessation of refugee protection’, in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law* (2003) 491; Gilbert, G., ‘Current issues in the application of the exclusion

clauses’, in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law* (2003) 425; Rikhof, J., *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (2012); Zimmermann, A., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 481–610; Hathaway, J. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014) 462–598; Yao Li, *Exclusion from Protection as a Refugee* (2017); Gilbert, G. & Bentajou, A. M., ‘Exclusion’ in Costello, C., Foster, M. & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021); Cole, G., ‘Cessation’, *ibid.*

² IRO Constitution, Section D, Pt. II: 18 UNTS 3.

³ The word ‘exclusion’, the ordinary meaning of which generally signifies the denial of access to a status or privilege, does not appear in the 1951 Convention, but it is current in the terminology of UNHCR, States, and commentators; see, for example, *UNHCR, Handbook* (n 1) paras. 140–63.

⁴ Cf. *MT (Algeria) v Secretary of State for the Home Department* [2008] 1 QB 533, para. 88: ‘[b]eing or becoming a “refugee” as defined in the Refugee Convention does not require or start with a formal state act of recognition of status. A person simply is or is not a refugee within article 1A’.

⁵ Cf. *UNHCR, Handbook* (n 1) para. 28; *Khaboka v Secretary of State for the Home Department* [1993] Imm AR 434.

⁶ In the words of the Court of Appeal, ‘Although Convention rights accrue to a refugee by virtue of his being a refugee, unless a refugee can have access to a decision-maker who can determine whether or not he is a refugee, his access to Convention rights is impeded’: *Saad, Diriye and Osorio v Secretary of State for the Home Department* [2002] INLR 54, para. 12.

⁷ See Preamble to the Refugee Convention; 1951 Conference of Plenipotentiaries, ‘Inaugural Address by the Personal Representative of the Secretary-General’: UN doc. A/CONF.2/SR.1, 4–7 (19 Jul. 1951); closing remarks of the President of the Conference: UN doc. A/CONF.2/SR.35, 45–6 (3 Dec. 1951); *UNHCR, Handbook* (n 1) paras. 5, 12.

⁸ *UNHCR, Handbook* (n 1) para. 24. See also Executive Committee Conclusion No. 8 (XXVIII) (1977) Determination of Refugee Status. The ‘consequential obligation’ flows from the principles of good faith and effectiveness of obligations, but may also be required by regional law; see art. 24, EU Qualification Directive (recast), on the obligation to issue a residence permit.

⁹ On the limited scope for cessation, see *UNHCR, Handbook* (n 1): ‘116. The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status ... 117. Article 1C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts ... or that one of the exclusion clauses would have applied to him had all the relevant facts been known.’

¹⁰ Art. 2: ‘Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.’

¹¹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Draft Convention relating to the Status of Refugees. France: Amendment to Article 2, UN doc. A/CONF.2/18 (3 Jul. 1951): ‘Any refugee guilty of grave dereliction of duty and who constitutes a danger to the internal or external security of the receiving country may, by appropriate procedure ensuring maximum safeguards to the person concerned, be declared to have forfeited the rights pertaining to the status of refugee, as defined in this Convention.’

¹² Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records, UN doc. A/CONF.2/SR.4, 8–9 (19 Nov. 1951).

¹³ UN doc. A/CONF.2/SR.4, 10 (19 Nov. 1951).

¹⁴ Ibid., 11–12 (emphasis added).

¹⁵ Ibid., 10–11.

¹⁶ UN doc. A/CONF.2/SR.24, 19 (27 Nov. 1951). For the France/UK amendment, see UN doc. A/CONF.2/69; also, the remarks of Mr Hoare: UN doc. A/CONF.2/SR.24, 4–5. The debate and adoption of the joint French/UK amendment are recorded at UN doc. A/CONF.2/SR.16, 4–17 (23 Nov. 1951).

¹⁷ UN doc. A/CONF.2/SR.29, 22–23 (28 Nov. 1951).

¹⁸ The Supreme Court of Canada, for example, has held that the general purpose of art. 1F is not to protect the host state from dangerous refugees, which is what art. 33(2) does, but rather, to exclude *ab initio* those who are not bona fide refugees at the time of their claim for refugee status: *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 58. See Gilbert (^{n 1}) 458: ‘[t]he grounds listed in Article 1F are not grounds for cessation under Article 1C. Article 33(2) is the proper route where a refugee commits a particularly serious crime in the country of refuge and constitutes a danger to the community of that country’.

¹⁹ The relative simplicity of the 1951 approach had already been departed from in the 1969 OAU Convention, which applies cessation also to one who has committed a serious non-political crime outside the country of refuge and after admission there as a refugee, and to one who has ‘seriously infringed the purposes and objectives of [the] Convention’: art. I(4) (f), (g). Sharpe sees the latter provision, in particular, as ‘operationalising’ the OAU Convention’s prohibition of subversive activities: Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018) 81–2.

²⁰ See Gilbert, G., ‘Running Scared Since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation’, in Simeon, J., ed., *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (2010) 118.

²¹ See, for example, Bond, J., ‘Unwanted but Unremovable: Canada’s Treatment of “Criminal” Migrants who cannot be Removed’ (2017) 36(1) RSQ 168; Dauvergne, C. & Kaushal, A., ‘The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions’

(2011) 23 *IJRL* 54; Singer, S., ‘“Undesirable and Unreturnable” in the United Kingdom’ (2017) 36(1) *RSQ* 1; Gilbert, G., ‘Undesirable but Unreturnable—Extradition and other Forms of Rendition’ (2017) 15(1) *Journal of International Criminal Justice* 57. See also *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110; *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09 [2012] ECHR 56.

²² This concession dates to 2003, when ‘revocation’ was simply included, without more, in the ‘Guidelines on International Protection. Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, HCR/GIP/03/05 (4 Sep 2003) para. 6, and in UNHCR’s contemporaneous ‘Background Note’, paras. 12, 17. See also UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 (the Qualification Directive) (Jan. 2005) 29–31 (commenting on art. 14(3)(a) and 14(4)–(6)).

²³ ‘Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in excludable conduct which comes within the scope of Article 1F (a) or (c) of the 1951 Convention after recognition’: UNHCR, Comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)’ (Jul. 2010) 13.

²⁴ UNHCR, ‘Asylum in the European Union: A study on the implementation of the Qualification Directive’ (Nov. 2007): <http://www.refworld.org/docid/473050632.html>.

²⁵ UNHCR, ‘Comments on the European Commission Proposal for a Qualification Regulation COM(2016) 466’ (Feb. 2018) 22–3: <https://www.refworld.org/docid/5a7835f24.html>.

²⁶ Joined Cases C-391/16, C-77/17 and C-78/17, *M and Others v Commissaire général aux réfugiés et aux apatrides*, CJEU, Grand Chamber (14 May 2019) paras. 110–12; see also Conclusions de l’Avocat General, M Melchior Wathelet, (21 juin 2018) in *Affaires jointes C-391/16, C-77/17 et C-78/17*.

²⁷ Joined Cases C-391/16, C-77/17 and C-78/17, *M and Others v Commissaire général aux réfugiés et aux apatrides* (²⁶) paras. 49, 91–2.

²⁸ Ibid., paras. 97–100, 110. It is also not clear that this interpretation, clever though it be, is entirely consistent with the definitions of ‘international protection’, ‘refugee’, and ‘refugee status’ set down in art. 2(a), (d), and (e) of the Qualification Directive (recast).

²⁹ Joined Cases C-391/16, C-77/17 and C-78/17, *M and Others v Commissaire général aux réfugiés et aux apatrides* (²⁶) paras. 107–9. Besides those Convention rights which are not dependent on lawful stay, the Court referred to Member States’ obligations under the Charter.

³⁰ To a certain extent, this situation was anticipated in *Dang (Refugee—query revocation—Article 3)* [2013] UKUT 00043 (IAC); see the Tribunal’s discussion of a ‘European refugee status’ different from the individual’s status under the 1951 Convention: paras. 19–20, 26.

³¹ Although it will doubtless be argued that, by reason of their conduct or beliefs, the

refugees had placed themselves beyond the pale, the principle of equal treatment is but one argument for rehabilitation. Peers, however, considers that the impact will generally be minimal: Peers, S., ‘What if a refugee allegedly supports terrorism? The CJEU judgment in T’ (24 Jun. 2015): <http://eulawanalysis.blogspot.com/2015/06/what-if-refugee-allegedly-supports.html>.

³² Cf. Case C-373/13 *H. T. v Land Baden-Württemberg*, CJEU (24 Jun. 2015), discussed further below. In the view of the Court, revocation of a residence permit and revocation of refugee status are two distinct issues with different implications, and revocation of a residence permit under art. 24(1) does not deprive the refugee of the rights to which he or she is entitled under Chapter VII of the Directive: para. 95. The case involved a Turkish national recognized as a refugee because of his activities in support of the PKK. This was later designated as a terrorist organization by the EU; after being convicted for supporting terrorism by collecting money for the PKK and distributing its literature, his residence permit was revoked, but he kept his refugee status and was not expelled.

³³ Joined Cases C-391/16, C-77/17 and C-78/17, *M and Others v Commissaire général aux réfugiés et aux apatrides* ([n 26](#)) para. 87.

³⁴ CESEDA: Code de l’entrée et du séjour des étrangers et du droit d’asile (version consolidée au 22 mars 2020), art. L.711–4; art. L.711–6.

³⁵ Statute, para. 6(a)–(d); Convention, art. 1C(1)–(4).

³⁶ UNHCR, *Handbook* ([n 1](#)) paras. 118–25.

³⁷ For useful annual collections of French jurisprudence, see Cour National du Droit d’Asile, *Recueils annuels de la jurisprudence de la CNDA* (*Recueil* 20xx): <http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Recueils-de-jurisprudence>; also, *Les grandes décisions du Conseil d’Etat et de la Cour nationale du droit d’asile sur l’asile* (2009); Denis-Linton, M., Malvasio, F., & Logeais, E., *Trente ans de jurisprudence de la Cour nationale du droit d’asile et du Conseil d’État sur l’asile: Principales décisions de 1982 au 31 décembre 2011* (2012). For abstracts from an earlier generation of French decisions, see *Jurisprudence de la Commission de recours des réfugiés* (1961); Tiberghien, F., *La protection des réfugiés en France* (2ème édn., 1988), and the third edition of this work, 136–9. The *Commission de recours des réfugiés*, established in 1952, became the *Cour national du droit d’asile* in 2007 and has been attached to the *Conseil d’Etat* since 2009.

³⁸ *Recueil* 2013, 121–2, CNDA (24 juillet 2013) Mlle L. M., n° 12002308C+: Passport extended at request of Paris police in order to ensure continuation of medical care; not voluntary. Also, *Recueil* 2018, 201–3, CNDA (14 septembre 2018) M. H., n° 16029914C: no voluntary reavainment where driving licence renewed by third party; personal contact with the authorities required.

³⁹ *Recueil* 2017, 167–8, CNDA (9 février 2017) M. T. et Mme T., n° 16005130 et 16005131C: multiple journeys back to country of origin, Russia, with passports obtained voluntarily—cessation; *Recueil* 2015, 45–6, CNDA (5 octobre 2015) M. Z., n° 14033523C+: passport obtained, followed by two month stay in country of origin, Afghanistan, allegedly

because of spouse's hospitalization in dangerous conditions, but the court found no serious reason (*nécessité impérieuse*) obliging return. Cessation of status, but subsidiary protection granted owing to high level of indiscriminate violence in appellant's province of origin and real risk of serious, individual harm; in this regard, see Joined Cases C175/08, C-176/08, C-178/08, and C-179/08, *Abdulla and Others*, CJEU (2 Mar. 2010) para. 80. Also, Denis-Linton, Malvasio, & Logeais (n 37) 185–6, CNDA (20 octobre 2011) M. K., n° 10010000R—voluntary reavainment where appellant returned following Kosovo's declaration of independence and was issued with a passport and certificate of identity by the Kosovar authorities; see also Sweden, Migration Court of Appeal (13 Jun. 2011) UM 5495-10: cessation in the case of voluntary application for and use of Iraqi passport which, together with other elements, indicated wish to continue relationship with the country of origin.

⁴⁰ See European Migration Network, *Beneficiaries of International Protection travelling to their Country of Origin: Challenges, Policies and Practices in EU Member States, Norway and Switzerland* (Nov. 2019): www.ec.europa.eu/emn—the variety of practice in the States reviewed suggested that such travel was a low priority and relatively infrequent.

⁴¹ Grahl-Madsen (n 1) 384 f. *Recueil 2017* (n 39) 165–6, CNDA (9 juillet 2017) M. Q., n° 16032301R: voluntary return and four-week stay with family without incident, after being advised on departure that the refugee passport (CTD) was not valid for travel to Vietnam, the country of origin; appellant had also previously obtained permission to return from the consular authorities in Paris—cessation of status.

⁴² Art. 1C(4), providing for cessation of status on 'voluntary re-establishment' in the country of origin, clearly implies something more than a visit or mere presence.

⁴³ Denis-Linton, Malvasio, & Logeais (n 37) 180, CRR SR (18 juillet 1997) M. D., n° 95008581/286135R: marriage celebrated by consular authorities of country of origin, with no evidence of compulsion—cessation.

⁴⁴ See further Ch. 11, s. 1.2.3.

⁴⁵ Art. 3 of Decree Law no. 81 of 11 Oct. 1973; *Diario Oficial*, no. 28694 (6 Nov. 1973).

⁴⁶ Cf. Amnesty International *1978 Report*, 111; *1980 Report*, 118; *1981 Report*, 122–3.

⁴⁷ In a series of cases in 1980, the Australian DORS Committee considered the weight to be accorded to Taiwanese passports held by Indo-Chinese seeking refugee status in Australia. The Committee noted that the Taiwanese authorities issued two types of passport, only one of which (the so-called 'MFA' passport) enabled the holder to return to and reside in Taiwan. Other passports, issued freely to 'overseas Chinese', amounted to no more than a travel facility and could not be equated with the full protection normally accorded to passport holders by the State of issue. See, generally, Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 24–50; and on the nationality question, Tang Lay Lee, 'Stateless Persons and the Comprehensive Plan of Action-Part 1: Chinese Nationality and the Republic of China (Taiwan)' (1995) 7 *IJRL* 201.

⁴⁸ Statute, para. 6(b); Convention, art. 1C(2); UNHCR, *Handbook* (n 1) 126–8.

⁴⁹ In one nominally 'change of circumstances' case, the CNDA took account of the fact

that the appellant, who had been born in Laos of Vietnamese parents, had the right to obtain Vietnamese nationality by simple registration. In the absence of a present fear of persecution or evidence of previous persecution, the lack of family ties was not considered sufficient reason to refuse to avail himself of the protection of Vietnam, considered as his country of nationality: *Recueil* 2016, 149–50, CNDA (25 février 2016) M. D., n° 14018479C.

⁵⁰ Statute, para. 6(c); Convention, art. 1C (3); [UNHCR, Handbook \(n 1\)](#) 129–32.

⁵¹ In CE (19 juin 2020) Mme J. n° 435000 C, the Conseil d'Etat held that the CNDA must ensure itself of the effectiveness of national protection; it was not enough to rely on general measures, such as legislation forbidding FCM, but must check its application in practice: *Recueil* 2020, 109–10.

⁵² Statute, para. 6(d); Convention, art. 1C(4); [UNHCR, Handbook \(n 1\)](#) 133–4. Cf. IRO Constitution ([n 2](#)) Pt. ID.

⁵³ Denis-Linton, Malvasio, & Logeais ([n 37](#)) 180, CRR SR (21 novembre 1997) M. L., n° 96005257/300164R: appellant transited country of origin but no evidence of reavainment of protection, or that the change of government meant a change in conditions.

⁵⁴ Denis-Linton, Malvasio, & Logeais ([n 37](#)) 185, CRR SR (17 février 2006) M. O., n° 02008530/406325R.

⁵⁵ See Fitzpatrick & Bonoan ([n 1](#)) 491; UNHCR, Guidelines No. 3 on International Protection: ‘Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees’, HCR/GIP/03/03 (10 Feb. 2003); Zambelli, P., ‘Procedural Aspects of Cessation and Exclusion: The Canadian Experience’ (1996) 8 *IJRL* 144.

⁵⁶ Convention, art. 1C(5), (6); Statute, para. 6(e), (f). The difference in the wording of the two paragraphs reflects that between refugees with and refugees without a nationality.

⁵⁷ See Recommendation B, adopted unanimously by the 1951 Conference: Final Act, 189 UNTS 150.

⁵⁸ *Recueil* 2019, 164–6, Conseil d'Etat (29 novembre 2019) M. K., n° 421523B.

⁵⁹ Denis-Linton, Malvasio, & Logeais ([n 37](#)) 181–3; Conseil d'Etat (25 novembre 1998) Mme N., n° 164682A.

⁶⁰ Denis-Linton, Malvasio, & Logeais ([n 37](#)) 183–4, CRR SR (10 octobre 2000) M. M., n° 98013345/335731R.

⁶¹ See Immigration Rules, para. 339A(i)–(vi); also, para. 352D, ‘Requirements for leave to enter or remain as the child of a refugee’: Home Office, Asylum policy instruction. Revocation of refugee status, version 4.0 (19 Jan. 2016).

⁶² See *Secretary of State for the Home Department v JS (Uganda)* [2019] EWCA Civ 1670, paras. 114, 172, 188–9. The Court found that JS had not been granted refugee status in his own right, but under the family reunion policy, because his mother had been admitted as a refugee; he was therefore not himself entitled to any rights under the Convention.

⁶³ Cf. IRO Constitution ([n 2](#)) Pt. 1C2.

⁶⁴ In *Minister for Immigration, Multicultural and Indigenous Affairs v QAAH* [2006] HCA

53 (Kirby J, dissenting), the majority of the High Court of Australia misunderstood the centrality of *status* in the Convention scheme of protection; in applying domestic law without regard to international law and practice, they supposed that cessation was somehow automatic and thereby failed to do justice to the individual dimensions of a case involving a refugee subject to Australia's 'temporary protection visa' scheme. See O'Sullivan, M., 'Withdrawing protection under Article 1C(5) of the 1951 Convention: Lessons from Australia' (2008) 20 *IJRL* 596.

⁶⁵ 'Discussion Note on the Application of the "ceased circumstances" Cessation Clause in the 1951 Convention': EC/SCP/1992/CRP.1 (20 Dec. 1991). The inelegant phrase, 'ceased circumstances', is somewhat misleading in its reference to the Convention provisions, which predicate the end or 'cessation' of refugee status, *inter alia*, on a sufficient change *in the factual base for a well-founded fear of persecution*.

⁶⁶ Executive Committee Conclusion No. 69 (1992) on Cessation of Status. The draft conclusion was revised in two earlier inter-sessional meetings; see 'Report of the 13–14 April Meeting': EC/SCP/71 (7 Jul. 1992) paras. 6–11; 'Report of the 25 June Meeting': EC/SCP/76 (13 Oct. 1992) paras. 20–2.

⁶⁷ 'Report of the 23 January Meeting': EC/SCP/70 (7 Jul. 1992) para. 20; Executive Committee Conclusion No. 69 (ⁿ 66) para. (b).

⁶⁸ 'Report of the 23 January Meeting': EC/SCP/70 (ⁿ 67), para. 20; see also generally paras. 11, 12, 14, 15.

⁶⁹ Executive Committee Conclusion No. 69 (ⁿ 66) para. (d). A parallel paper introduced by the Swiss government in the Sub-Committee also emphasized the right to request reconsideration; see 'Report of the 23 January Meeting': EC/SCP/70 (ⁿ 67), para. 8.

⁷⁰ 'Discussion Note': EC/SCP/1992/CRP.1, para. 19.

⁷¹ Executive Committee Conclusion No. 69 (ⁿ 66) Preamble, third paragraph; see also 'Discussion Note': EC/SCP/1992/CRP.1, para. 3.

⁷² UNHCR, Guidelines No. 3 (ⁿ 55) paras. 10, 11. See *NBGM v Minister for Immigration, Multicultural and Indigenous Affairs* (2004) 84 ALD 40, [2004] FCA 1373, considering whether the removal of the Taliban in Afghanistan amounted to a 'substantial, effective and durable' change; also *WAHK v Minister for Immigration, Multicultural and Indigenous Affairs* (2004) 81 ALD 322, [2004] FCAFC 12, finding, again on the effects of the Taliban's removal, that the tribunal erred in focusing on risk of persecution by government, and remitting for consideration of whether the interim government was able and willing to protect the appellant from acts of persecution in Ghazni province.

⁷³ UNHCR, Guidelines No. 3 (ⁿ 55) paras. 15, 16.

⁷⁴ *Loi sur l'asile* (28 juin 1998) art. 63 Révocation.

⁷⁵ Immigration and Refugee Protection Act 2001, s. 108. The change in the cessation climate is also discernible in small things, such as substituting the words 'met' and 'met fin' for the words 'peut mettre' and 'peut mettre fin' in arts. L. 711–4 and L. 711–6 CESEDA (describing OFPRA's role in bringing refugee status to an end): Loi n° 2018-778 du 10

septembre 2018 pour une immigration maîtrisée, un droit d’asile effectif et une intégration réussie, JORF n° 0209 du 11 septembre 2018; see also UNHCR, ‘Comments on the European Commission Proposal for a Qualification Regulation—COM(2016) 466’ (Feb. 2018) 22–4: <https://www.refworld.org/docid/5a7835f24.html>.

⁷⁶ UNHCR, Guidelines No. 3 ([n 55](#)) para. 17. In *Secretary of State for the Home Department v MS (Somalia)* [2019] EWCA Civ 1345, the court declined to follow UNHCR on this point (at paras. 33, 52, 82), notwithstanding Upper Tribunal Judge Plimmer’s sensible words of caution regarding evidential issues in *Secretary of State for the Home Department v AMA* [2019] UKUT 00011 (quoted at paras. 42 ff).

⁷⁷ UNHCR, ‘Guidelines on International Protection No. 3’, paras. 3, 23–4.

⁷⁸ Ibid.

⁷⁹ Ibid., para. 25(1). A ‘general declaration of cessation’ is necessarily without prejudice to later refugee claims premised on the particular circumstances of individuals or groups: ibid., para. 25(ix). Also, Executive Committee Conclusion No. 69 ([n 66](#)) para. a.

⁸⁰ See generally, UNHCR, ‘Guidelines on Exception Provisions in respect of Cessation Declarations’ (Dec. 2011) and at paras. 8–13 on the role of UNHCR. See also, UNHCR, ‘Guidelines on International Protection No. 11: Prima facie recognition of refugee status’, HCR/GIP/15/11 (24 Jun. 2015) para. 28.

⁸¹ For a summary look at those complexities, see the following UNHCR ‘Notes on International Protection’: UN docs. A/AC.96/1098 (28 Jun. 2011) paras. 59, 69; A/AC.96/1110 (4 Jul. 2012) paras. 47, 52; A/AC.96/1122 (3 Jul. 2013) para. 49; A/AC.96/1134 (9 Jul. 2014) paras. 50, 51, 55. See also O’Sullivan, M., *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (2019); Kingston, L. N., ‘Bringing Rwandan Refugees “Home”: The Cessation Clause, Statelessness, and Forced Repatriation’ (2017) 29 *IJRL* 417; Sniderman, A. S., ‘Explaining Delayed Cessation: A Case Study of Rwandan Refugees in Zimbabwe’ (2015) 27 *IJRL* 607; McMillan, K. E., ‘Uganda’s Invocation of Cessation Regarding its Rwandan Refugee Caseload: Lessons for International Protection’ (2012) 24 *IJRL* 231; Siddiqui, Y, ‘Reviewing the application of the Cessation Clause of the 1951 Convention relating to the status of refugees in Africa’, Refugee Studies Centre, Working Paper Series No. 76 (Aug. 2011); Malongo, L., ‘Implementation of the cessation clause: a useless mechanism, a motive of insecurity’: <https://lamenparle.hypotheses.org/701>.

⁸² The change of circumstances cessation clause was first proposed by the French representative in the Third Committee: UN doc. A/C.3/L.123 (27 Nov. 1950), and was incorporated, apparently without debate, in a revised draft drawn up by an informal working group: UN doc. A/C.3/L.131/ Rev.1 (1 Dec. 1950), and duly adopted in UNGA res. 429(V) (14 Dec. 1950) Annex, recommending the draft definition to the Conference of Plenipotentiaries to be held in July 1951. Apart from isolated references to the restoration of democracy, the *travaux préparatoires* do not deal with how or when change of circumstances should result in cessation of refugee status. France, for example, simply thought that a

country which had ‘returned to democratic ways’ should ‘take over the burden’ of its nationals: UN doc. A/CONF.2/SR.28, 12, 13. Cf. Israel’s view: UN doc. A/CONF.2/SR.23, 20–1.

⁸³ In *Yusuf v Canada (Minister of Employment and Immigration)* (1995) 179 N.R. 11, para. 2, the Federal Court of Appeal of Canada noted that ‘the issue of so-called “changed circumstances” seems to be in danger of being elevated, wrongly in our view, into a question of law when it is, at bottom, simply one of fact’. The fundamental issue is the possibility or risk of persecution: ‘there is no separate legal “test” by which any alleged change in circumstances must be measured. The use of words such as “meaningful”, “effective” or “durable” is only helpful if one keeps clearly in mind that the only question, and therefore the only test, is ... does the claimant now have a well-founded fear of persecution?’ To similar effect, see Conseil d’Etat, 10/9 SSR (19 décembre 1986) 72.149, *Zapirain Elisalde*, recognizing the relevance of country conditions generally, but emphasizing the central focus on whether the individual’s fear was well-founded.

⁸⁴ *Recueil* 2019 (n 58) 166, CNDA (18 avril 2019) M. S., n° 18049018C. Cf. *Recueil* 2017 (n 39) 169, CNDA (13 novembre 2017) M. P., n° 16011816C—cessation upheld for a former MPLA deserter from Angola, in view of the effective and extensive application of the 2002 amnesty law. The court relied on information from the Canadian Immigration and Refugee Board and UNHCR, noted also UNHCR’s termination of its voluntary repatriation programme and June 2012 declaration of cessation, and the post-election transition in 2017.

⁸⁵ Denis-Linton, Malvasio, & Logeais (n 37) 188–90, CNDA (25 novembre 2011) M. K., n° 10008275R: ‘M. K. ne fait valoir aucune raison impérieuse tenant à des persécutions antérieures pour refuser de se réclamer de la protection des autorités du Kosovo, pays dont il peut reventiquer la nationalité ou, en tout état de cause, dans lequel il avait sa résidence habituelle.’

⁸⁶ See Arden LJ in *Secretary of State for the Home Department v MA (Somalia)* [2018] EWCA Civ 994, para. 2: ‘A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist’, a view apparently endorsed by, among others, Hamblen LJ in *MS (Somalia)* (n 76) para. 47, who adds that it is ‘consistent’ with the CJEU’s approach in *Abdulla* (n 39) (although that court mentioned neither mirrors, nor symmetry). Although both Hamblen LJ and Underhill LJ, the latter with some qualification, relied in part on the House of Lords decision in *Hoxha v Secretary of State for the Home Department* [2005] UKHL 19, neither mentioned Lord Brown’s observation at paras. 65–7, that the grant of refugee status, ‘does not precisely mirror the approach to its subsequent withdrawal’.

⁸⁷ *Secretary of State for the Home Department v MM (Zimbabwe)* [2017] EWCA Civ 797, para. 24 (Sales LJ).

⁸⁸ *Abdulla* (n 39) para. 73; in addition, the individual concerned must have no other reason to fear persecution; *ibid.*, para. 87. See Errera, R., ‘Cessation and Assessment of New

Circumstances: A Comment on *Abdulla*, CJEU, 2 March 2010' (2011) 23 *IJRL* 521, 528, on the notion that refugee status and cessation take the form of a syllogism: 'This is not so: first, because a certain amount of time separates this procedure from the initial granting of refugee status. The person is not the same one; the country of nationality is not or does not seem to be the same one. Secondly, because withdrawal of refugee status introduces a substantial change in the situation and legal status of the person concerned. Thirdly, because the QD contains a number of new provisions on the nature and on the actors and content of persecution and of protection that do not figure in the Convention'; also, Schultz, J, 'The end of protection? Cessation and the "return turn" in refugee law' (31 Jan. 2020): <http://eumigrationlawblog.eu/>.

⁸⁹ Opinion of Advocate General Hogan in Case C-255/19 *Secretary of State for the Home Department v OA* (30 Apr. 2020) para. 90.

⁹⁰ *Abdulla* (n 39) paras. 65–70.

⁹¹ AG Hogan (n 89) para. 91, referring to art. 7 (actors of protection) and art. 11(1)(e) of the Qualification Directive.

⁹² *Abdulla* (n 39) paras. 86–7.

⁹³ See *MS (Somalia)* (n 76) paras. 48, 82.

⁹⁴ See *MM (Zimbabwe)* (n 87).

⁹⁵ UNHCR, 'Statement on the 'ceased circumstances' clause of the EU Qualification Directive' (Aug. 2008). Not having been party to the original proceedings, UNHCR could not intervene formally, for example, as *amicus curiae*.

⁹⁶ Ibid., 12–14.

⁹⁷ Executive Committee Conclusion No. 69 (n 66) para. (a); *Abdulla* (n 39).

⁹⁸ Cf. IRO Constitution (n 2) Pt. 1C(a)(iii).

⁹⁹ In *Hoxha* (n 86) para. 70, Lord Brown considered that the use of the word 'perversely' in earlier editions of this work to describe the limits of the humanitarian exception was putting it too high; we incline to agree and recognize that it may have been understandable why some States wanted to limit the proviso. Since then, the EU Qualification Directive (recast) has adopted the broad approach, and even though the UK is not bound by the revision, Home Office Asylum Instructions accept that it is to be interpreted beyond the express words of the Convention: 'Revocation of refugee status', version 4.0 (19 Jan. 2016) s. 4.5, 'Change in circumstances'.

¹⁰⁰ The precise relationship between the various parts of para. 6 of the Statute is far from clear.

¹⁰¹ Pompe, C. A., 'The Convention of 28 July 1951 and the international protection of refugees', HCR/INF/42 (May 1958) 10, n. 3; originally published in Dutch in (1956) *Rechtsgeleerd Magazyn Themis* 425.

¹⁰² See UN doc. A/CONF.2/SR.23 (26 Nov. 1951) 20–1 (Mr Robinson, Israel).

¹⁰³ Ibid.

¹⁰⁴ UN doc. A/CONF.2/SR.28 (28 Nov. 1951) 16 (Mr Rochefort, France).

¹⁰⁵ Para. 6A(ii)(e) of the Statute provides that the competence of the High Commissioner shall cease to apply to any refugee if ‘[h]e can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked’.

¹⁰⁶ UN doc. A/CONF.2/SR.28 (28 Nov. 1951) 15–16.

¹⁰⁷ UNHCR, *Handbook* (n 1) para. 136: ‘Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.’ See also, UNHCR, Guidelines No. 3 (n 55) paras. 20–1.

¹⁰⁸ Executive Committee Conclusion No. 69 (n 66) para. 22.

¹⁰⁹ See subs. 2(3) of the Immigration Act, as amended by R.S.C. (1985) (4th Supp.) c. 28, s. 1.

¹¹⁰ Immigration and Refugee Protection Act 2001, s. 108(4) (emphasis supplied).

¹¹¹ 8 CFR § 208.13(b)(iii), ‘Establishing asylum eligibility’.

¹¹² Commission of the European Communities, Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention, doc. COM(2001) 510 (12 Sep. 2001) Explanatory Memorandum, comments to draft art. 13.

¹¹³ See arts. 11, 14(1), Qualification Directive 2004 and Qualification Directive (recast) 2011. Cf. art. 28(2), Temporary Protection Directive.

¹¹⁴ Art. 22(2), Council Directive 2001/55/EC of 20 July 2001on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof: [2001] OJ (7 Aug. 2001) L212/12.

¹¹⁵ V.B.C. (2 ch.) (3 Oct. 1994) E84, cited in Carlier, J.-Y. and others, eds., *Who is a Refugee? A Comparative Case Law Study* (1997) 106; also, Commission des recours des réfugiés (28 Feb. 1984) 10.884, *ibid.*, 431. See also *Skalak v INS* 944 F.2d 364, 365 (7th Cir., 1991): ‘The experience of persecution may so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution.’

¹¹⁶ *Minister of Employment and Immigration v Obstoj* [1992] 2 FC 739; see also, *Biakona v Minister of Citizenship and Immigration* [1999] FCJ No. 391 (Trial Division), Teitelbaum J, paras. 32, 35; *Shahid v Canada (Minister of Citizenship and Immigration)* (1995) 28 Imm LR (2d) 130, 138; *Arguello-Garcia v Minister of Employment and Immigration* (1993) 21 Imm LR (2d) 285.

¹¹⁷ See also the summary conclusions of the Expert Roundtable of the Global Consultations on International Protection, Lisbon (3–4 May 2001) in Feller, Türk, & Nicholson, *Refugee Protection in International Law* (n 1) 545.

¹¹⁸ Art. 31(3), 1969 Vienna Convention on the Law of Treaties: 1155 UNTS 331.

¹¹⁹ See UNGA res. 73/202, ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’ (20 Dec. 2018) Annex, Conclusion 7. On subsequent practice, supplementary means, and subsidiary means, see also, Goodwin-Gill, G. S., ‘The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law’ (2020) 69 *ICLQ* 1, 38–9.

¹²⁰ *Hoxha* ([n 86](#)) paras. 3–26 Lord Hope; paras. 69–88 (Lord Brown). See also Goodwin-Gill, G. S., ‘The Search for the One, True Meaning ...’, in Goodwin-Gill G. S. & Lambert, H., eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010) 204, 227–9; Milner, D., ‘Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention’ (2004) 16 *IJRL* 91.

¹²¹ On identification of the State responsible to determine an asylum claim and the broader context of non-admission policies, see [Ch. 7](#), s. 6.

¹²² UN doc. A/CONF.2/SR.14, 4–5.

¹²³ France first favoured a limitation to refugees coming directly from their *country of origin*, objecting to the first draft which would have allowed the refugee, ‘to move freely from one country to another without having to comply with frontier formalities’: UN doc. A/CONF.2/SR.13, 13. This position was moderated in acceptance of the present wording, which is thus capable also of covering unsafe transit countries.

¹²⁴ See Moreno-Lax, V., ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’, in Goodwin-Gill, G. S. & Weckel, P., eds., *Migration & Refugee Protection in the 21st Century: Legal Aspects* (2015) 665; Gil-Bazo, M.-T., ‘The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice’ (2015) 33 *NethQHR* 42.

¹²⁵ See Denis-Linton, Malvasio, & Logeais ([n 37](#)), CNDA SR (30 mai 2011) M. O., n° 09009538R.

¹²⁶ 1951 Convention, arts. 27, 28; see further [Ch. 10](#), s. 1.2.3.

¹²⁷ *Rosenberg v Yee Chien Woo* 402 US 49 (1971): (1971) 65 *AJIL* 828: US Supreme Court held that presence in the United States must be a consequence of the flight in search of refuge, ‘reasonably proximate to the flight and not following a flight remote in point of time or intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge’.

¹²⁸ Refugee Act 1980; see now 8 USC § 1158(b)(2)(vi)—asylum; 8 USC §1157(c)—admission of refugees from abroad; 8 CFR § 208.18—definition of ‘firm resettlement’. The combined effect of statute and regulations is to disqualify refugees ‘firmly resettled’ in third countries from both asylum and overseas admission. The individual will be considered ‘firmly resettled’ if, before seeking admission, he or she entered another State with, or received while there, an offer of permanent residence, citizenship or other type of permanent resettlement. The person concerned will not be considered firmly resettled, however, if he or

she can show, either that entry into the other State was a necessary consequence of flight, that he or she remained there only so long as was necessary to arrange onward travel, and that no significant ties were established; or that the conditions of residence there were ‘so substantially and consciously restricted by the authority of the country of refuge’, that he or she was not in fact resettled. Relevant factors for consideration by the decision-maker include the living conditions of residents, type of housing and employment available, property and other rights and privileges, such as travel documents, rights of entry and return, education, and public relief.

¹²⁹ Cf. Ziebritzki, C., ‘Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers’ freedom of movement’ (22 Jun 2018): <https://eumigrationlawblog.eu/>.

¹³⁰ See further Ch. 8, s. 6; also, arts. 35, 38–9, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast); ECRE, ‘Information Note on Directive 2013/32/EU’ (Dec. 2014) (40–6); Mysen Consulting, ‘The Concept of Safe Third Countries —Legislation and National Practices’ Study commissioned by the Norwegian Ministry of Justice and Public Security (2017).

¹³¹ Frelick, B., Kysel, I. M., & Podkul, J., ‘The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4 *Journal on Migration and Human Security* 190.

¹³² See Additional Paragraph to Draft Article 1, ‘Report of the United Nations Conference on Territorial Asylum, UN doc. A/CONF.78/12 (21 Apr. 1977).

¹³³ Report of the 30th Session: UN doc. A/AC.96/572, para. 72(2).

¹³⁴ See, in particular, Albanese F. P. & Takkenberg, L., *Palestinian Refugees in International Law* (2nd edn., 2020); BADIL, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd edn., 2015); Akram, S., UNRWA and Palestine Refugees’, in Costello, Foster, & McAdam (n 1).

¹³⁵ See, for example, UNGA res. 75/172, ‘The right of the Palestinian people to self-determination’ (16 Dec. 2020) (168-5-10); UNGA res. 75/126, ‘Assistance to the Palestinian people’ (11 Dec. 2020) (adopted without a vote); UNGA res. 75/236, ‘Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab people in the occupied Syrian Golan over their natural resources’ (21 Dec. 2020) (153-6-17).

¹³⁶ See, for example, UNGA res. 75/84, ‘Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East’ (10 Dec. 2020) (169-4-9); UNGA res. 75/93, ‘Assistance to Palestine refugees’ (10 Dec. 2020) (160-5-12); UNGA res. 75/95, ‘Palestine refugees’ properties and their revenues’ (10 Dec. 2020) (160-5-12).

¹³⁷ United Nations, ‘The Question of Palestine’: <https://www.un.org/unispal/>; Erakat, N., *Justice for Some: Law and the Question of Palestine* (2019); Shlaim, A., *Israel and*

Palestine: Reappraisals, Revisions, Refutations (2009); Rogan, E. & Shlaim, A., eds., *The War for Palestine: Rewriting the History of 1948* (2nd edn., 2008); Morris, B., *The Birth of the Palestinian Refugee Problem, 1947–1949* (1987); *The Birth of the Palestinian Problem Revisited* (2004).

¹³⁸ See League Council resolution (22 Apr. 1923): [1923] OJ 604, quoted in Weis, P., *Nationality and Statelessness in International Law* (2nd edn., 1979) 20. Administering powers did not acquire sovereignty over the territories in question; see McNair J in the *South West Africa Case* [1950] ICJ Rep. 128, 150.

¹³⁹ Palestinian Citizenship Order 1925–41, S.R. & O. (1925) No. 25.

¹⁴⁰ See *R v Ketter* [1940] 1 KB 787, where it was held that the appellant, a native of Palestine born when that territory was under Turkish sovereignty, but holding a passport marked ‘British Passport— Palestine’, had not become a British subject by virtue of art. 30 of the Treaty of Lausanne of 24 July 1923, [1923] UKTS 16 (Cmd. 1929), or under the terms of the Mandate agreement of 24 July 1922, since Palestine was not transferred to and, consequently, was not annexed by Great Britain by either Treaty or Mandate. See further Bentwich, N., ‘Palestine nationality and the mandate’ (1939) 21 *Journal of Comparative Legislation and International Law* 230.

¹⁴¹ Weis (n 138) 18–20, 22; Qafisheh, M. M., *The International Law Foundations of Palestinian Nationality: A Legal Examination of Nationality in Palestine under Britain’s Rule* (2008); Banko, L., *The Invention of Palestinian Citizenship, 1918–1947* (2016).

¹⁴² Cf. O’Connell, D. P., *State Succession in Municipal Law and International Law*, vol. 1 (1967) 128–9.

¹⁴³ See further Ch. 13.

¹⁴⁴ Cf. *Kahane (Successor) v Parisi and Austrian State*, 5 Ann. Dig. (1929–30) No. 131, in which the tribunal regarded Romanian Jews as Romanian nationals; even though Romania withheld citizenship, it did not consider them to be stateless persons. With developments in related human rights, the view from international law is now somewhat different; see further Ch. 13.

¹⁴⁵ *Oseri v Oseri* (1953) 8 PM 76; (1950) 17 ILR 111; this decision of the Tel Aviv District Court, ostensibly based on the fact of termination of Palestinian citizenship, is likely also to have been inspired by a desire not to recognize Palestinian Arabs as citizens of Israel.

¹⁴⁶ See *A.B. v M.B.* (1950) 17 ILR 110 (1950); Zeltner J said: ‘So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel, was resident in the territory which today constitutes the State of Israel, is also a national of Israel.’

¹⁴⁷ (1952) 6 PD 897, 901; 17 ILR 111 (1950); *Nakara v Minister of the Interior* (1953) 7 PD 955; 20 ILR 49. See also Qafisheh (n 141); Banko (n 141); Kattan, V., ‘The Nationality of Denationalized Palestinians’ (2005) 74 *Nordic Journal of International Law* 67.

¹⁴⁸ Under the Law of Return, 5710–1950 (5 Jul. 1950).

¹⁴⁹ Nationality Law, 5712–1952, s. 1 (14 Jul. 1952).

¹⁵⁰ UNGA res. 67/19, ‘Status of Palestine in the United Nations’ (29 Nov. 2012) (138-9-41); the General Assembly decided ‘to accord to Palestine non-member observer State status’ in the UN: para. 2. More than 135 States have recognized the State of Palestine, but its status as a State in the sense of international law remains contested by others.

¹⁵¹ GAOR, 5th Sess., Plenary, Summary Records, 328th Meeting (27 Nov. 1950) paras. 37 (Egypt), 45–7 (Lebanon), 54–5 (Saudi Arabia). See also GAOR, 5th Sess., Plenary, Summary Records, 325th Meeting (14 Dec. 1950) paras. 187–92 (Iraq). As early as 1946, in the Third Committee, the Egyptian, Iraqi and Lebanese representatives wanted a clear distinction to be made between ‘the political and humanitarian aspects of the Jewish question’: UN doc. A/C.3/SR.7, pp. 18–20 (4 Feb. 1946). Support for this approach was by no means limited to Arab States; the United States, for example, endorsed the exclusion of certain groups, such as Palestinians, for whom the UN had made special arrangements. See for example, Ad hoc Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.3, paras. 35–48 (26 Jan. 1950). The limitation also had a functional aspect and served to delimit the respective areas of responsibility of UNHCR, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), and the United Nations Conciliation Commission for Palestine (UNCCP).

¹⁵² Convention, art. 1D. See also Qafisheh, M. M. & Azarov, V., ‘Article 1 D 1951 Convention’, in Zimmermann, (ⁿ 1) 537.

¹⁵³ Report of the Third Committee: UN doc. A/1682: GAOR, Fifth Session, Annexes, 26, Recommendations of the Third Committee, B; UNGA res. 429 (V) (14 Dec. 1950).

¹⁵⁴ 1951 Conference of Plenipotentiaries: UN doc. A/CONF.2/SR.2, 22 Mostafa Bey (Egypt) (emphasis added); see also the Egyptian delegate’s remarks at the 20th Meeting: UN doc. A/CONF.2/SR.20, 8–9; and the views of Mr Rochefort (France): UN doc. A/CONF.2/SR.2, 27, and UN doc. A/CONF.2/SR.3, 10.

¹⁵⁵ UN doc. A/CONF.2/SR.19, 16–17; UN doc. A/CONF.2/13. See also comments of the British representative, Mr Hoare: UN doc. A/CONF.2/SR.19, 18; also, UN doc. A/CONF.2/SR.19, 26–7 (Mr Habicht, International Association of Penal Law).

¹⁵⁶ The Egyptian amendment was adopted by 14 votes to 2, with 5 abstentions, and the relevant paragraph, as amended, was adopted by 18 votes to none, with 5 abstentions: UN doc. A/CONF.2/SR.29, 6, 8, 9.

¹⁵⁷ As Laws LJ remarked in *El Ali*, below ⁿ 168, ‘the displaced Palestinians were considered at all relevant stages to be *refugees* ... [and] were regarded, in and out of the United Nations, as belonging to a special category’ (para. 15, emphasis in original).

¹⁵⁸ Mr Rochefort, France, noted: ‘... as the representative of Egypt had pointed out, the effect of [the] paragraph ... would be *merely to postpone* the inclusion of the Palestinian refugees’ (emphasis supplied); he was nevertheless concerned lest Contracting States bind themselves to ‘include a new, large group of refugees, not as the result of a decision freely arrived at, but through the operation of United Nations policy—or in other words, by the withdrawal of assistance which various United Nations bodies were at present giving to the

Arab refugees in Palestine': UN doc. A/CONF.2/SR.19, 11–12. See also UN doc. A/CONF.2/SR.19, 16 (Mostafa Bey, Egypt); UN doc. A/CONF.2/SR.20, 8–9 (Mostafa Bey, Egypt).

¹⁵⁹ See, generally, Heian-Engdal, M., *Palestinian Refugees after 1948: The Failure of International Diplomacy* (2020); Erakat, N., *Justice for Some: Law and the Question of Palestine* (2019).

¹⁶⁰ In practice, assistance has been provided to Palestinian refugees by UNRWA, within the area of its operations (Lebanon, Syria, Jordan, West Bank including East Jerusalem, and Gaza), and subject to the conditions of entitlement and registration; see further Ch. 9, s. 1.2; Bocco, R., 'UNRWA and the Palestinian Refugees: A History within History' (2009) 28(2–3) RSQ 229. Initially, no international agency was expressly charged with providing protection to Palestinian refugees, although elements of that function were entrusted to UNCCP. Over time, however, protection has come to be an important feature of UNRWA's role; see UNRWA, 'Protecting Palestine Refugees' (2015); Akram, S. M. & Goodwin-Gill, G. S., 'Amicus Brief on the Status of Palestinian Refugees under International Refugee Law' (2000–2001) 11 *Palestine Yearbook of International Law* 185; Takkenberg, L., 'The Protection of Palestine Refugees in the Territories Occupied by Israel' (1991) 3 *IJRL* 414; Albanese & Takkenberg ([n 134](#)) Ch. 6; Khouri, R. G., 'Sixty Years of UNRWA: From Service Provision to Refugee Protection' (2009) 28(2–3) RSQ 438; Goddard, B., 'UNHCR and the International Protection of Palestinian Refugees' (2009) 28(2–3) RSQ 475; Kagan, M., 'Is there Really a Protection Gap? UNRWA's Role vis-à-vis Palestinian Refugees' (2009) 28(2–3) RSQ 511.

¹⁶¹ Cf. UNHCR, *Handbook* ([n 1](#)) para. 143: a refugee from Palestine outside the UNRWA area 'may be considered for determination of refugee status under the criteria [sc. well-founded fear of persecution] of the 1951 Convention. It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses'. See now, UNHCR, 'Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees', HCR/GIP/17 (13 Dec. 2017).

¹⁶² See Grahl-Madsen ([n 1](#)) 140–2: the words '*ipso facto*' in art. 1D imply that 'no new screening is required for the persons concerned to become entitled to the benefits of the Convention', and that on the cessation of UNRWA assistance and/or protection, those concerned 'will become a kind of "statutory refugees" ...' Statutory refugees are those within the scope of art. 1A(1) of the Convention, having qualified or been treated as refugees under earlier treaties and arrangements. Grahl-Madsen also suggests that the cessation of protection or assistance may result from departure from UNRWA's area of operations: *ibid.*, 263–5.

¹⁶³ See, for example, the views of the French representative at the 1951 Conference: UN doc. A/CONF.2/SR.19, 11–12; and of the Egyptian and Iraqi representatives: *ibid.*, 16–17. Egypt proposed an amendment to the initial draft of art. 1D, with the expressed object of

ensuring that ‘Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function, would automatically come within the scope of the Convention’. See UN doc. A/CONF.2/SR.29, 5–9. The question is whether, without those organs or agencies ceasing to function as such, the requisite protection or assistance should be deemed to have terminated, either because of voluntary removal from the jurisdiction of UNRWA, or because of expulsion or denial of return to a country of residence, such as Lebanon.

¹⁶⁴ See further Ch. 9, s. 1.2.

¹⁶⁵ Art. 1(2)(i) of the 1954 Convention relating to the Status of Stateless Persons, which is not considered further, provides that the Convention shall not apply ‘to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for refugees protection or assistance so long as they are receiving such protection or assistance ...’. Clearly, the composition of this group would have changed in the three years since the equivalent provision was adopted in the 1951 Convention, as a result of births, deaths and other displacement. For this reason alone, it is reasonable and consistent with history to see the group in question, Palestine refugees, as identified by the events of 1948–49, as receiving protection or assistance both in 1951 and 1954, and as likely to continue to receive protection or assistance thereafter.

¹⁶⁶ That recognition continues; see UNGA res. 75/22, ‘Peaceful settlement of the question of Palestine’ (2 Dec. 2020) (145-7-9), reaffirming ‘the permanent responsibility of the United Nations with regard to the question of Palestine until it is resolved in all its aspects in accordance with international law and relevant resolutions’, and the UN’s commitment to the two-State solution and a just resolution of the problem in conformity with UNGA res. 194 (III): paras. 1, 10, 12.

¹⁶⁷ GAOR, Fifth Session, 344th Meeting (11 Dec. 1950) para. 13 (Mr Raafat, Egypt); paras. 24–5 (Mr Baroody, Saudi Arabia); para. 28 (Mr Lesage, Canada); paras. 29–30 (Mr Davin, New Zealand); para. 39 (Mr Noriega, Mexico); para. 42 (Mr Raafat, Egypt).

¹⁶⁸ [2002] EWCA Civ 1103. UNHCR intervened in this appeal with the permission of the court and was represented by Guy Goodwin-Gill; for detailed discussion of the case, see the third edition of this work, 156–9. See also *Minister for Immigration and Multicultural Affairs v WABQ* (2002) 121 FCR 251, [2002] FCAFC 329 (Federal Court of Australia, Full Court); *Al-Khateeb v Minister for Immigration and Multicultural Affairs* (2002) 116 FCR 261, [2002] FCA 7 (Federal Court of Australia); and further below.

¹⁶⁹ *El Ali* [2002] EWCA Civ 1103, paras. 28–43; cf. Lord Phillips MR, paras. 63, 66.

¹⁷⁰ See Fiddian-Qasmiyah, E, ‘The Changing Faces of UNRWA’ (2019) 1(1) *Journal of Humanitarian Affairs* 28; Rosenfeld, M., ‘From Emergency Relief Assistance to Human Development and Back: UNRWA and the Palestinian Refugees, 1950–2009’ (2009)(2–3) 28 RSQ 286; Bartholomeusz, L., ‘The Mandate of UNRWA at Sixty’ (2009) (2–3) 28 RSQ 452; on which, see further Ch. 8, s. 1.2.

¹⁷¹ Cf. Feldman, I., ‘The Challenge of Categories: UNRWA and the Definition of a

“Palestinian Refugee”’ (2012) 25 JRS 387.

¹⁷² Hathaway & Foster ([n 1](#)) 509, 515, n 338. In our view, an error of analysis appears at once, when the authors assert that, with regard to those falling within art. 1D, the drafters agreed that ‘refugee status was to be denied’. Neither in art. 1D nor in any other provision does the Convention mention ‘status’ being denied or withheld, while Palestine refugees were always accepted as such; it is their entitlement to Convention benefits that is contingent, not their ‘status’. Advocate General Sharpston adopts a somewhat similar approach in her opinion in Case C-364/11 *El Kott* (13 Sep. 2012) paras. 36–8, although with different results; see text following [n 182](#).

¹⁷³ *AD (Palestine)* [2015] NZIPT 800693-699, paras. 201, 239–40, 242; also, *AE (Lebanon)* [2019] NZIPT 801588, para. 91.

¹⁷⁴ See Akram & Goodwin-Gill ([n 160](#)) 198–201.

¹⁷⁵ See UNGA res. 74/84, ‘Persons displaced as a result of the June 1967 and subsequent hostilities’ (13 Dec. 2019) (162-7-11).

¹⁷⁶ UNHCR, ‘Guidelines on International Protection No. 13’ ([n 161](#)) para. 8.

¹⁷⁷ Feldman ([n 171](#)) 392: ‘Because a Palestine refugee was defined in relation to relief, not rights, a gap quickly emerged between a “Palestine refugee” and an “eligible refugee”.’ See also Goddard, B., ‘UNHCR and the International Protection of Palestinian Refugees’ (2009) 28(2–3) *RSQ* 475.

¹⁷⁸ Case C-31/09, *Bolbol v Bevándorlási és Állampolgársági Hivatal* (ECJ, Grand Chamber, 17 Jun. 2010).

¹⁷⁹ Ibid., paras. 47–9; see also the opinion of Advocate General Sharpston ([n 172](#)) paras. 62, 65–8. Cf. *Said (Article 1D: interpretation)* [2012] UKUT 00413 (IAC).

¹⁸⁰ *Bolbol* ([n 178](#)) paras. 50, 51. The Court accepted that others also might qualify.

¹⁸¹ Case C-364/11 *El Kott*, CJEU, Grand Chamber (19 Dec. 2012).

¹⁸² Ibid., paras. 78–81.

¹⁸³ Opinion of Advocate General Sharpston in Case C-31/09 (4 Mar. 2010) paras. 81–4.

¹⁸⁴ Ibid., paras. 82–3; 90; Opinion of Advocate General Sharpston in *El Kott* ([n 172](#)) paras. 24–5, 76–83.

¹⁸⁵ *El Kott* ([n 181](#)) paras. 59–63; the Court added that if the applicant were able to return to that area of UNRWA’s operations where he or she was formerly resident, then refugee status would cease: *ibid.*, paras. 76–8. See CNDA 9 décembre 2020 M. E. n°s 20016437 et 20005472 C+ *Recueil* 2020 116: the lack of coverage for the most serious illnesses (‘L’absence de prise en charge des soins concernant les maladies les plus graves, qui met en cause la survie d’une personne palestinienne’) could oblige a Palestinian to leave UNRWA’s zone of operations and justify Convention status. Cf. Belgium, Council for Alien Law Litigation (23 May 2013) Nr. 103.509.

¹⁸⁶ Case C-585/16, *Alheto*, CJEU, Grand Chamber (25 Jul. 2018) paras. 86–7.

¹⁸⁷ Ibid., paras. 91–101.

¹⁸⁸ Because of the security situation in 2014, Ms Alheto had left Gaza, where she was registered with UNRWA and travelled to Jordan, from where she went on to Bulgaria.

¹⁸⁹ See arts. 35, 38, ‘Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)’, *OJ*, L180/60 (29 Jun. 2013).

¹⁹⁰ *Alheto* ([n 186](#)) paras. 133–4.

¹⁹¹ In practice, Palestine refugees are likely to be linked by residence to one particular area, such as the West Bank or Gaza, but as UNHCR has pointed out, access to UNRWA protection or assistance in other areas of operations cannot be assumed: UNHCR, ‘Guidelines on International Protection No. 13’ ([n 161](#)) para. 22k.

¹⁹² *Alheto* ([n 186](#)) paras. 140, 143. In such circumstances, the third country effectively becomes ‘a State actor of protection, within the meaning of Article 7(1)(a) of Directive 2011/95’: *ibid.*, para. 141. Cf. CNDA (24 mai 2013) M. XXX, Mme YYY, épouse XXX, n° 04020557, 04020558.

¹⁹³ On the ‘objective reasons’ that may bring an individual within the second paragraph of art. 1D, see UNHCR, ‘Guidelines on International Protection No. 13’ ([n 161](#)) paras. 22–3. But see *AK v Secretary of State for the Home Department* [2006] EWCA Civ 1117, considering the possibility of refusal of re-entry to the Occupied Palestinian Territories and whether denial of entry could constitute ‘persecution’: Richards LJ, paras. 46–8.

¹⁹⁴ See UN doc. A/48/486-S/26560, Annex (11 Oct. 1993). See CNDA 2 juin 2020 M. G. n ° 15005532 C+ *Recueil* 2020 100, in which the court took account of the respective competences of the Palestinian authority and the Israeli military and recognized refugee status for reasons of political opinion and inability to secure protection: ‘L’ensemble de ces éléments confirme l’incapacité de la part de l’Autorité Palestinienne à protéger les Palestiniens contre les agissements des services de sécurité israéliens dans les territoires palestiniens occupés dans leur ensemble, le contrôle effectif exercé par l’armée israélienne dépassant la lettre des Accords intérimaires “Oslo II”.’ In the circumstances, ‘l’Autorité palestinienne … ne peut être … un acteur effectif de protection nationale ou internationale.’ Also, Refworld: <https://www.refworld.org/docid/3de5e96e4.html>.

¹⁹⁵ See UNGA res. 74/83, ‘Assistance to Palestine refugees’ (13 Dec. 2019 (169-2-9) para. 7, extending UNRWA’s mandate until 30 June 2023, ‘without prejudice to the provisions of paragraph 11 of General Assembly resolution 194 (III)’. Also, UNGA res. 75/93 (10 Dec. 2020) (169-2-7).

¹⁹⁶ In UNHCR’s view, the words ‘at present receiving’ includes both those actually receiving protection or assistance, and those who are eligible: ‘Guidelines on International Protection No. 13’ ([n 161](#)) paras. 13–14.

¹⁹⁷ See generally, United Kingdom, ‘Report of a Home Office Fact-Finding Mission. Occupied Palestinian Territories: Freedom of movement, security and human rights situation’ (Mar. 2020).

¹⁹⁸ UNRWA is also said to be part of the problem, perpetuating the refugee dimension,

rather than promoting ‘solutions’; see, for example, Lindsay, J. L., ‘Fixing UNRWA: Repairing the UN’s Troubled System of Aid to Palestinian Refugees’, Washington Institute for Near East Policy, Focus 91 (26 Jan. 2009).

¹⁹⁹ For some discussion along these lines, see ‘1948 Refugees: Proceedings of an International Workshop’, Hebrew University of Jerusalem Faculty of Law, 14-15 Dec. 2016’ (2018) 51 *Israel Law Review* 47.

²⁰⁰ See also Heian-Engdal, M., *Palestinian Refugees after 1948: The Failure of International Diplomacy* (2020); Qafisheh, M. M., ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (2013); Brynen, R., ‘Compensation for Palestinian Refugees: Law, Politics and Praxis’ (2018) 51 *Israel Law Review* 29; Peters, J. & Gal, O., ‘Israel, UNRWA, and the Palestinian Refugee Issue’ (2009) 28(2–3) *RSQ* 588; Hilal, L., ‘Peace Prospects and Implications for UNRWA’s Future: An International Law Perspective’ (2009) 28(2–3) *RSQ* 607; Al Husseini, J. & Bocco, R., ‘The Status of the Palestinian Refugees in the Near East: The Right of Return and UNRWA in Perspective’ (2009) 28(2–3) *RSQ* 260; Lawand, K., ‘The Right to Return of Palestinians in International Law’ (1996) 8 *IJRL* 532; Brynen, R., ‘Imagining a Solution: Final Status Arrangements and Palestinian Refugees in Lebanon’ (1997) 26 *Journal of Palestine Studies* 42.

²⁰¹ Statute, para. 7(b); Convention, art. 1E; Qualification Directive (recast), art. 12(1)(b); Marx, R., ‘Article 1 E 1951 Convention’, in Zimmermann, ([n 1](#)) 571.

²⁰² See The Berlin (Potsdam) Conference (17 July–2 August 1945) (a) Protocol of the Proceedings (1 August 1945) Article XII (‘Orderly Transfer of German Populations’): https://avalon.law.yale.edu/20th_century/decade17.asp

²⁰³ Constitution of the International Refugee Organization, Annex I, part II, s. 4: 18 UNTS 3: ‘Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who: (a) have been or may be transferred to Germany from other countries; (b) have been, during the second world war, evacuated from Germany to other countries; (c) have fled from, or into, Germany, or from their places of residence into countries other than Germany in order to avoid falling into the hands of Allied armies.’ The agency responsible for refugees in the Federal Republic of Germany was for many years correspondingly known as the *Bundesamt für die Anerkennung ausländischer Flüchtlinge*/Federal Office for the Recognition of Foreign Refugees; it was not competent for German ‘refugees’, whether they fled from the German Democratic Republic before reunification, or from German minority communities elsewhere in eastern Europe. The Office is now named the *Bundesamt für Migration und Flüchtlinge*/Federal Office for Migration and Refugees: <http://www.bamf.de>.

²⁰⁴ See, for example, Second Report of the Social Committee to ECOSOC: UN doc. E/1814, para. 4 (10 Aug. 1950). For an account of the transfers, see de Zayas, A., *Die Anglo-Amerikaner und die Vertreibung der Deutschen* (1977); published in English as *Nemesis at Potsdam: The Anglo-Americans and the Expulsion of the Germans* (1977); *Nemesis at Potsdam: The Expulsion of the Germans from the East* (3rd edn., 1988).

²⁰⁵ Art. 116(1), Grundgesetz für die Bundesrepublik Deutschland: ‘Deutscher im Sinne dieses Grundgesetzes ist, vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitz oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatten oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat’: Translation available at <https://germanlawarchive.iuscomp.org/>.

²⁰⁶ See Immigration Act 1971, ss. 1, 2, 2A, as amended.

²⁰⁷ The British Nationality Act 1981 abandoned use of the term ‘British subject’ as a common description of all Commonwealth citizens, with certain savings. In 1979, changes in the UK immigration rules provided for the first time for the recognition of refugees from Commonwealth countries, who even if granted asylum had not previously been accepted under the Convention, because of their status as ‘British subjects’; see 967 HC Deb. cols. 1379–80 (1979).

²⁰⁸ Cf. *Kola v MIMA* (2002) FCA 265, [2002] FCAFC 59—finding that ethnic Albanians from Serbia were able to enter and reside in Albania where they enjoyed effective protection and faced no risk of *refoulement* to Serbia. See also *NAFV v MIMIA* (2005) 79 ALJR 609, [2005] HCA 6 (High Court of Australia).

²⁰⁹ Art. 1D deals similarly with an already recognized group of refugees, whose protection and assistance by a UN agency other than UNHCR means that they have no claim to Convention protection unless certain conditions are satisfied.

²¹⁰ Whereas art. 1D and 1E state that, ‘This Convention shall not apply’, art. 1F provides that ‘The provisions of this Convention shall not apply’; nothing appears to follow from this difference. The UNHCR Statute and the 1951 Convention also differ in approach and language, but again with little if any difference in substance: see Statute, para. 7(d); Convention, art. 1F; *UNHCR, Handbook* (n 1) paras. 147–63, 175–80; OAU Convention, art. I(5); Qualification Directive (recast), arts. 12, 14, 17.

²¹¹ See Li (n 1); Singer, S., *Terrorism and Exclusion from Refugee Status in the UK: Asylum Seekers Suspected of Serious Criminality* (2015); Rikhof (n 1); Zimmermann, A. & Wennholz, P., ‘Article 1 F 1951 Convention’, in Zimmermann (n 1) 579; Gilbert & Bentajou (n 1); Gilbert (n 1) 425; Summary Conclusions on exclusion, in Feller, Türk & Nicholson (n 1) 479; ‘Exclusion from Protection’ (2000) 12 *IJRL* Special Supplementary Issue; UNHCR, Guidelines on International Protection No. 5: ‘Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, HCR/GIP/03/05 (4 Sep. 2003).

²¹² ‘Once something is categorized as an issue of national security, it immediately assumes an overwhelming importance in the minds of politicians, officials, media, and public. Other important interests are thrust aside, and specialized institutions hidden from public view and enjoying vast and unique powers are given authority to deal with the matter’: Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy* (1994) 34. At 23, they note: ‘[T]he state is simultaneously protector and threat to vital personal and

political values, and we must all live with this inescapable contradiction as best we can.'

²¹³ UNHCR nevertheless emphasizes the importance of 'rigorous procedural safeguards' and that exclusion decisions in principle be dealt with in the regular refugee status determination procedure, not in admissibility or accelerated procedures: UNHCR, Guidelines No. 5 ([n 211](#)) paras. 4, 5, 31.

²¹⁴ See *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, paras. 36–9; cf. McLoughlin CJ in *Febles v Canada (Citizenship and Immigration)* [2014] 3 SCR 43, paras. 28–30, favouring restrictive, but not 'overly narrow interpretations'. In one Australian case, *FTZK v Minister of Immigration and Border Protection* [2014] HCA 26, it was suggested that to describe 'serious reasons' as a 'standard of proof' tends to mislead: paras. 33–6, 79, 81; the reference to *proof* may not be ideal, but practice across jurisdictions supports the usage.

²¹⁵ UNHCR, Guidelines No. 5 ([n 211](#)), para. 35; UNHCR, Background Note ([n 221](#)), paras. 107–8. The Conseil d'État has noted that exclusion under art. 1F, 'est seulement subordonnée à l'existence de "raisons sérieuses de penser", lesquelles ne sauraient constituer "une vérité juridique irréfutable"': CE (24 juin 2015) OFPRA c. M. C., n° 370417 C, *Recueil* 2015 ([n 39](#)) 62; also, CE (4 décembre 2017) OFPRA c. M. G. n° 403454 B: *Recueil* 2017 ([n 39](#)) 135 —there must be serious reasons for considering that a measure of responsibility can be imputed to the asylum seeker, which is not to be inferred from context alone; however, this does not require proof of specific facts implicating him or her in the crimes in question ('elle n'implique pas que soient établis des faits précis caractérisant l'implication de l'intéressé dans ces crimes').

²¹⁶ *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306; *Moreno v Minister of Employment and Immigration* [1994] 1 FC 298 (FCA) para. 16—the criteria are not satisfied if there are serious reasons for considering that an act *could* be classified as a crime against humanity; it must be established that, in law, it definitely was. See also, Bliss, M., ' "Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 *IJRL* Special Supplementary Issue 115; Kapferer, S., 'Exclusion Clauses in Europe: A Comparative Overview of State Practice in France, Belgium and the United Kingdom' (2000) 12 *IJRL* Special Supplementary Issue 207.

²¹⁷ *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, para. 114. The Federal Court of Australia has similarly approved an approach based on 'clear and convincing evidence': *SRYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42. Cf. Holvoet, M., 'Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law' (2014) 12 *Journal of International Criminal Justice* 1039, arguing for harmonization of 'serious reasons to consider' with the 'reasonable grounds to believe' standard in art. 58 of the ICC Statute.

²¹⁸ *Charkaoui v Canada (Minister of Citizenship and Immigration)* 2004 FCA 421, para.

103; *Lai v Minister of Immigration and Citizenship* [2000] FCA 125, para. 25; see also *Arquita v Minister for Immigration and Multicultural Affairs* [2000] FCA 1889 (Federal Court of Australia)—the evidence must be capable of being regarded as ‘strong’, but not up to either the ‘beyond reasonable doubt’ or ‘balance of probability’ test.

²¹⁹ *R (JS) (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15, para. 39, quoting Sedley LJ in *Al-Sirri v Secretary of State for the Home Department (UNHCR Intervening)* [2009] EWCA Civ 222, para. 33. See also Supreme Court of New Zealand, *Attorney-General (Minister of Immigration) v Tamil X and the RSAA* [2010] NZSC 107, para. 39.

²²⁰ *Al-Sirri v Secretary of State for the Home Department (UNHCR Intervening)* (ⁿ 219) para. 27. A similar point was acknowledged by the Conseil d’État, if only in passing, when noting that the evidence provided serious reasons for considering that the claimant had committed a serious crime, notwithstanding the presumption of innocence from which he benefited/*quelle que soit la présomption d’innocence dont [il] pourrait bénéficier*: CE, SSR (15 mai 1996) n° 153491 R: *Les grandes décisions sur l’asile* (2009) 26.

²²¹ *Al-Sirri v Secretary of State for the Home Department, DD v Secretary of State for the Home Department* [2012] UKSC 54, paras. 73–5; UNHCR, ‘Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’ (4 Sep. 2003) paras. 4, 7. UNHCR recognizes that art. 1F(a) allows for a ‘dynamic interpretation’ of the relevant crimes, and that the ICC Statute and ICC jurisprudence may well become the principal sources of interpretation: *ibid.*, para. 25.

²²² *Al-Sirri v Secretary of State for the Home Department, DD v Secretary of State for the Home Department* (ⁿ 221) para. 75. The case was referred back to the Upper Tribunal, which reiterated that in every art. 1F case, the onus is on the Secretary of State, that a detailed and individualized examination of the facts is required, and that there must be clear and credible evidence judged and assessed against a standard higher than suspicion or belief. The tribunal rejected the case for exclusion: *Al-Sirri (Asylum—Exclusion—Article 1F(c))* [2016] UKUT 448 (IAC). See also *MAB (Iraq) v Secretary of State for the Home Department* [2019] EWCA Civ 1253—where the decision-maker draws an inference of complicity, it must be justified on the facts as shown through a sufficiently detailed and individualized examination and demonstrated in the reasoning.

²²³ See, among others, Case C-573/14, *Lounani v Commissaire général aux réfugiés et aux apatrides*, CJEU Grand Chamber (31 Jan. 2017); Joined Cases C-57/09 and C-101/09, *Germany v B and D*, Grand Chamber (9 Nov. 2010); and further below.

²²⁴ UNHCR, Guidelines No. 5 (ⁿ 211), paras. 18, 21; UNHCR, Background Note (ⁿ 221), paras. 50–64. See also *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 317: ‘[N]o one can commit international crimes without personal and knowing participation’.

²²⁵ *Al-Sirri v Secretary of State for the Home Department, DD v Secretary of State for the Home Department* (ⁿ 221) paras. 35–8. In *AB (Article 1F(a)—defence—duress) Iran* [2016]

UKUT 00376 (IAC), involving an Iranian asylum seeker who had had a senior role in a women's prison where political prisoners were detained and tortured. The Tribunal took its lead from the ICC Statute and concluded that 'aiding and abetting ... encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime, it is not necessary to establish a common purpose' (para. 29).

²²⁶ *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40. The 'personal and knowing' test was laid down by the Federal Court in *Ramirez v Minister of Employment and Immigration* [1992] 2 FC 306; see also, though subject to the ruling in *Ezokola*, *Valère v Minister of Citizenship and Immigration* [2005] FC 524, paras. 21–4. See also Bond, J., Benson, N., & Porter, J., 'Guilt by Association: Ezokola's Unfinished Business in Canadian Refugee Law' (2020) 39 RSQ 1; Simeon, J. C., 'The Application and Interpretation of International Humanitarian Law and International Criminal Law in the Exclusion of those Refugee Claimants who have Committed War Crimes and/ or Crimes Against Humanity in Canada' (2015) 27 IJRL 75; Zambelli, P., 'Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law' (2011) 23 IJRL 252.

²²⁷ *B and D* ([n 223](#)) para. 63; also, Opinion of Advocate General Sharpston in *Commissaire général aux réfugiés et aux apatrides v Lounani* ([n 223](#)) para. 86.

²²⁸ *Commissaire général aux réfugiés et aux apatrides v Lounani* ([n 223](#)) paras. 54, 70. See also the decision of the German Federal Administrative Court (BVerwG 10C 48.07 (14 Oct. 2008), cited by Lord Brown in *JS (Sri Lanka)* ([n 219](#)) para. 14.

²²⁹ *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395, para. 16. The weight to be given to any conviction will necessarily depend on the court and the circumstances; see the views of the Court of Appeal in *Al-Sirri v Secretary of State for the Home Department* ([n 219](#)) paras. 40–4, 61. See also CE (28 novembre 2016) OFPRA c. M. B., n° 389733 B, *Recueil* 2016 ([n 49](#)) 130—the CNDA ought to take into account the underlying elements in extradition proceedings in order to understand whether 'serious reasons' exist. After reviewing the dossier, the CNDA concluded that the extradition demand did not support there being serious reasons to consider the applicant to have committed a serious non-political crime, or that any responsibility could be imputed to him personally for the violent acts alleged: CNDA (28 septembre 2018) M. B., n° 13024407 C, *Recueil* 2018 ([n 38](#)) 138.

²³⁰ IRO Constitution ([n 2](#)) Annex I, Pt. II.

²³¹ See *Memorandum by the Secretary-General*: UN doc. E/AC.32/2 (2 Jan. 1950) 15–18, 22–3. 'Exclusion' was not mentioned as such. Art. 14(2), which provides that the right to seek and to enjoy asylum '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', was cited in the context of admission of refugees. See Kapferer, S., 'Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection' (2008) 27(3) RSQ 53.

²³² UN doc. E/AC.32/L.3 (17 Jan. 1950) 3.

²³³ UN doc. E/AC.32/SR.4 (26 Jan. 1950) para. 25.

²³⁴ UN doc. E/AC.32/SR.5 (26 Jan. 1950) para. 16.

²³⁵ Ibid., para. 45. The French representative concurred: para. 73.

²³⁶ UN doc. E/AC.32/L.6 (23 Jan. 1950).

²³⁷ UN doc. E/AC.32/SR.17 (6 Feb. 1950) para. 37.

²³⁸ See UN doc. E/AC.32/SR.17, para. 38 (Israel); UN doc. E/AC.32/SR.18, para. 4 (France).

²³⁹ The proposed French amendment provided that, ‘The High Contracting Parties shall not apply the present convention in the case of a person they consider a war criminal’: UN doc. E/AC.32/SR.18, para. 5. It was adopted by the Committee: UN doc. E/AC.32/L.20/Rev.1.

²⁴⁰ See UN docs. E/1814; A/1682. The Third Committee took note also of the Second Session of the *Ad hoc* Committee (UN docs. E/1850 and E/1850/Annex).

²⁴¹ UNGA res. 429(V) (14 Dec. 1950). The text of the draft convention was submitted to the Conference of Plenipotentiaries by the Secretary-General: UN doc. A/CONF.2/1 (12 Mar. 1951). It comprised the Preamble, adopted by ECOSOC in res. 319(XI)B II (11 Aug. 1950); art. 1, the definition, adopted by the General Assembly; and the text of the remaining articles and annex, prepared by the *Ad hoc* Committee: *Report of the Second Session* (14–25 Aug. 1950): UN doc. E/1850 and Annex.

²⁴² Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: UN doc. A/CONF.2/SR.19, 26; for the German proposal, see UN doc. A/CONF.2/76.

²⁴³ See UN doc. A/CONF.2/SR.24, 7. As the representative for Germany pointed out, even art. 6 mentioned crimes committed ‘before or during *the war*’ (emphasis supplied). The representative of the Consultative Council of Jewish Organizations argued strongly against deletion of the reference to the London Charter, on the ground that its principles had since been twice confirmed by the UN General Assembly, and formulated by the International Law Commission (see UNGA resolutions 95(I) (11 Dec. 1946) and 177(II) (21 Nov. 1947); neither the Geneva Conventions nor the UN Genocide Convention had the same ‘solid foundation’: UN doc. A/CONF.2/SR.21, 7–11, a view later reiterated by the Israeli delegate: UN doc. A/CONF.2/SR.24, 14–15. The Federal Republic of Germany replied that the objective would be as well met by a provision excluding anyone who had committed non-political crimes or acts contrary to the purposes and principles of the United Nations: UN doc. A/CONF.2/SR.24, 6–8.

²⁴⁴ UN doc. A/CONF.2/SR.24, 16. The Canadian representative suggested that the working group might consider including a suitable reference to art. 30 UDHR 48 (no right to engage in any activity or to perform any act aimed at the destruction of rights and freedoms in the Declaration); in his view, one serious problem was that of refugees, or presumed refugees, who presented themselves and attempted then to subvert the country of refuge: *ibid.*

²⁴⁵ UN docs. A/CONF.2/SR.29, 9; A/CONF.2/92.

²⁴⁶ A commentary published shortly after the 1951 Conference suggested that the agreed

formulation of art. 1F(a) was broader than the corresponding reference to the London Charter in the UNHCR Statute, and took account of continuing work on the subject: Robinson, N., *Convention relating to the Status of Refugee: A Commentary* (1953); see also, Weisman, N., ‘Article 1F(a) of the 1951 Convention relating to the Status of Refugees’ (1996) 8 *IJRL* 111.

²⁴⁷ 1946 London Agreement for the Establishment of an International Military Tribunal: 82 UNTS 279; confirmed by UNGA resolutions 3(I) (13 Feb. 1946) and 94(I) (11 Dec. 1946).

²⁴⁸ *Moreno v Minister of Employment and Immigration* [1994] 1 FC 298 (FCA), para. 16—the criteria are not satisfied if there are serious reasons for considering that an act *could* be classified as a crime against humanity; it *must* be established that, in law, it definitely was. Art 1F(a) of the Convention is now incorporated by s. 98 of the Canadian Immigration and Refugee Protection Act 2001. See also *Barahona v Wilkinson*, US Ct. Apps, 8th Circ. (3 Feb. 2021): ‘serious reasons for believing’ standard requires a finding of probable cause, and no such finding had been made.

²⁴⁹ *Gonzalez v Minister of Employment and Immigration* [1994] 3 FC 646 (FCA); New Zealand, RSAA, *Refugee Appeal No. 74796* (10 Apr. 2006).

²⁵⁰ International Military Tribunal ([n 247](#)). See also, Brownlie, I., *International Law and the Use of Force by States* (1963) Ch. IX.

²⁵¹ Brownlie ([n 250](#)) 176, 197.

²⁵² *Ibid.*, 195.

²⁵³ Art. 5, 1998 Rome Statute of the International Criminal Court: 2187 UNTS 3; at 30 April 2021, 123 States were party to the Statute. On the international crime of aggression and municipal law, see *R v Jones* [2006] UKHL 16.

²⁵⁴ Review Conference of the Rome Statute of the International Criminal Court, Kampala (31 May–11 June 2010) *Official Records*, doc. RC/11, Part II, 17–22. Art. 8 *bis* provides: ‘1. For the purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, *by a person in a position effectively to exercise control over or to direct the political or military action of a State*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’ Art. 15 *bis/ter* sets out the conditions governing the exercise of jurisdiction (emphasis added).

²⁵⁵ Res. ICC-ASP/16/Res.5 (14 Dec. 2017): doc. ICC-ASP/16/20, Assembly of States Parties to the Rome Statute of the International Criminal Court, 16th Sess. (4–14 Dec. 2017) vol. I, 35. As of 30 April 2021, 41 States had ratified the amendments.

²⁵⁶ Art. 50, 1949 Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (GCI); see also arts. 50, 51, 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GCII); arts. 129, 130, 1949 Geneva Convention relative to the Treatment of Prisoners of War (GCIII); arts. 146, 147, 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV); arts. 11, 85, Additional Protocol I (API). The term ‘war crimes’ is not used in the Conventions, but art. 85 API provides that

grave breaches shall be considered as such: art. 85(5). International humanitarian law also identifies certain ‘terrorist’ crimes; see GCIV, art. 33(1), prohibiting measures of terrorism; API, art. 51(2), prohibiting spreading terror among civilians. See generally, Rikhof, J., ‘War Crimes, Crimes against Humanity and Immigration Law’ (1993) 19 *Imm LR* (2d) 18; and for a detailed analysis of sources relevant to art. 1F(a), and discussion of superior orders, see *SRYY v Minister for Immigration, Multicultural and Indigenous Affairs* [2005] FCAFC 42.

²⁵⁷ ICC Statute, art. 8. para. 1 provides that: ‘The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’

²⁵⁸ ICC Statute, art. 8(2)(b). Additional Protocol I includes attack on or indiscriminate attack affecting the civilian population; attack on those known to be *hors de combat*; population transfers, either of the State’s own population into occupied territory, or of the local population out of occupied territory; and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination; and attacking non-defended localities and demilitarized zones. see Akhavan, P., ‘Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order’ (1993) 15 *HRQ* 262.

²⁵⁹ ICC Statute, art. 8(2)(c). Art. 4 of the 1994 Statute of the International Tribunal on Rwanda also referred to serious violations of Additional Protocol II: Text in SC res. 955 (8 Nov. 1994) Annex. ICC Statute, art. 8(2)(e) nevertheless addresses ‘other serious violations of the laws and customs applicable in armed conflicts not of an international character’, providing a comprehensive list of such acts.

²⁶⁰ 78 UNTS 277; at 30 April 2021, 152 States were party to the Convention.

²⁶¹ 1015 UNTS 243; at 30 April 2021, 109 States were party to the Convention. Under art. 1, States parties declare apartheid to be a crime against humanity, undertake to adopt appropriate legislative and administrative measures to prosecute and punish those responsible, and agree that the acts constituting the crime shall not be considered political crimes. On the relation between war crimes, crimes against humanity, genocide, and apartheid, see generally Ruhashyankiko, N., ‘Study of the Question of the Prevention and Punishment of the Crime of Genocide’: UN doc. E/CN.4/Sub. 2/416 (1978) paras. 377–408.

²⁶² ICC Statute, art. 6.

²⁶³ ICC Statute, art. 7 opens with the qualification, ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. See *AA-R (Iran) v Secretary of State for the Home Department* [2013] EWCA Civ 835, interpreting ‘other inhumane acts’ as implying acts which, by their nature and the gravity of their consequences, should be of comparable or similar character to the other crimes enumerated in art. 7 ICC Statute. Art. 5 of the 1993 Statute of the International Tribunal on Yugoslavia referred to crimes ‘committed in armed conflict, whether international or internal in character, and directed against any civilian population’; and art. 3 of the 1994 Statute of the International Tribunal on Rwanda to crimes ‘committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic,

racial or religious grounds'. Cf. *SK (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 807; *Mugesera v Minister of Citizenship and Immigration* 2005 SCC 40, [2005] 2 SCR 100—persecution by hate speech; *A-H-*, 23 I&N Dec. 774 (AG, 2005)—incitement to the persecution of others; *Equizabal v Minister of Employment and Immigration* [1994] 3 FC 514 (FCA)— claimant, deserter from the Guatemalan army admitted torturing civilians; excluded on ground of crime against humanity and defence of superior orders not made out; New Zealand, RSAA, *Refugee Appeal No. 74302* (26 Jun. 2006); *Refugee Appeal No. 74273* (10 May 2006)—informant for security forces, 'with full knowledge ... that the killings and torture would in all likelihood continue', excluded.

²⁶⁴ Art. 7(2)(g), ICC Statute. On the interpretation and application of the elements of the crime of persecution, see Ch. 3, s. 5.2.1.

²⁶⁵ UNGA res. 74/187, 'Crimes against humanity' (18 Dec. 2019). The ILC also recommended that a convention be elaborated, either by the General Assembly or by an international conference; the General Assembly will return to the matter in 2021: UNGA res. 75/136 (15 Dec. 2020). For the reports of the Special Rapporteur, see UN docs. A/CN.4/680 (2015); A/CN.4/690 (2016); A/CN.4/704 (2017); A/CN.4/725; Add.1 (2019); and for government comments, UN docs. A/CN.4/726; Add.1; Add.2 (2019).

²⁶⁶ Arts. 3, 4, ICC Statute; for the draft articles and commentary, see *Report of the International Law Commission*, 71st Sess. (2019) Ch. IV, 10–140.

²⁶⁷ Art. 5, ICC Statute.

²⁶⁸ Ibid., art. 11.

²⁶⁹ Ibid., art. 13(3).

²⁷⁰ Ibid., art. 13(11).

²⁷¹ See, generally, *Attorney-General of Israel v Eichmann* 36 ILR 277 (Supreme Court of Israel, 1962); *R v Finta* [1994] 1 SCR 701; *In Matter of Demjanjuk*, 603 F. Supp. 1468; aff'd 776 F.2d 571; *Barbie* [1983] *Gazette du Palais. Jurisprudence.* 710 (Cass crim, 6 Oct. 1983). In *Barbie*, the court confirmed the non-applicability of any limitations period with respect to crimes against humanity; for summary in English: <http://www.internationalcrimesdatabase.org/Case/183> (*The Prosecutor v Klaus Barbie*).

²⁷² Judgment of the Nuremberg International Military Tribunal (1947) 41 AJIL 172, 221. In *Sivakumar v Minister of Employment and Immigration* [1994] 1 FC 433 (1993) 163 NR 197, a senior member of the Sri Lankan LTTE was held excluded, the court ruling in a comprehensive judgment that non-governmental entities can commit crimes against humanity. A challenge to removal was upheld on the ground that it would breach the claimant's rights under ss. 7, 12 of the Canadian Charter of Fundamental Rights and Freedoms: [1996] 2 FC 872 (FCA).

²⁷³ See, for example, art. 49, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.

²⁷⁴ See, for example, the UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005); for amendments to 2013, see

<https://www.gov.uk/government/publications/the-manual-of-the-law-of-armed-conflict-amendments-to-the-text>. Grahl-Madsen also considered it reasonable to include within art. 1F(a) anyone guilty of any of the grave breaches identified in the Geneva Conventions: Grahl-Madsen (n 1) 276.

²⁷⁵ Art. 27, ICC Statute. To similar effect, see art. 7(2), 1993 Statute of the International Tribunal on Yugoslavia; art. 6(2), 1994 Statute of the International Tribunal on Rwanda. As noted above, the crime of aggression can *only* be committed by ‘a person in a position effectively to exercise control over or to direct the political or military action of a State’: art. 8bis, above n. 253.

²⁷⁶ Art. 28, ICC Statute. Responsibility is contingent on the superior knowing or having reason to know that the subordinate was about to commit or had committed the crimes in question, and having failed to take reasonable measures to prevent their commission or to punish the perpetrators. See also arts. 7(3) and 6(3) of the Statutes for Yugoslavia and Rwanda, respectively.

²⁷⁷ Art. 33, ICC Statute; cf. art. 6(4), Statute for Rwanda. There was no equivalent provision in the Statute for Yugoslavia; see art. 7.

²⁷⁸ Art. 31(1)(d), ICC Statute. See generally, Werle, G. & Jeßberger, F., *Principles of International Criminal Law* (3rd edn., 2014) 239–44; Ambos, K., *Treatise on International Criminal Law* (2013) Vol. 1, Foundations and General Part, 342–66; Moran, C. F., ‘A Perspective on the Rome Statute’s Defence of Duress: The Role of Imminence’ (2018) 18 *International Criminal Law Review* 154; Moran, C. F., ‘A Comparative Exploration of the Defence of Duress’ (2017) 6 *Global Journal of Comparative Law* 51; also, Immigration and Refugee Board Legal Services, *Interpretation of the Convention Refugee Definition in the Case Law*, Ottawa (Mar. 2019) ‘Duress’, Section 11.2.4.1.

²⁷⁹ AB (n 225) para. 71. On the court’s assessment of the facts, finding that the claimant had given ‘no valid answer’ to the ‘serious reasons for considering’ advanced by the Secretary of State, see paras. 79–80. On proportionality between the harm threatened and the harm inflicted, see Werle & Jeßberger (n 278) 242; Ambos (n 278) 353–4; *Oberlander v Canada (Attorney General)* 2016 FCA 52, para. 19; AB (n 225) para. 79.

²⁸⁰ Cf. *R v Hasan* [2005] UKHL 22, paras. 17–22; *R v Ryan* 2013 SCC 3; *Ezokola v Canada* (n 226) para. 86; *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, para. 70.

²⁸¹ AB (n 225) paras. 55–7, 62; the appellant’s reasons for continuing to perform her duties in a senior role in a women’s prison where political prisoners were detained and tortured had to be carefully measured against the requirements of duress which, on the facts, could not be upheld: *ibid.*, para. 63. Cf. *MH (Syria) v Secretary of State for the Home Department* [2009] EWCA Civ 226; *MAB* (n 222).

²⁸² See *Al-Sirri (Asylum—Exclusion—Article 1F(c))* (n 222)—‘detailed and individualised examination of the facts is required’; *Ezokola v Canada* (n 226) para. 100. For a very full contextual analysis, including possible duress (‘sous la contrainte’), of the asylum claim by a

Syrian military medical doctor who was frequently present in detention centres where torture was carried out, see CNDA (30 octobre 2015) M. A., n° 15000096 C, *Recueil* 2014, 63–7 (duress not established); also, CNDA (18 novembre 2014) M. K., n° 09018932 C+, *Recueil* 2014, 101–5 (exclusion from refugee status); 106–9 (exclusion from subsidiary protection). Cf. on the inapplicability of exclusion to a 13-year old forcibly drafted by FARC, see CRR (26 mai 2005) M. V., n° 03029292/459358 C+; Denis-Linton, Malvasio, & Logeais ([n 37](#)) 153 ('en raison de la situation de particulière vulnérabilité et de contrainte de l'intéressé et eu égard à sa participation uniquement passive à certaines actions violentes').

[283](#) Art. 66, ICC Statute.

[284](#) Apart from its mischaracterization of the standard of proof, the decision of the US Board of Immigration Appeals in *Negusie* 27 I&N Dec. 347, 367 (BIA, 2018) Interim Decision # 3930, is remarkable for its reference to the ICC Statute and to decisions by courts in other jurisdictions. In October 2018, however, the US Attorney General vacated the BIA's decision and referred it to himself for review: 27 I&N Dec. 481 (AG, 2018). That this was not done with a view to bringing US practice closer to the standards of international criminal law was confirmed in the Attorney General's decision of 5 November 2020: 28 I&N Dec. 120 (AG, 2020) ruling that the bar to eligibility for asylum and withholding of removal does not include an exception for coercion or duress. Moreover, if the evidence shows that the bar may apply, then the burden falls on the applicant to prove 'by a preponderance of the evidence' that it does not. This is one of many limits on asylum that remains outstanding and liable to be challenged. For background and critical analysis of the US approach, see Jastram, K., 'Left out of Exclusion: International Criminal Law and the "Persecutor Bar" in US Refugee Law' (2014) 12 *Journal of International Criminal Justice* 1183; also, Romanow, D., 'Recalibrating the Scales: Balancing the Persecutor Bar' (2020) 61 *Boston College Law Review* 385.

[285](#) Art. 67 ICC Statute: the accused is entitled 'not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'. See also AB ([n 225](#)) para. 56: in domestic criminal proceedings, 'the necessary evidential burden does not impose a need for the accused to establish duress on a balance of probabilities'. In exclusion proceedings, the overall burden falls on the Secretary of State to establish that there are serious reasons for considering that the claimant did not act under duress.

[286](#) *Ezokola v Canada* ([n 226](#)) paras. 101–2; Bond, J., 'The Defence of Duress in Canadian Refugee Law' (2016) 41 *Queen's Law Journal* 409.

[287](#) From the CJEU to national courts and tribunals, the jurisprudence consistently rejects organizational membership as sufficient to lead to 'serious reasons'. See, for example, Finland, Supreme Administrative Court (2 Nov. 2018) KHO:2018:147—military membership at the time of the bombing of Homs in Syria cannot automatically equate to commission of war crimes.

[288](#) Judgment of the Nuremberg International Military Tribunal ([n 272](#)) 251. The UK judgment in *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115 was

therefore always on uncertain ground, particularly in its disregard of important caveats in UNHCR's position at the time, and its readiness to rely overmuch on assumptions as to what membership implied. *Gurung* has since been disapproved by the UK Supreme Court in *JS (Sri Lanka)* (n 219) paras. 104-8.

²⁸⁹ Art. 25(3)(c), ICC Statute. Cf. *Commissaire général aux réfugiés et aux apatrides v Lounani* (n 223) paras. 66, 70. See also art. 25(3)(d) on 'common purpose'; Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute* (2016) 576-82; Hathaway, O. and others, 'Aiding and Abetting in international Criminal Law' (2019) 104 *Cornell Law Review* 1593; Ventura, M. J., 'Aiding and Abetting', in de Hemptinne, J., Roth, R., & van Sliedregt, E., eds., *Modes of Liability in International Criminal Law* (2019) 173.

²⁹⁰ *Ezokola v Canada* (n 226) para. 69.

²⁹¹ *Ezokola v Canada* (n 226) para. 84. The Supreme Court listed those factors as including: a voluntary contribution to the crime; a significant contribution; a knowing contribution; an individual's position or rank in the organization; how long the individual was a member, particularly after becoming aware of the organization's crime or criminal purpose; the method by which the individual was recruited and any opportunity which he or she may have had to leave.

²⁹² AS (s.55 'exclusion' certificate—process) *Sri Lanka* [2013] UKUT 00571 (IAC) paras. 91, 98-9; *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, para. 70 (accepting the 'contribution principle' and other elements of liability in arts. 25 and 30, ICC Statute, as 'well established in customary international law'); *B and D* (n 223) paras. 61-3; *Commissaire général aux réfugiés et aux apatrides v Lounani* (n 223) paras. 74-8 (also on acts amounting to participation sufficient to amount to 'serious reasons'); Opinion of Advocate General Sharpston (31 May 2016) paras. 69-74; *MAB* (n 222) (a detailed and individualized examination of the facts ought to have been carried out; doctor's treatment of torture victims was an insufficient basis for a finding of 'significant contribution'). See also, CNDA 30 octobre 2015 M. A. n° 15000096 C, *Recueil* 2015 63-7; CNDA (16 décembre 2016) M. K. n° 16010759 C, *Recueil* 2016 139-41.

²⁹³ See further, Quénivet, N., 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 *EJIL* 433; Bond, J. & Krech, M., 'Excluding the most vulnerable: application of Article 1F(a) of the Refugee Convention to child soldiers' (2016) 20 *International Journal of Human Rights* 567 (arguing that until there is clear international consensus favouring prosecution over protection, child soldiers should not be denied refugee protection on the basis of their involvement in armed conflict, no matter the nature of their specific acts).

²⁹⁴ Art. 8(2)(b)(xxvi)-(e)(vii), ICC Statute; art. 4(c), Statute of the Special Court of Sierra Leone. French jurisprudence has consistently upheld exclusion where the individual had been involved in the recruitment of children under 15 (a war crime), and in the recruitment of older children (a serious non-political crime). See CNDA (29 avril 2013) M. G., n° 12018386 C+: *Recueil* 2013; CNDA (1 février 2017) M. T., n° 16027532 C+: *Recueil* 2017 143-7;

CNDA (20 avril 2017) M. K., n° 12033163 C+: *Recueil 2017* 151–6.

²⁹⁵ Art. 3, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: 2173 UNTS 222; at 30 April 2021, 171 States were party to the Protocol.

²⁹⁶ Among others, see the work of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict: <https://childrenandarmedconflict.un.org>; also, Goodwin-Gill, G. S., ‘The Challenge of the Child Soldier’, in Strachan, S. & Scheipers, S., eds., *The Changing Character of War* (2011) 410; Happold, M., *Child Soldiers in International Law* (2005); Brett, R. & McCallin, M., *Children: The Invisible Soldiers* (2nd edn., 1998); Cohn, I. & Goodwin-Gill, G. S., *Child Soldiers: The Role of Children in Armed Conflict* (1994).

²⁹⁷ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN doc. S/2000/915 (4 Oct. 2000) 7–8; Statute of the Special Court, arts. 7, 15(5): *ibid.*, 21–9. The French *Commission des recours* recognized that children who have committed offences which make them liable to exclusion may be exonerated, if they were in a particularly vulnerable situation: CRR (28 avril 2005) 459358, M. V. (Colombie—mineur contraint par les FARC de participer à différentes actions); CRR (28 janvier 2005) 448119, M. C. (Sierra Leone). See also art. 31, ICC Statute (defence of duress). For further discussion of the ‘age issue’, see Happold, M., ‘Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention’ (2002) 17 *American University International Law Review* 1131, 1148; also, Gallagher, M. S., ‘Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum’ (2001) 13 *IJRL* 310.

²⁹⁸ *Minister for Immigration & Multicultural Affairs v Singh* (2002) 209 CLR 533, [2002] HCA 7. The Conseil d’Etat held in the past that crimes committed in France did not permit exclusion under art. 1F(b); see n° 165525 (25 septembre 1998) M. R. Under current law, however, refugee status may be refused or terminated if the presence of the person concerned in France constitutes a serious threat to security. Also, if the person concerned has been convicted by final judgment in France, in an EU Member State, or in another State listed by decree, ‘soit pour un crime, soit pour un délit constituant un acte de terrorisme ou puni de dix ans d’emprisonnement, et sa présence constitue une menace grave pour la société française’: CESEDA, art. L. 711–6.

²⁹⁹ Art. 12(2)(c), Qualification Directive (recast) interprets ‘prior to admission as a refugee’ to mean, ‘the time of issuing a residence permit based on the granting of refugee status’.

³⁰⁰ The 1936 provisional agreement on German refugees, for example, proposed limiting expulsion to reasons of national security or public order: art. 4(2); text in 171 *LNTS* No. 3952; see also art. 5, 1938 Convention concerning the Status of Refugees coming from Germany: 192 *LNTS* No. 4461. The UK made a reservation to the effect that refugees subject to extradition proceedings commenced in the UK were not to be regarded as entitled to claim protection; and declared that ‘public order’ included matters relating to crime and morals.

³⁰¹ The IRO’s *Eligibility Manual* included the following extradition crimes: murder,

poisoning, rape, arson, forgery, issuing counterfeit money, perjury, theft, bankruptcy, receiving stolen goods, embezzlement, bigamy, assault, grave injury, and malicious destruction.

³⁰² Para. 7(d) excludes those whom there are serious reasons for considering have ‘committed a crime covered by the provisions of treaties of extradition’.

³⁰³ See Rasulov, A., ‘Criminals as Refugees: The “Balancing Exercise” and Article 1F(b) of the Refugee Convention’ (2002) 16 *Georgetown Immigration Law Journal* 815, 817–8, who wonders, not unreasonably but too late, whether art. 1F(b) is so ambiguous as to justify recourse to the *travaux préparatoires* in accordance with art. 32, 1969 Vienna Convention on the Law of Treaties.

³⁰⁴ See UN doc. A/CONF.2/SR.24, 4.

³⁰⁵ Ibid., 5.

³⁰⁶ Ibid., 9–16.

³⁰⁷ Ibid., 13 (Denmark). See also Sir Leslie Brass (UK) in the *Ad hoc* Committee, commenting on the precursor to art. 33: UN doc. E/AC.32/SR.40, 30–1.

³⁰⁸ UN doc. A/CONF.2/SR.29, 11–12.

³⁰⁹ Ibid., 17–24. Overall, the summary records reveal shared concerns, but little consensus. The Netherlands thought it illogical to exclude common criminals from the benefits of the Convention, but appropriate that they should not enjoy the right of asylum. Belgium thought there should be no denial of refugee status to a person simply because of conviction for a criminal offence, but that some reference to extradition was called for: ibid., 12–14.

³¹⁰ Cf. *AH (Algeria) v Secretary of State for the Home Department* [2013] UKUT 382, para. 86. On art. 33(2), see further Ch. 5, s. 3.2.

³¹¹ Whatever may have been the legal situation in 1951, later developments in treaty law and the practice of States have confirmed that the principle of *non-refoulement*, which covers expulsion or return ‘in any manner whatsoever’, also includes extradition; and that a refugee should not be extradited to a country in which he or she may be persecuted for Convention reasons. See Ch. 5, s. 3.3.3.

³¹² UNHCR, *Handbook* (n 1) paras. 151–61, at 157; see now also UNHCR, Guidelines No. 5 (n 211) para. 23.

³¹³ Cf. UNHCR, *Handbook* (n 1) para. 149: ‘Considering the serious consequences of exclusion for the person concerned, ... the interpretation of these exclusion clauses must be restrictive’. This position is determined by the overall approach to the refugee definition, which supposes that a person must first be found to satisfy the ‘inclusion’ provisions of art. 1A(2) (that is, to have a well-founded fear of persecution), before he or she can be considered as excluded under any of the subsequent provisions. In practice, the two issues frequently run together, and separation becomes quite arbitrary. See also, Kosar, D., ‘Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say’ (2013) 25 *IJRL* 87.

³¹⁴ Simentić, J., ‘To exclude or not to exclude, that is the question. Developments regarding

bases for exclusion from refugee status in the EU' (2019) 20 *German Law Journal* 111; Bolhuis, M. P. & Van Wijk, J., 'Alleged Terrorists and Other Perpetrators of Serious Non-Political Crimes: The Application of Article 1F(b) of the Refugee Convention in the Netherlands' (2016) 29 *JRS* 19; Guild E. & Garlick, M., 'Refugee Protection, Counter-terrorism, and Exclusion in the European Union' (2011) 29(4) *RSQ* 63; Conseil d'Etat, 10ème—9ème CR, n° 402242 M. A. (11 avril 2018); *B and D* (n 223) paras. 81, 83.

³¹⁵ A similar view is advanced by Tiberghien (n 37) 103. The French representative at the 1951 Conference, however, seems to have been pressing for a wider discretion to deny refugee status to common criminals. In *Attorney General v Ward* [1993] 2 SCR 689, the Supreme Court of Canada inclined to the view that art. 1F(b) was confined to accused persons who are fugitives from prosecution, as consistent with the *travaux préparatoires*. Rikhof doubts that this interpretation stands scrutiny, a reading of the *travaux* showing that they are nebulous at best: Rikhof, 'War Crimes' (n 256). See now *Zrig v Minister of Citizenship and Immigration* [2003] 3 FC 761 (2003) 229 DLR (4th) 235 (Federal Court of Appeal).

³¹⁶ Grahl-Madsen (n 1) 291 ff.

³¹⁷ For example, the 1843 treaty between France and Great Britain dealt with 'Murder (comprehending the Crimes designated in the *French Penal Code* by the Terms Assassination, Parricide, Infanticide, and Poisoning), or of an Attempt to commit Murder, or of Forgery, or of fraudulent Bankruptcy ... ': Extradition Act 1843. The 1870 Extradition Act, in force when the 1951 Convention was drafted, contained a longer list of offences, with more financial crimes, such as embezzlement, obtaining money by false pretences, crimes against bankruptcy law, and fraud, but also adding, among others, rape, abduction, child stealing, burglary, arson, robbery with violence, threats with intent to extort, piracy, and various other offences on the high seas: Schedule 1; bribery was added in 1906. With the Extradition Act 1989, extraditable offences came to be defined in terms of liability to imprisonment for twelve months or more: s. 2; and under the Extradition Act 2003, s.148, an extradition offence in relation to the United Kingdom includes one in respect of which a 'sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment' has been imposed. See also Australia, Extradition Act 1988, s. 5—offences for which the maximum penalty is death or imprisonment or other deprivation of liberty for not less than 12 months; 1957 European Convention on Extradition, art. 2—at least one year; 1981 Inter-American Convention on Extradition, art. 3(1)—not less than two years of deprivation of liberty.

³¹⁸ See further s. 4.2.2.

³¹⁹ See *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 158 ALR 289 (Branson JA at 300; Whitlam JA at 294—both referring to 'ordinary meaning'; Sackville JA at 302–4); *Zrig* (n 315) paras. 65–7, 83–4, 123–4 (referring to and agreeing with the second edition of this work). Cf. *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431, paras. 48, 59.

³²⁰ Zrig ([n 315](#)) 67, 125–6.

³²¹ See s. 4.1.

³²² See 1968 Convention on the Non-Applicability of Statutory Limitations of War Crimes and Crimes against Humanity: 754 UNTS 73; in force November 1970; also, art. 1, 1975 Additional Protocol to the European Convention on Extradition: ETS No. 86.

³²³ In part, accountability may be increased by an approach on the part of decision-makers that focuses on the individual in the context of the offence and on all the relevant circumstances, provided at least that the assessment and evaluation do not become formulaic. However, the difficulty of supervising security-driven measures should not be underestimated; see, for example, *A v Secretary of State for the Home Department* [2005] 2 AC 68, [2004] UKHL 56; *Secretary of State for the Home Department v M* [2004] EWCA Civ 324; *Suresh v Minister of Citizenship and Immigration* [2002] 1 SCR 3, (2002) 208 DLR (4th) 1; *Ahani v Minister of Citizenship and Immigration* [2002] 1 SCR 72, (2002) 208 DLR (4th) 57; Barak, A., ‘A Judge on Judging: the Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 16, 158; Türk, V., ‘Forced Migration and Security’ (2003) 15 *IJRL* 113.

³²⁴ See, for example, UN docs. A/CONF.2/SR.24, 5, 10 (France); SR.29, 12 (the Netherlands).

³²⁵ Contracting States are not therefore free to adopt their own definition of serious crime for art. 1F(b) purposes; *AH (Algeria) v Secretary of State for the Home Department* ([n 229](#)) para. 30.

³²⁶ At the Conference of Plenipotentiaries, the President, Mr Larsen, said that it would be ‘for the country of refuge to strike a balance between the offences committed ... and the extent to which [the] fear of persecution was well-founded’: UN doc. A/CONF.2/SR.29, 23; cf. Weis, P., ‘The concept of the refugee in international law’ (1960) 87 *Journal du droit international* 1, 30.

³²⁷ Cf. Grahl-Madsen ([n 1](#)) 294.

³²⁸ Cf. s. 101(1)(f) of the Canadian Immigration and Refugee Protection Act, which excludes from the refugee status procedure any individual who has been convicted in Canada of an offence punishable with a term of imprisonment of ten years or more and a sentence of at least two years has been imposed; and, in the case of convictions outside Canada, where the Minister is of the opinion that the person is a danger to the public in Canada and the conviction is for an offence which, if committed in Canada, would be punishable by a maximum sentence of at least ten years’ imprisonment. See *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 296, 297, in which the New Zealand Court of Appeal indicated that exclusion under art. 1F(b) is directed towards offending, ‘in the upper end of the scale, which is likely to attract a severe penalty, at least in the nature of imprisonment for an appreciable period of years’. It added that: ‘To classify any crime as serious requires an evaluation not only of the elements which form the crime, but also of its facts and circumstances, as well as the circumstances of the offender which are relevant for the

purposes of the criminal law.'

³²⁹ See *Ibrahim Ali Abubaker Tantoush v Refugee Appeal Board and Others*, 13182/06, South Africa, High Court (14 Aug. 2007) paras. 114, 115: 'The theft of gold would not fall into the category justifying exclusion; but theft in which violence or the threat of violence is used to induce the possessor of the gold to submit to its taking and where that is achieved through the aggravating circumstance of a firearm (armed robbery) would.' In *Zrig* (n 315) para. 21, the court noted that the group with which the appellant was associated had committed twelve crimes which could be characterized as serious non-political crimes, all of which involved violence to individuals or to property (bomb attacks, arson, conspiracy to assassinate, etc.). See also, *Immigration and Naturalization Service v Aguirre-Aguirre*, 526 US 415, 119 S. Ct. 1439 (1999)—In determining whether the political aspect outweighs the common law character of the offence, it may be necessary to consider whether there is a gross disproportion between means and ends, and whether atrocious acts are involved.

³³⁰ See Ch. 3, s. 5.5.2. If clear judicial guidance on 'political offence' seems lacking, this is because the issues tend to arise in different judicial contexts. See Lord Mustill, *T v Secretary of State for the Home Department* [1996] AC 742, 773D—in extradition cases, 'the political nature of the offence is an exception to the general duty to return the fugitive, whereas in relation to asylum there is a general duty *not* to perform a refoulement unless the crime is non-political'. In such proceedings, the offence is an indicator of the opposition or conflict between the individual and the State. In different situations, that opposition need to be established by other means, including the political environment and the 'politics' of the offence.

³³¹ *T v Secretary of State for the Home Department* [1996] AC 742, 775–6: Lord Slynn saw no reason to limit political crimes to those committed *against* the government. See also *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721, paras. 93–7, where the New Zealand Supreme Court upheld the political character of criminal conduct that involved scuttling a ship in the course of a voyage intended to support the armed capacity of the LTTE in Sri Lanka. It had not involved indiscriminate violence against civilians and the overall political purpose was not too remote. Cf. Kälin, W. & Künzli, J., 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes' (2000) 12 *IJRL* Special Supplementary Issue, 46, 65; also, Australia, Migration Act, s. 91T(1), defining a political crime as a crime where the individual's motives were wholly or mainly political in nature, and subject to exceptions listed in s. 91T(3); *Minister for Immigration and Multicultural Affairs v Singh* [2002] HCA 7.

³³² This was cited with approval by the Court of Appeals in *McMullen v INS*, 788 F.2d 591, 597 (9th Cir. 1986). See also, Qualification Directive (recast), art. 12(2)(b); CRR, Sections réunies, 9 janvier 2003) n° 362645, M.A.—founding member of the PKK excluded on ground of serious reasons to consider he had participated in decisions leading to the commission of serious non-political crimes, including the use of terrorist methods against the civilian population and in the absence of evidence of disassociation from the aims and methods of the organization. French jurisprudence now consistently finds the recruitment of

children over 15 to be ‘une crime grave de droit commun’: CNDA (29 avril 2013) M. G. n° 12018386 C, *Recueil* 2013 ([n 38](#)) 108.

[333](#) See, for example, art. 16, 1963 Tokyo Convention on Offences and Certain other Acts committed on board Aircraft; art. 7, 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; art. 7, 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; art. 7, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; art. 3, 1957 European Convention on Extradition; art. 5, 1977 European Convention on the Suppression of Terrorism; art. 9, 1979 United Nations Convention on the Taking of Hostages; art. 9, 1971 OAS Convention to prevent and punish Acts of Terrorism taking the form of Crimes against Persons and related Extortion that are of International Significance; art. 5, 1981 OAS Inter-American Convention on Extradition. See further below on recent action with regard to terrorism and its impact on refugees and asylum seekers.

[334](#) For its final report on the obligation to extradite or prosecute, see ILC, *Report on the Work of its 66th Sess.*, Vol. II, Pt. Two, Ch. VI, 91–105; also, UNGA res. 69/118 (10 Dec. 2014) para. 3, encouraging its ‘widest possible dissemination’.

[335](#) See generally, Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’, in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 199.

[336](#) Djordjevic, N., ‘Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes’ (2014) 12 *Journal of International Criminal Justice* 1057. Cf. Grahl-Madsen ([n 1](#)) 289–99.

[337](#) See *R (Mahmood) v Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWCA Civ 717, a non-refugee case concerning whether a person had been convicted of an offence that had caused ‘serious harm’. In the view of the court, the word ‘serious’ qualified the extent of the harm, and an evaluative judgment had implicitly to be made in the light of the facts and the circumstances of the offending. There could be no general and all-embracing test of seriousness, and in the particular statutory scheme—Nationality, Immigration and Asylum Act 2002, s. 117D(2)—the burden was on the Secretary of State to prove each element on a balance of probability; although his or her views might be a starting point, the question was ultimately one for the tribunal.

[338](#) See *Prosecutor v Kupreskic*, ICTY, Case No. IT-95-16, Trial Chamber (14 Jan. 2000) para. 852: ‘The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.’ Cited in Rasulov ([n 303](#)) 819. See CNDA (22 juillet 2013) M. M., n° 09015396 C+, *Recueil* 2013 ([n 38](#)) 110, where the court factored recidivism and the continuing anti-social and violent attitude of the claimant into its assessment of the seriousness of the crime committed.

[339](#) This list, of course, is by no means exclusive, but draws on the sorts of offences in fact admitted or established by the asylum seekers themselves, in interviews with US officials.

³⁴⁰ Mere possession of marijuana for personal use was not considered to amount to a serious non-political crime. Cf. Gottwald, M., ‘Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(b) of the 1951 Convention relating to the Status of Refugees and the UN Drug Conventions’ (2006) 18 *IJRL* 81.

³⁴¹ For further details, see the third edition of this work, 179–80.

³⁴² UNHCR, Guidelines No. 5 ([n 211](#)) para. 24.

³⁴³ See s. 5.2.1.

³⁴⁴ *Pushpanathan* ([n 18](#)) para. 73; *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721, para. 82. On the interpretation and application of the exceptions to *non-refoulement* in art. 33(2), see [Ch. 5](#), s. 3.2.

³⁴⁵ For reasons set out below, this terminology perhaps describes more accurately than ‘balancing’ what ought to occur in certain exclusion hearings.

³⁴⁶ Art. 3; see also art. 4(4), 1981 Inter-American Convention on Extradition—denial of extradition when, ‘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 these reasons’. Cf. *Fernandez v Government of Singapore* [1971] 1 WLR 987, discussed in [Ch. 2](#), s. 3, s. 3.

³⁴⁷ Extradition Act 2003, ss. 13, 81.

³⁴⁸ *Ibid.*, ss. 21, 87, 94.

³⁴⁹ Art. 33(2) of the Convention, of course, is not in fact about ‘exclusion’, an art. 1F matter, but about a limited exception to the principle of *non-refoulement*; see further [Ch. 5](#), s. 3.2. Cf. EU Qualification Directive (recast), arts. 12, 14.

³⁵⁰ S. 72(2); ss. 72(3) and 72(4) provide for equivalent presumptions in relation to conviction and sentence outside the UK, and in relation to such other offences as may be specified or certified by the Secretary of State. At no time has the UK Government shown any empirical justification for the additional penalization of refugees, for example, by reference to above average criminality.

³⁵¹ The government admitted at the time that the legislation was intended to do away with the proportionality test: Lord Rooker, *Hansard*, HL 629, col. 1253.

³⁵² Joint Committee on Human Rights, *The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, HL Paper 190/HC1212 (2004) 14–15; see also at 8–12 on the ‘proper interpretation’ of art. 33(2), CSR 51.

³⁵³ *Ibid.*, 11.

³⁵⁴ See the Anti-Terrorism and Effective Death Penalty Act 1996, Pub. L. No. 104–32, 110 Stat. 1214 (1996); and the Illegal Immigration Reform and Immigrant Responsibility Act 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996). During the Trump administration, US asylum law (and immigration generally) faced major revisions and cut-backs; see <https://immpolicytracking.org/>; Schoenholtz, A., Ramji-Nogales, J., & Schrag, P., *The End of Asylum* (2021).

³⁵⁵ 8 USC § 1158(b)(2)(A)(ii), 8 USC § 1158(b)(2)(B)(i).

³⁵⁶ 8 USC § 1231(b)(3)(B). See *L-S-*, 22 I&N Dec. 645 (BIA, 1999), holding that an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction is required, and finding that an alien convicted of bringing a foreign national illegally into the country and sentenced to three-and-a-half months' imprisonment had not, in the circumstances, been convicted of a particularly serious crime and was eligible to apply for withholding of removal.

³⁵⁷ *Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (BIA, 2002).

³⁵⁸ In *A-H-*, 23 I&N Dec. 774 (AG, 2005), the Attorney General ruled that the phrase 'danger to the security of the United States' means any non-trivial risk to the nation's defense, foreign relations, or economic interests.

³⁵⁹ 8 USC § 1227(a)(4)(B), dealing with 'terrorist activities', states that any alien described in 8 USC § 1182(a)(3) is deportable. This in turn provides in part that 'terrorist activity' is 'any activity which is unlawful ... which involves ... [using an] explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly the safety of one or more individuals or to cause substantial damage to property': 8 USC § 1182(a)(3)(B)(iii)(V)(b). In *McAllister v Attorney General*, 444 F.3d 178 (3d Cir. 2006), the Court considered that, while 'certainly broad', the definition was 'neither vague nor overbroad in that it does not infringe on constitutionally protected behavior'. Moreover, the qualification 'personal monetary gain' removed common crimes from the category, while further protection lay in the requirement of specific intent to endanger the safety of individuals or to cause substantial damage to property.

³⁶⁰ 8 USC § 1101(a)(43)(F); 1182(a)(2)(A)(i)(I), and 1182(a)(2)(B).

³⁶¹ 8 USC § 1231(b)(3)(B). In a concurring opinion in *McAllister v Attorney General* (ⁿ 359), Barry J strongly regretted that the law was drawn too broadly, bearing 'no relation to any common-sense understanding of what "terrorist activity" really is or should be', and that it did not allow consideration to be given to whether the Appellant was now a threat to anyone or to national security.

³⁶² The reluctance of courts in some jurisdictions to apply the proportionality test may reflect a measure of deference in national security matters, and recognition also that, in matters of judicial review, there is little opportunity to reassess findings and matters of fact; however, that does not except first instance decision-makers from examining all the circumstances.

³⁶³ Cf. art. 28(2), EU Directive on Temporary Protection, requiring that the grounds for exclusion, 'shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality'.

³⁶⁴ *B and D* (ⁿ 223) paras. 100–5, 106–9. The Court agreed with the view of several governments that exclusion under these grounds was, 'intended as a penalty for acts committed in the past': para. 103.

³⁶⁵ *Ibid.*, paras. 101, 109. This was clearly recognized at an earlier stage of proceedings in

AH (Algeria) v Secretary of State for the Home Department ([n 229](#)) para. 38.

[366](#) Cf. CE (4 mai 2011) OFPRA c./ M. H., n° 320910 B: Denis-Linton, Malvasio, & Logeais ([n 37](#)) 160—protection may be available after conviction but not on the ground of sentence served alone; all the circumstances must be considered in determining whether, by reason of the serious non-political crimes committed, the individual is a danger or threat.

[367](#) *AH (Algeria) v Secretary of State for the Home Department (UNHCR intervening)* [2015] EWCA Civ 1003, para. 20.

[368](#) Ibid., para. 32.

[369](#) *Febles v Canada (Citizenship and Immigration)* 2014 SCC 68, [2014] 3 SCR 431.

[370](#) Ibid., paras. 16–18.

[371](#) Ibid., para. 74; even so, assessments will still need to have been made regarding culpability and responsibility.

[372](#) Cf. *B and D* ([n 223](#)) paras. 116–20, on ‘another kind of protection’.

[373](#) For example, a ‘mercy killing’ may yet be ‘serious’, but given the circumstances, not such as likely to be repeated or indicative of a risk to the community.

[374](#) See *MS (India) v Secretary of State for the Home Department* [2017] EWCA Civ 1190; *Tanvir Babar v Secretary of State for the Home Department* [2018] EWCA Civ 329.

[375](#) IRO Constitution ([n 2](#)) Annex I, Pt. II. See also Annex I, General Principles, para. 1(d): ‘It should be the concern of the Organization to ensure that its assistance is not exploited in order to encourage subversive or hostile activities directed against the Government of any of the United Nations.’ IRO, *Manual for Eligibility Officers* (s.d.) 39. IRGUN, for example, was classified as a terrorist organization: *ibid.*, para. 64. With respect to the second category of excludables, the practice was to concentrate on leaders, not subordinates or followers: *ibid.*, 40.

[376](#) UN doc. A/CONF.2/SR.29, 20–1, 27.

[377](#) UN doc. A/CONF.2/SR.24, 5; SR.29, 11–12. In debate in the Social Committee, the French representative also considered that those guilty of genocide were covered: UN doc. E/AC.7/SR.160, 15. He later added that the provision was not aimed at the ordinary individual, ‘but at persons occupying government posts, such as heads of State, Ministers and high officials’: SR.166, 6. The US representative mentioned collaborators: SR.160, 16; and the representative of the UN Secretariat was of opinion that it referred to those who violated human rights without committing a crime: SR.166, 9.

[378](#) See UN doc. A/CONF.2/SR.29, 12 (United Kingdom); UN doc. E/AC.7/SR.160, 16 (Canada); Grahl-Madsen ([n 1](#)) 283.

[379](#) Simma, B. and others, eds., *The Charter of the United Nations: A Commentary* (3rd edn., 2012).

[380](#) See now 8 USC §1231(a)(3)(B)(i), which provides that the benefit of *non-refoulement* shall not apply if the Attorney General decides that, ‘the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race,

religion, nationality, membership in a particular social group, or political opinion'. Also, 8 CFR § 208.13(c)(2)(E), which includes such involvement in persecution as a basis for mandatory denial of asylum.

³⁸¹ Immigration and Refugee Protection Act, s. 35, provides for inadmissibility on grounds of violating human or international rights in the case of, among others, a permanent resident or foreign national who has committed an offence outside Canada referred to in ss. 4–7 of the Canadian Crimes Against Humanity and War Crimes Act; or who is a 'prescribed senior official' in a government that, 'in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity ...' Inadmissibility in the second case may be waived if the individual satisfies the Minister that their presence in Canada would not be detrimental to the national interest. See further, Dauvergne & Kaushal ([n 21](#)); Bond, Benson., & Porter ([n 226](#)); Zambelli, 'Problematic Trends' ([n 226](#)).

³⁸² See also, art. 29 UDHR 48; art. 54, EU Charter of Fundamental Rights; art. 29, 1969 American Convention on Human Rights; art. 16, *Grundgesetz 1949* (Constitution of the Federal Republic of Germany); Daes, E.-I., 'Study of the Individual's Duties to the Community and the Limitations of Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights': UN doc. E/CN.4/Sub.2/432/Rev.1 (1980); [Ch. 3](#), s.5.5.2, and s. 5.4.4.

³⁸³ UNHCR, *Handbook* ([n 1](#)) paras. 162–3; also, UNHCR, Guidelines No. 5 ([n 211](#)) para. 17. The Court of Appeal has relied on SC res. 2178 (2014) as reason to disregard the 2003 position: *Youssef v Secretary of State for the Home Department* [2018] EWCA Civ 933, paras. 61–3.

³⁸⁴ Cf. Grahl-Madsen ([n 1](#)) 282–3, 286; Köfner, G. & Nicolaus, P., *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* (1986) 330.

³⁸⁵ VG Ansbach (17 Oct. 1972) Nr. 2735-II/72, cited in Köfner & Nicolaus ([n 384](#)) 330, n 75.

³⁸⁶ VG Ansbach (18 Apr. 1973) Nr. 2907-II/72, cited in Köfner & Nicolaus ([n 384](#)) 330 f, n 75. The applicant had been involved in transporting arms for the PFLP. In the view of the court, this had supported his organization in the escalation of the conflict with Israel. It found further that this organization was involved in terror and sabotage from Lebanon into Israel, and that this was contrary to the purposes and principles of the United Nations, specifically, peaceful co-existence and peaceful settlement of disputes.

³⁸⁷ BVerwG (1 Jul. 1975) I C 44.68. The applicant illegally purchased two loaded pistols for two fellow nationals; he ought to have known that they might have been used for political killings in Croatia. He was convicted and fined, and his application for asylum was initially refused on the ground that his offence had been contrary to the purposes and principles of the United Nations, in that it was likely to disturb German/Yugoslav relations. However, the Federal Administrative Court ruled that art. 1 of the UN Charter was concerned with inter-State, that is, international relations; and art. 2 was directed to the UN Organization and its

Members; neither area was affected by the applicant's offence.

³⁸⁸ See Tiberghien ([n 37](#)) 106, 256.

³⁸⁹ CRR 18 juillet 1986 *Duvalier* n° 50265 (emphasis added); Tiberghien ([n 37](#)) 262–3. The Conseil d'Etat agreed: CE 10/3 SSR (31 juillet 1992) *Duvalier*, n° 81963; see also CE 10/ 3 SSR (31 juillet 1992) *Mme. Duvalier* n° 81962—the claimant's fear of persecution was the consequence of the serious human rights violations committed by security forces under the responsibility of her husband, and not of any political opinion of her own or of any other Convention reason.

³⁹⁰ See Conseil d'Etat (25 mars 1998) M.M., n° 170172, finding error of law where the Commission des recours excluded a former official, 'du seul fait de l'adhésion à un régime politique qu'aurait impliqué l'exercice de certaines fonctions publiques ... sans rechercher si l'intéressé s'était personnellement rendu coupable d'agissements contraires aux buts et principes des Nations unies': *Les grandes décisions du Conseil d'Etat et de la Cour nationale du droit d'asile sur l'asile* (2009) 28; see also, Tiberghien ([n 37](#)) 470.

³⁹¹ *Pushpanathan* ([n 18](#)) paras. 63–5 (L'Heureux-Dubé, Gonthier, McLachlin, and Bastarache JJ; emphasis added). The Court added that the 'connection between persecution and the international refugee problem' is what justifies exclusion in art. 1F(a) and (c): para. 74.

³⁹² In *Al-Sirri*, which involved allegations of involvement in 'terrorist' acts, the UK Supreme Court approved UNHCR's 'appropriately cautious and restrictive approach' in para. 17 of the Exclusion Guidelines: 'Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category': *Al-Sirri* ([n 221](#)) para. 38.

³⁹³ Sivakumaran, S., 'Exclusion from Refugee Status: The Purposes and Principles of the United Nations and Article 1F(c) of the Refugee Convention' (2014) 26 *IJRL* 350, 381. Historically, there are also good grounds for requiring art. 1F(c) to be linked to *criminal conduct*. Art. 14(2) UDHR 48 states expressly that the benefit of the right to seek and enjoy asylum, '[m]ay not be invoked in the case of *prosecutions* genuinely arising ... from acts contrary to the purposes and principles of the United Nations'. See also, McKeever, D., 'Evolving Interpretation of Multilateral Treaties: "Acts Contrary to the Purposes and Principles of the United Nations" in the Refugee Convention' (2015) 64 *ICLQ* 405; Hathaway & Foster ([n 1](#)) 586–98.

³⁹⁴ Conseil d'Etat, 10ème—9ème CR, n° 410897, M. B. A. (11 avril 2018): exclusion depends on there being serious reasons to think that part of the responsibility for the acts in question is attributable personally to the person concerned ('peut être imputée personnellement au demandeur d'asile').

³⁹⁵ See the *Lounani* case ([n 223](#)), discussed below.

³⁹⁶ CE 7 juin 2017 OFPRA c. Mme K. n° 396261 B. Although it is not mentioned in the

decision, the Conseil d'Etat may have taken into account the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents: 1035 UNTS 167 (as at 30 April 2021, 180 States were party); see Wood, M. C., ‘[The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents](#)’ (1974) 23 *ICLQ* 791—noting that the Convention does *not* affect whether to extradite political offenders or nationals, but leaves it to national law to decide (art. 8).

³⁹⁷ *Applicant (former Libyan Ambassador to Malta) vs. Dutch State Secretary for Security and Justice*, AWB 13/7809, Rechtbank Den Haag (7 Feb. 2014). The court relied on para. 98 of *B and D* ([n 223](#)).

³⁹⁸ CNDA (20 avril 2017) M. K., n° 12033163 C+, *Recueil* 2017 ([n 39](#)) 151–6: recruitment of children for combat both a serious non-political crime and an act within art. 1F(c).

³⁹⁹ Cf. CE 27 novembre 2020 OFPRA c. M. A. n° 428703 C *Recueil* 2020 131, in which the Conseil d'Etat upheld the CNDA's finding that an officer's simple presence in a conflict zone did not raise serious reasons to consider he was responsible for repression of the population. Also similarly, CE 19 juin 2020 OFPRA c. M. A. n° 431731 C *Recueil* 135: no decision-making power.

⁴⁰⁰ The connection to the drugs trade was rejected by the Court in *Pushpanathan* ([n 18](#)) para. 74, as not being linked, by international consensus, to ‘a serious violation of fundamental human rights amounting to persecution’. The CNDA in France has not been so reticent, finding that involvement in trafficking and prostitution was sufficient to justify exclusion under art. 1F(c): CNDA 20 août 2019 M. A. n° 18052314 C+: *Recueil* 2019, 118–20. It has also excluded an applicant convicted and sentenced by the ICC for suborning witnesses, given the ‘lien indéfectible entre les objectifs de la Cour pénale internationale et les buts et principes des Nations unies’. The assault on the administration of justice, ‘nuit à la crédibilité et à l'intégrité des témoignages qui constituent le moyen de preuve privilégié devant les instances pénales internationales’: CNDA 17 janvier 2020 M. A. n° 18035545 R: *Recueil* 2020, 139–42.

⁴⁰¹ See further s. 5.4.5.

⁴⁰² See Pecic, J., ‘Armed Conflict and Terrorism: There is a (Big) Difference’, in Salinas de Frías, A. M., Samuel, K. L. H., & White, N., *Counter-Terrorism: International Law and Practice* (2012) 171; ‘Terrorism and Refugee Protection’ (2011) 29(4) *RSQ*; Guild E. & Garlick, M., ‘Refugee Protection, Counter-Terrorism, and Exclusion in the European Union’ (2011) 29(4) *RSQ* 63; Singer, S., ‘Terrorism and Article 1F(c) of the Refugee Convention: Exclusion from Refugee Status in the United Kingdom’ (2014) 12 *Journal of International Criminal Justice* 1075; Juss, S. S., ‘Terrorism and the Exclusion of Refugee Status in the UK’ (2012) 17 *Journal of Conflict and Security Law* 465; Syring, T., ‘Protecting the Protectors or Victimizing the Victims Anew? “Material Support of Terrorism” and Exclusion from Refugee Status in U.S. and European Courts’ (2011–2012) 18 *ILSA Journal of International and Comparative Law* 597.

⁴⁰³ Art. 30, UDHR 48; see also art. 29.

⁴⁰⁴ Art. 17, ECHR 50; see also art. 18.

⁴⁰⁵ The 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, states that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments: UN doc. A/CONF.157/23 (12 Jul. 1993) section I, para. 17.

⁴⁰⁶ Joint Statement: UN doc. E/CN.4/2004/4, ‘Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights’, Annex I (5 Aug. 2003). See also ‘Report of the Policy Working Group on the United Nations and Terrorism’: UN doc. A/57/273, S/2002/875 (6 Aug. 2002) para. 14; for membership of the Working Group, see para. 3.

⁴⁰⁷ UNGA res. 49/60, ‘Measures to eliminate international terrorism’ (9 Dec. 1994) Section I, para. 3; see also UNGA res. 51/210, ‘Measures to eliminate international terrorism’ (17 Dec. 1996) Annex: ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’. In *Al-Sirri v Secretary of State for the Home Department* ([n 221](#)) para. 39, the UK Supreme Court noted that: ‘The essence of terrorism is the commission, organisation, incitement or threat of serious acts of violence against persons or property for the purpose of intimidating a population or compelling a government or international organisation to act or not to act in a particular way.’

⁴⁰⁸ See, generally, Saul, B., *Defining Terrorism in International Law* (2006); Sub-Commission on the Promotion and Protection of Human Rights, ‘Terrorism and human rights’, Progress report prepared by Ms Kalliopi K. Koufa, Special Rapporteur: UN doc. E/CN.4/Sub.2/2001/31 (27 Jun. 2001) paras. 24–101. In debate in the General Assembly in 1996, many States stressed the need for a definition which distinguished terrorism from the ‘legitimate defence’ of rights. Cf. UN Press Release GA/L/3008 (4 Oct. 1996).

⁴⁰⁹ See UNGA res. 75/145, ‘Measures to eliminate international terrorism’ (15 Dec. 2020) para. 25—as it had done in previous years, the General Assembly recommended that the Sixth Committee establish a working group to finalize drafting the comprehensive convention and settle the question of a possible high-level conference under UN auspices. See also UNGA res. 74/194 (18 Dec. 2019) and the oral report of the working group: UN doc. A/C.6/74/SR.34, paras, 1–10; UN Press Release GA/L/3566 (3 Oct. 2018).

⁴¹⁰ Note, however, the view of the UK Supreme Court that the phrase ‘acts contrary to the purposes and principles’ must have an ‘autonomous meaning’ in international law, and that States are not free to adopt their own definitions of terrorism for use in an interpretative context directly tied to treaty and general international law: *Al-Sirri v Secretary of State for the Home Department* ([n 221](#)) para. 36. See also *Youssef v Secretary of State for the Home Department* [2018] EWCA Civ 933, paras. 84, 95.

⁴¹¹ The Appendix to the Report of the Policy Working Group ([n 405](#)) lists some 19 global

or regional treaties relating to the subject.

⁴¹² Cf. art. 10, United Nations Charter.

⁴¹³ UNGA res. 75/145, ‘Measures to eliminate international terrorism’ (15 Dec. 2020) paras. 14–17; UNGA res. 49/60 ([n 406](#)) paras. 7, 8.

⁴¹⁴ UNGA res. 75/145 ([n 412](#)) preambular paragraphs 16 and 28; UNGA res. 51/210 (17 Dec. 1996) ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’, Preamble.

⁴¹⁵ Art. 24, United Nations Charter.

⁴¹⁶ Art. 25, United Nations Charter: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

⁴¹⁷ To take an extreme example, the Security Council could not lawfully authorize genocide; see Judge Sir Elihu Lauterpacht, Dissenting Opinion, *Case concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia & Herzegovina v Yugoslavia (Serbia and Montenegro)) (Further Request for the Indication of Provisional Measures)* [1993] ICJ Rep. 325, 440, para. 100.

⁴¹⁸ The Security Council’s record on individual sanctions is less than stellar, but its Security Council ‘targeted sanctions’ practice will certainly carry considerable weight in an exclusion context, both in identifying individuals and cataloguing relevant acts and policies; see, for example, SC res. 2521 (2020) (29 May 2020) paras. 11–15 (South Sudan); also, SC res. 2510 (2020) (12 Feb. 2020) para. 9 (Libya); SC res. 2213 (2015) (27 Mar. 2015) paras. 11–12 (Libya).

⁴¹⁹ SC res. 1076 (22 Oct. 1996) para. 5.

⁴²⁰ SC res. 1189 (13 Aug. 1998) preamble; SC res. 1193 (28 Aug. 1998); SC res. 1214 (8 Dec. 1998).

⁴²¹ SC res. 1269 (19 Oct. 1999).

⁴²² SC res. 1373 (28 Sep. 2001); see also SC res. 1368 (12 Sep. 2001) SC res. 1390 (16 Jan. 2002).

⁴²³ SC res. 1373, para. 3(f), (g). See also the 2002 Inter-American Convention against Terrorism; 2005 European Convention for the Prevention of Terrorism: CETS No. 196; 2001 EU Common Position on Combating Terrorism, arts. 16, 17; 2004 EU Qualification Directive (recast) Recital, paras. 31, 37, art. 12(2)(b), 14(4), (c), Annex 1, No. 6.

⁴²⁴ SC res. 1373, para. 5; see also SC res. 1377 (12 Nov. 2001)—Declaration on the global effort to combat terrorism.

⁴²⁵ SC res. 2178 (2014) (24 Sep. 2014) preambular paras. 8 and 9. The resolution ‘highlights’ the situation of those possessing more than one nationality, and reiterates its call on States to ensure that refugee status is not ‘abused’: ibid., preambular paras. 19 and 20. See also UN Security Council, Counter-Terrorism Committee Executive Directorate (CTED), ‘Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters’ (2015): UN doc. S/2015/338 (14 May 2015); ‘Madrid Guiding Principles on

Foreign Terrorist Fighters’: UN doc. S/2015/939 (23 Dec. 2015; Addendum to the Madrid Guiding Principles: UN doc. S/2018/1177 (28 Dec. 2018); ‘Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’: UN doc. A/HRC/RES/15/15 (7 Oct. 2010); <https://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>.

⁴²⁶ SC res. 2178 (2014) para. 2.

⁴²⁷ Ibid., para. 5. See para. 6, recalling member States’ obligations with regard to prosecution and criminalization; also, SC res. 2462 (2019).

⁴²⁸ SC res. 2178 (2014) para. 8. Member States’ duties in this regard are ‘without prejudice’ to such entry or transit as may be necessary for judicial process purposes; and shall not oblige any State, ‘to deny entry or require the departure … of its own nationals or permanent residents’. Presumably, this also means that no State is entitled to refuse to admit a national; see further Ch. 13.

⁴²⁹ See, for example, SC res. 2253 (2015) (17 Dec. 2015) para. 3; SC res. 2255 (2015) (21 Dec. 2015) para. 2.

⁴³⁰ SC res. 2354 (2017) (24 May 2017); SC res. 2368 (2017) (20 Jul. 2017) para. 2. The Security Council has also called for greater openness to the use of intelligence threat data, for example, at border points: SC res. 2322 (2016) (12 Dec. 2016) paras. 5, 10.

⁴³¹ SC res. 2395 (2017) (21 Dec. 2017).

⁴³² SC res. 2396 (2017) (21 Dec. 2017) Preamble and paras. 4, 31.

⁴³³ Ibid., paras. 11, 12.

⁴³⁴ Opinion of Advocate General Sharpston ([n 223](#)) paras. 31, 71–2. This had already been anticipated in art. 12(3), Qualification Directive (recast), as acknowledged in *JS (Sri Lanka)* ([n 219](#)) para. 14.

⁴³⁵ Opinion of Advocate General Sharpston ([n 223](#)) para. 86.

⁴³⁶ As the court noted in *AH (Algeria) v Secretary of State for the Home Department* ([n 229](#)) para. 16, citing *JS (Sri Lanka)* ([n 219](#)) and *B and D* ([n 223](#)), the fact of conviction may make the exclusion decision much easier, but ‘only if the nature of the offence … and/or the findings made by the court are sufficient to enable … a conclusion as to the individual’s “own personal involvement and role in the organisation”, or the “true role” played by the individual in the acts perpetrated by the organisation’. See also *Secretary of State for the Home Department v NF* [2021] EWCA 17—the possession of large amounts of terrorist-related material and contact with extremists might amount to acts within art. 1F(c), but only if the person’s conduct was sufficiently grave would it cross the high threshold set in *Al-Sirri* ([n 221](#)).

⁴³⁷ Opinion of Advocate General Sharpston ([n 223](#)) para. 89.

⁴³⁸ *Commissaire général aux réfugiés et aux apatrides v Lounani* ([n 223](#)) paras. 45–9, 66–8; see also CENDA grande formation 26 septembre 2017 M. K., n° 16029802 R, *Recueil* 2017 ([n 39](#)) 136, paras. 19–22.

⁴³⁹ Commissaire général aux réfugiés et aux apatrides v Lounani ([n 223](#)) para. 70, SC res. 2396 (2017) recognizes that foreign terrorist fighters may be travelling with family members and emphasizes the need for such individuals to be assessed and investigated (without discriminatory profiling ...) for any potential involvement in criminal or terrorist activities: paras. 4, 31.

⁴⁴⁰ SC res. 2462 (2019) (28 Mar. 2019) para. 5 (emphasis added). Potentially, this may lead to increased exposure to the risk of exclusion, whereas exclusion decisions in fund-raising cases so far tended to depend on the extent of the individual's activity and his or her role in the 'beneficiary' terrorist organization. Compare CNDA (14 décembre 2018) M. M., n° 17030884 C, *Recueil* 2018 ([n 38](#)) 156—exclusion annulled notwithstanding conviction and suspended sentence for fund-raising, given his low-level involvement ('sa faible implication') and the fact that he had no responsibilities in the organization in question; with CNDA (11 octobre 2018) M. B., n° 17014478 C, *Recueil* 2018 ([n 38](#)), 159—exclusion upheld, account being taken of the appellant's conviction and sentence to five years imprisonment for membership of and financing a terrorist organization, his leading role ('son rôle dirigeant'), and his contribution to ideological and logistical support activities. But cf. CE 13 mars 2020 M. J. n° 423579 B *Recueil* 2020, 127—the appellant could not rely on the fact that he had served his sentence of imprisonment and therefore did not represent a threat to *ordre public*.

⁴⁴¹ For developments in the UN, see <http://www.un.org/terrorism/>.

⁴⁴² Bowett, D., 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *EJIL* 89, 93.

⁴⁴³ Brownlie, I., *The Rule of Law in International Affairs* (1999) 219.

⁴⁴⁴ On UK legislation, including the Anti-Terrorism, Crime and Security Act 2001, the Terrorism Act 2000, the the Terrorism Act 2006 and the Immigration, Asylum and Nationality Act 2006 (s.55), see the third edition of this work, 196; and on the necessity to 'read down' certain legislative constructions, see *Al-Sirri v Secretary of State for the Home Department* ([n 221](#)) paras. 36–9.

⁴⁴⁵ In SC res. 1624 (14 Sep. 2005), the Security Council recalled art. 14 UDHR 48 and the right to seek asylum, as well as States' *non-refoulement* obligations: Preamble and para. 4. The requirement of 'consistency' or 'compatibility' is well established in law and is as applicable in times of emergency as in normal times; cf. art. 15 ECHR 50. However, municipal legislation appears often to go beyond what is required, and to be framed in disregard of the important qualifications recognized by the Security Council.

⁴⁴⁶ SC res. 1386 (2001) (20 Dec. 2001) para.1. See also para. 3, authorizing 'the Member States participating in the International Security Assistance Force to take all necessary measure to fulfil its mandate'; ISAF was authorized separately from the US-led Operation Enduring Freedom.

⁴⁴⁷ See SC resolutions 1413 (2002), 1444 (2002), 1510 (2003), 1563 (2004), 1623 (2005), 1659 (2006), 1707 (2006), 1776 (2007), 1917 (2010), 2011 (2011), 2069 (2012), and 2120

(2013).

⁴⁴⁸ SC res. 1510 (2003) expanded the mandate beyond Kabul, first North and then West, and SC res. 1707 (2006) endorsed expansion in the South and East; in each case, the Security Council has acted under Chapter VII and repeated its authorization to Member States participating in ISAF, ‘to take all necessary measure to fulfil its mandate’.

⁴⁴⁹ SC res. 1401 (2002) (28 Mar. 2002); unlike ISAF, UNAMA was not established under Chapter VII.

⁴⁵⁰ SC res. 1471 (2003) (28 Mar. 2003) para. 6; see also, SC resolutions 1662 (2006), 1746 (2007), 1806 (2008), 1917 (2010), 1974 (2011), 2041 (2012), 2096 (2013), 2145 (2014), 2210 (2015), 2274 (2016), 2344 (2017), 2405 (2018), 2460 (2019), 2489 (2019)—extending UNAMA’s mandate to 17 Sep. 2020; 2543 (2020) para. 5, extending the mandate to 17 Sep. 2021.

⁴⁵¹ Cf. SC res. 1471 (2003), para. 8; SC res. 1890 (2009), 8th preambular paragraph.

⁴⁵² SC res. 1401 (2002), para. 6; see, for example, UN doc. S/2011/760, ‘Letter dated 7 December 2011 from the Secretary-General addressed to the President of the Security Council’.

⁴⁵³ See further below.

⁴⁵⁴ 1994 Convention on the Safety of United Nations and Associated Personnel: 2051 UNTS 363; at 30 April 2021, 95 States were party to the Convention. See Bourloyannis-Vrailas, M. C., ‘The Convention on the Safety of United Nations and Associated Personnel’ (1995) 44 *ICLQ* 560.

⁴⁵⁵ 1994 Convention (ⁿ 454) art. 1(c).

⁴⁵⁶ UNGA res. 60/42, ‘Optional Protocol to the Convention on the Safety of United Nations and Associated Protocol’ (8 Dec. 2005) Annex; 2689 UNTS 59; UN doc. A/60/518. At 30 April 2021, 33 States were party to the Optional Protocol.

⁴⁵⁷ 2005 Optional Protocol, art. II(1).

⁴⁵⁸ 1994 Convention (ⁿ 454) art. 2(2).

⁴⁵⁹ Roberts, A. & Guelff, R., *Documents on the Laws of War* (3rd edn., 2000) 623–38, 624.

⁴⁶⁰ Art. 8(2)(b)(iii) and art. 8(2)(e)(iii).

⁴⁶¹ Art. 3, 1949 Geneva Convention IV; arts. 50–51, 1977 Additional Protocol I.

⁴⁶² Those forces are nevertheless bound by that body of law; see ‘Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law’: UN doc. ST/SGB/1999/13 (6 Aug. 1999); reproduced in Roberts & Guelff (ⁿ 459) 721–30.

⁴⁶³ Trial Chamber 1, § 235; reported in Special Court for Sierra Leone, *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Case No. SCSL-04-15-T, Trial Chamber I (2 Mar. 2009); Appeals Chamber (26 Oct. 2009): (2010) 104 *AJIL* 73.

⁴⁶⁴ For a description of the complexity of tribal and political relations in Afghanistan, see Farrell, T., *Unwinnable: Britain’s War in Afghanistan 2001–2014* (2018); Giustozzi, A., ed., *Decoding the New Taliban: Insights from the Afghan Field* (2009); see also, Niland, N.,

‘Impunity and insurgency: A deadly combination in Afghanistan’ (2010) 92 *International Review of the Red Cross* 931, 936; the author was UN Senior Human Rights Advisor in Afghanistan from 1999 to 2002, and from 2008 to 2010, Director of Human Rights, United Nations Assistance Mission in Afghanistan and Representative of the UN High Commissioner for Human Rights.

⁴⁶⁵ Coghlan, T., ‘The Taliban in Helmand: An Oral History’, in Giustozzi ([n 464](#)) 120.

⁴⁶⁶ See Hall, A., ‘US troops “tricked into killing Afghan drug clan’s rival”’ *Daily Telegraph* (30 Mar. 2009); Sengupta, K., ‘Taliban factions may be using British forces to assassinate rival commanders’ *The Independent* (25 Jul. 2008); cited in Geiß, R. & Siegrist, M., ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ (2011) 93 *International Review of the Red Cross* 11, 23, n 62.

⁴⁶⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16, paras. 94, 116.

⁴⁶⁸ Wood, M. C., ‘The Interpretation of Security Council Resolutions, Revisited’ (2017) 20 *Max Planck Yearbook of United Nations Law Online* 1 (2017); Wood, M. C., ‘The Interpretation of Security Council Resolutions’ (1998) 2 *Max Planck Yearbook of United Nations Law* 73.

⁴⁶⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010* [2010] ICJ Rep. 403, para. 94.

⁴⁷⁰ As was noted already in 2006, treaties then in force, ‘[d]efine nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes against the use, possession or threatened use of “bombs” or nuclear materials, and two crimes against the financing of terrorism’: O’Donnell, D., ‘International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces’ (2006) 88 *International Review of the Red Cross*, 853–80, 855, quoted in Pejic, J., ‘Armed Conflict and Terrorism: There is a (Big) Difference’, in Salinas de Frías, A. M., Samuel, K. L. H., & White, N. D., eds., *Counter-Terrorism: International Law and Practice* (2012) 171–204, 186.

⁴⁷¹ Pejic ([n 470](#)) 203; also, 172–3, 177 (emphasis added). The careful application of legal categories does not affect the status of combatants, or encourage terrorist acts. On the contrary, labelling as ‘terrorist’ acts which are committed in armed conflict but which are not prohibited by international humanitarian law, ‘reduces the likelihood of obtaining respect for [IHL] rules even further’: *ibid.*, 185. As Krahenmann notes in a related context, ‘It generates confusion to refer to “terrorist acts”, “terrorist groups”, or “terrorist fighters” in a manner that does not distinguish in specific terms between the different legal regimes that are applicable’: Krahenmann, S., *Foreign Fighters under International Law* (2014) 61.

⁴⁷² 1999 International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197 (emphasis added). At 30 April 2021, 189 States were party to the Convention.

⁴⁷³ 1997 International Convention for the Suppression of Terrorist Bombings: 2149 UNTS

256; at 30 April 2021, 170 States were party to the Convention.

⁴⁷⁴ 2005 International Convention for the Suppression of Acts of Nuclear Terrorism: 2445 UNTS 89; at 30 April 2021, 117 States were party to the Convention.

⁴⁷⁵ Pejic ([n 470](#)) 188–9.

⁴⁷⁶ Art. 4(2) of the Nuclear Terrorism Convention is worded similarly.

⁴⁷⁷ Pejic ([n 470](#)) 190–3; see also draft art. 3 of the draft comprehensive convention on international terrorism: ‘Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996’, Sixteenth sess. (8 to 12 April 2013): UN doc. A/68/37 (2013) 15–16; ‘Oral report by the Chair of the working group on measures to eliminate international terrorism’: UN doc. A/C.6/74/SR.34 (29 Nov. 2019) paras. 1–10; UNGA res. 74/194, ‘Measures to eliminate international terrorism’ (18 Dec. 2019).

⁴⁷⁸ Wood, M. C., ‘The Interpretation of Security Council Resolutions’ (1998) 2 *Max Planck Yearbook of United Nations Law* 73, 95: ‘SCRs are not treaties; indeed the differences are very great ... SCRs must be interpreted in the context of the United Nations Charter ... [G]iven their essentially political nature and the way they are drafted, the circumstances of the adoption of the resolution and such preparatory work as exists may be of greater significance than in the case of treaties.’

⁴⁷⁹ Art. 31(3)(c), 1969 Vienna Convention on the Law of Treaties.

⁴⁸⁰ Mere membership of particular organizations is not enough, ‘because the notion of guilt by association, implicit in the crime of membership; does not comport with the underlying principle ... that criminal liability is personal’: Shraga, D. & Zacklin, R., ‘The International Criminal Tribunal for the Former Yugoslavia’ (1994) 5 *EJIL* 360, 369—the reference to the underlying principle of the ICTY Statute is nonetheless generally applicable. See also, ‘Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)’, UN doc. S/25704 (3 May 1993) paras. 53–9.

⁴⁸¹ *DD v Secretary of State for the Home Department* [2012] UKSC 54, paras. 64–8. The appeal in *DD* was heard jointly with that of *Al-Sirri*. Guy Goodwin-Gill was one of counsel for DD, with Richard Drabble QC and Christopher Jacobs; the above remarks should be read in that light.

⁴⁸² The phrase, ‘internationalized non-international armed conflict’, is a more accurate description; see Gasser, H.-P., ‘Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon’ (1983) 33 *American University Law Review* 145, 154; Pejic, J., ‘The protective scope of Common Article 3: more than meets the eye’ (2011) 93 *International Review of the Red Cross*, 189, 196.

⁴⁸³ See SC res. 1746 (2007) (23 Mar. 2007) paras. 18, 25,

⁴⁸⁴ Ibid., para. 19 (stressing the importance of the ongoing process of national reconciliation).

The Principle of *Non-refoulement*—Part 1

The principle of *non-refoulement* prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution, torture, or other serious ill-treatment. In this chapter, the scope of the principle is examined against the background of a number of recurring issues: its sources; the question of ‘risk’; the personal scope of the principle, including its application to certain categories of asylum seekers; exceptions to the principle; and its operation in the context of extradition and expulsion.

1. Evolution of the principle

The term *non-refoulement* derives from the French *refouler*, which means to drive back or to repel, as of an enemy who fails to breach one’s defences. In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers.¹ *Refoulement* is thus to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a State, or be forcibly removed.

The idea that a State ought not to return persons to other States in certain circumstances is of comparatively recent origin. Common in the past were formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors.² Only in the early- to mid-nineteenth century did the concept of asylum and the principle of non-extradition of political offenders begin to concretize,³ in the sense of that protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic governments, were worthy of protection.⁴ It was a period of political turmoil in Europe and South America, as well as of mass movements of populations occasioned by pogroms against Jewish and Christian minorities in Russia and the Ottoman Empire.

A sense of the need to protect the persecuted can be gathered from the UK’s 1905 Aliens Act, where section 1 made an exception to refusal of entry for want of means in respect of those ‘seeking to avoid prosecution or punishment on

religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief'.⁵ From the very beginning of the involvement of the League of Nations with refugees, it was accepted that no one should be required to return to their country of origin, unless adequate guarantees of security were in place.⁶ On at least three occasions, and before the word *non-refoulement* had entered the vocabulary, the High Commissioner, Fridtjof Nansen, intervened successfully to prevent refugees being returned.⁷ In article 3 of the 1933 Convention relating to the International Status of Refugees, the contracting parties undertook not to remove resident refugees or keep them from their territory, 'by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)', unless dictated by national security or public order.⁸ Each State undertook, 'in any case not to refuse entry to refugees at the frontiers of their countries of origin'. Only eight States ratified this Convention, however; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom expressly objected to the principle of non-rejection at the frontier.

Agreements regarding refugees from Germany in 1936 and 1938 also contained some limitation on expulsion or return.⁹ They varied slightly: broadly, refugees required to leave a contracting State were to be allowed a suitable period to make arrangements; lawfully resident refugees were not to be expelled or sent back across the frontier¹⁰ save 'for reasons of national security or public order'; and even in such cases, governments undertook not to return refugees to the German Reich,¹¹ 'unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object'.

Action in the inter-war period focused principally on improving administrative arrangements to facilitate resettlement and relieve the burden on countries of first asylum. The need for protective principles for refugees began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of *non-refoulement*. Nevertheless, the period was also remarkable for the very large numbers of refugees not in fact sent back to their countries of origin, whether they fled Russia after the revolution, Spain, Germany, or the Ottoman Empire.¹²

Following the Second World War, a new era began. In February 1946, the

United Nations expressly accepted that ‘refugees or displaced persons’ who had expressed ‘valid objections’ to returning to their country of origin should not be compelled to do so.¹³ The International Refugee Organization was established the same year, charged with resolving the problems of displacement left over from the war; some 1,620,000 refugees were assisted with resettlement and integration, while many others fleeing political developments in Eastern Europe were readily admitted to western countries.¹⁴

In 1949, the United Nations Economic and Social Council (ECOSOC) appointed an *Ad hoc* Committee to ‘consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention’.¹⁵ The *Ad hoc* Committee on Statelessness and Related Problems met twice in New York in January–February and August 1950,¹⁶ and drew up the following provision, considered so fundamental that no exceptions were proposed:

No contracting State shall expel or return 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 or political opinion.¹⁷

During this same period, however, States resisted inclusion of a right to be granted asylum, both in the 1948 Universal Declaration of Human Rights and in the 1951 Convention.¹⁸ The 1951 Conference of Plenipotentiaries also had concerns regarding the absoluteness of *non-refoulement*, adding the following paragraph to what was to become article 33:

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

Apart from certain situations of exception, the drafters of the 1951 Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk.²⁰

As expressed in article 33, the principle of *non-refoulement* raises questions as to its personal scope and relation to the issues of admission and non-rejection at the frontier. It is a rule clearly designed to benefit the refugee, the person who, in the sense of article 1 of the Convention, has a well-founded fear of being

persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. In principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx.²¹ Likewise, it would scarcely be consonant with considerations of good faith for a State to seek to avoid the principle of *non-refoulement* by declining to make a determination of status.

From the point of general, as opposed to treaty-based, international law, the issue is rendered more problematic by developments in the refugee definition, as well as by debates as to the scope and standing of *non-refoulement* outside the relevant international instruments (namely, under customary international law). Extensions of UNHCR's mandate might be interpreted as purely functional, in that they authorize the channelling of material assistance to additional groups of persons but do not justify insistence on the provision of protection through *non-refoulement*. States have argued in the not so recent past that, in regard to this expanded class, their obligations are humanitarian rather than legal, but that view clearly requires reconsideration in light of the consolidation of human rights protection.²² As discussed in Chapter 7, State practice in cases of mass influx offers support for the view that *non-refoulement*, or an analogous principle of refuge, applies both to the individual refugee with a well-founded fear of persecution, and to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin in certain fairly well-defined circumstances.

2. The principle of *non-refoulement* in general international law

As UNHCR has made clear, '[r]espect for the principle of *non-refoulement* is absolutely critical to achieving international protection'.²³ Today, it unequivocally encompasses non-rejection at the frontier, since protection begins with the ability of the refugee to secure admission to territory.²⁴ While some States seek to avoid the principle through measures such as interception, pushbacks, and border closures, this does not absolve them of legal responsibility.

Let it be assumed that, in 1951, the principle of *non-refoulement* was binding solely on the conventional level, and that it did not encompass non-rejection at the frontier. Analysis today requires full account of State practice since that

date,²⁵ as well as that of international organizations. Over the past seven decades, the broader interpretation of *non-refoulement* (encompassing non-rejection at the frontier) has firmly established itself.²⁶ States have allowed large numbers of asylum seekers not only to cross their frontiers, for example, in Africa, Europe, and South East Asia, but also to remain pending a solution.²⁷ State practice, both individually and within international organizations, has contributed to further progressive development of the law. By and large, States in their practice and in their recorded views have recognized that *non-refoulement* applies to the moment at which asylum seekers present themselves for entry, either within a State or at its border.²⁸ Certain factual elements may be necessary before the principle is triggered, but the concept now encompasses both non-return and non-rejection. A realistic appraisal of the normative aspect of *non-refoulement* in turn requires that the rule be examined not in isolation, but in its dynamic sense and in relation to the concept of asylum and the pursuit of durable solutions.

Those who argue in favour of the restrictive view of the obligations of States under article 33 sometimes rely on comments made by the Swiss and Dutch delegates to the Conference of Plenipotentiaries in 1951. The Swiss interpretation of *non-refoulement* would have limited its application to those who had already entered State territory, but they spoke *only* about mass migrations, saying nothing about the non-applicability of article 33 outside that context.²⁹ The Dutch delegate considered that the word ‘return’ related only to refugees already within the territory, and that mass migrations were not covered.³⁰ This narrow view did not fully square with the meaning of *refoulement* in European immigration law or with the letter of article 3 of the 1933 Convention, at least in their individual dimension. The words ‘expel or return’ in the English version of article 33 also have no precise meaning in general international law. The former may describe any measure, judicial, administrative, or police, which secures the departure of an alien, although article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens. The word ‘return’ is even vaguer; to the Danish representative it suggested such action as a State might take in response to a request for extradition.³¹ The Dutch delegate’s comments, however, primarily reflected concern that the draft article would require his government to grant *entry* in the case of a mass migration.³²

Probably the most accurate assessment of States’ views in 1951 is that there was no unanimity, perhaps intentionally so. At the same time, however, States were not prepared to include in the Convention any article on admission of

refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum.

Since then, the views of commentators on the scope of article 33 have varied, and little is to be gained today by further analysis of the motives of States or the meaning of words in 1951. Likewise, it is fruitless to pay too much attention to moments of entry or presence, legal or physical.³³

As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will already be within State territory and jurisdiction; for this reason, and the better to retain sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted.³⁴ Similarly, no consequence of significance can be derived from repeated reliance on the proposition that States have no duty to admit refugees, or indeed, any other aliens. ‘No duty to admit’ begs many questions; in particular, whether States are obliged to protect refugees to the extent of not adopting measures which will result in their persecution or exposure to danger. State practice in fact attributes little weight to the precise issue of admission, but far more to the necessity for *non-refoulement* through time, pending the obtaining of durable solutions. For this reason, Noll describes *non-refoulement* in this context as ‘a right to transgress an administrative border’.³⁵ Gammeltoft-Hansen and Hathaway argue that it ‘amounts to a *de facto* duty to admit the refugee at least until the refugee claim is examined’,³⁶ and requires that the asylum seeker ‘be allowed to remain for the duration of the assessment of her status’.³⁷

The Inter-American Court of Human Rights has emphasized that it is only possible to ensure international protection, in accordance with international law, by admitting asylum seekers, guaranteeing the right to seek and receive asylum, and respecting the principle of *non-refoulement*, (among other rights), until a durable solution is found, while the UN Committee on the Rights of the Child has stated that since a ‘determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity ... allowing the child access to the territory is a prerequisite to this initial assessment process’.³⁸

2.1 Conventions and agreements

Beyond the 1951 Convention/1967 Protocol, the principle of *non-refoulement* forms part of international human rights law. In that context, it prevents (at a

minimum) removal to a real risk of torture; cruel, inhuman, or degrading treatment or punishment; arbitrary deprivation of life; subjection to the death penalty; and enforced disappearance.³⁹

In international humanitarian law, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War defines ‘protected persons’ as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.⁴⁰ Article 45 provides in part:

Protected persons shall not be transferred to a Power which is not a party to the Convention ...

In 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.* (Emphasis added.)

Non-refoulement is also embodied in regional refugee instruments. Article II(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁴¹ declares that:

[n]o person shall be subjected ... to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.

In the Americas, regional protection of asylees in fact goes back to the 1889 Montevideo Treaty on International Penal Law;⁴² article 16 proclaims that, ‘[p]olitical refugees shall be afforded an inviolable asylum’, and article 20 excludes extradition for political crimes.⁴³ The principle of *non-refoulement* is also part of the 1984 Cartagena Declaration on Refugees (discussed in the next section). Each of these regional instruments has been widely accepted, with no reservations recorded or attempted in respect of the basic principle of non-return.

The central features of *non-refoulement* are present in the regional human rights treaties as well. Article 22(8) of the 1969 American Convention on Human Rights declares:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.⁴⁴

Article 12(3) of the 1981 African Charter of Human and Peoples' Rights focuses specifically on asylum:

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

As detailed below, the principle of *non-refoulement* is also reflected in the 1950 European Convention on Human Rights (ECHR 50), which the European Court of Human Rights has interpreted and applied so as to protect individuals from removal, where they face a real risk of being arbitrarily deprived of life, subjected to torture or inhuman or degrading treatment or punishment, or subjected to other 'flagrant breach violations' of rights.⁴⁵ The obligation derives from the terms of the specific rights, read in conjunction with article 1, which requires contracting States to protect everyone within their jurisdiction from the real risk of such ill-treatment.

2.2 Declarations and resolutions

Besides the range of obligations formally undertaken by States, the standing of the principle of *non-refoulement* in international law must also be assessed by reference to non-binding declarations and resolutions. States are able to express their views and policies in a variety of international fora; if their practice in turn conforms to such statements, this will give further support to the concretization of a norm of customary international law.

States have continued to affirm the principle of *non-refoulement* ever since the 1951 Refugee Convention was adopted.⁴⁶ The most recent declarations by States on its importance include the 2018 Global Compact on Refugees, where it was described as the 'cardinal principle' of the international refugee protection regime;⁴⁷ the 2016 New York Declaration for Refugees and Migrants, in which States inter alia reaffirmed their 'respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law';⁴⁸ and a declaration adopted by States parties to the Convention and/or Protocol on the 50th anniversary of the Refugee Convention which reaffirmed those instruments' enduring importance, called for universal adherence, and noted 'the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is

embedded in customary international law'.⁴⁹

Earlier declarations reveal States' understanding of the meaning and scope of *non-refoulement*. Thus, the 1967 Declaration on Territorial Asylum, adopted unanimously by the General Assembly, recommends that States be guided by the principle that no one 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'.⁵⁰

Very similar language was used in article III(3) of the Bangkok Principles on the Status and Treatment of Refugees, adopted by the Asian–African Legal Consultative Committee in 1966,⁵¹ and revised and consolidated in June 2001.⁵² In January 2004, a Declaration on Refugees was adopted by the Eminent Persons Group (leading figures from five South Asian States), which called for States in that region to ratify the Convention and Protocol and develop national asylum legislation in accordance with a model law.⁵³ In November 2012, member States of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration, which recognized the right of every person 'to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements'.⁵⁴ Few States in South Asia are parties to the relevant binding international refugee or human rights law instruments, so these declarations provide the only agreed statements on refugee protection in the region.⁵⁵

In Africa, member States of the African Union in 2009 undertook 'to deploy all necessary measures to ensure full respect for the fundamental principle of non-refoulement as recognised in International Customary Law as enunciated in Article 33 of the 1951 UN Geneva Convention relating to the Status of Refugees and in Article 2 [sic] of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa'.⁵⁶

In Latin America, the 1984 Cartagena Declaration not only endorses a broader, regionally specific refugee definition, but also reiterates the importance of *non-refoulement* and non-rejection at the frontier as a 'corner-stone' of international protection, having the status of *jus cogens*.⁵⁷ This has been echoed in successive declarations each decade.⁵⁸ The 2004 Mexico Declaration, adopted on the 20th anniversary of the Cartagena Declaration, recognized 'the commitment of Latin American countries to keep their borders open in order to guarantee the protection and security of those who have a right to enjoy international

protection’,⁵⁹ while the 2010 Brasilia Declaration reiterated States’ ‘unrestricted respect for the principle of *non-refoulement*, including non-rejection at the border and indirect *non-refoulement*’.⁶⁰ In June 2012, the Organization of American States adopted a resolution on refugees, which (*inter alia*) underscored the importance of the principle of *non-refoulement*.⁶¹

The United Nations has also recognized the relationship between *non-refoulement* and the protection of human rights.⁶² For example, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, endorsed by the General Assembly in 1989, 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’.⁶³ In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance,⁶⁴ which was followed by the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, article 16(1) of which provides: ‘No State Party shall expel, return (“refouler”), surrender 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 enforced disappearance.’⁶⁵ The two Protocols to the Convention against Transnational Organized Crime operate subject to ‘the rights, obligations and responsibilities of States and individuals under international law ... in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein’,⁶⁶ echoed in the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.⁶⁷ These provisions contribute to and confirm the meaning of persecution, and consolidate the legal standing of the principle of *non-refoulement* in general international law.

The UN General Assembly has repeatedly affirmed the importance of full respect for the principle of *non-refoulement* and urged States to observe it.⁶⁸ Other branches of the United Nations have also given increased attention to the principle. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on the Human Rights of Migrants, and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have all expressed concern about, and reported on, cases of alleged or potential *refoulement* of asylum seekers by various States.⁶⁹

The 2017 Report of the Special Rapporteur on Torture noted that

communications regarding *refoulement* were sent to Austria, Croatia, France, Indonesia, Slovenia, Serbia, Israel, Macedonia, and Greece.⁷⁰ Between March 2015 and February 2016, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions sent communications to Indonesia, Malaysia, and Thailand regarding cases of expulsion, *refoulement*, or return of people to a country or a place where their lives were in danger.⁷¹

In 2015, a joint statement was issued by the UN High Commissioner for Refugees, the UN High Commissioner for Human Rights, the Director-General of the International Organization for Migration, and the Special Representative of the UN Secretary-General for International Migration and Development, urging Indonesia, Malaysia, and Thailand to take steps to protect migrants and refugees stranded in the Bay of Bengal and the Andaman Sea. The statement called on the leaders of these countries, with the support of ASEAN, to ‘[s]top boat push-backs and measures to “help on” boats to leave territorial waters, while ensuring that all measures taken are in strict accordance with the principle of non-refoulement and other fundamental human rights standards’.⁷²

2.3 The UNHCR Executive Committee Conclusions on International Protection

The UNHCR Executive Committee⁷³ has consistently endorsed the fundamental character of the principle of *non-refoulement* in both its general and specific conclusions. In 1977, for example, the Executive Committee noted that the principle was ‘generally accepted by States’, expressed concern at its disregard in certain cases, and reaffirmed,

the fundamental importance of the observance of the principle of *non-refoulement*—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.⁷⁴

Later Conclusions have stressed that the principle of non-rejection at the frontier requires ‘access to fair and effective procedures for determining status and protection needs’.⁷⁵ Thus, although *non-refoulement* is not synonymous with a right to admission, the principle of non-rejection at the frontier implies at least temporary admission to determine an individual’s status.⁷⁶ Only in this way can a State ensure that it does not remove an individual to a risk of persecution or torture, and this is integral to effective implementation of the obligation. Where

the facts indicate that rejection at the frontier will expose the individual to a real risk of persecution, then in practice the State may be obliged to admit them and to determine whether the protection claim is well-founded; however, *non-refoulement* in this context is not equivalent to a right to asylum.⁷⁷

Non-refoulement as a paramount consideration has also been reiterated in specific contexts. For example, ‘in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge’;⁷⁸ similarly, ‘in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge ... In all cases the fundamental principle of *non-refoulement*— including non-rejection at the frontier—must be scrupulously observed’.⁷⁹

In its 1982 General Conclusion on protection, the Executive Committee expressed the view that the principle ‘was progressively acquiring the character of a peremptory rule of international law’.⁸⁰ Reported instances of breach of the principle have been consistently deplored,⁸¹ and in 1989, after the matter was raised expressly by UNHCR in its annual Note on International Protection,⁸² the Executive Committee expressed its deep concern ‘that refugee protection is seriously jeopardized in some States by expulsion and *refoulement* of refugees or by measures which do not recognize the special situation of refugees’.⁸³ The same year, when dealing with the problem of irregular movements, the Executive Committee affirmed that ‘refugees and asylum seekers [who] move in an irregular manner from a country where they have already found protection ... may be returned to that country if ... they are protected there against *refoulement*'; but if, in exceptional circumstances, the physical safety or freedom of such refugee or asylum seeker may be at risk, or he or she has good reason to fear persecution there, then their cases should be considered favourably.⁸⁴

Similar language occurs in later Conclusions. In 1991, the Executive Committee emphasized ‘the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection’, while indirectly stressing the protective purpose of the principle by reference to the need for refugees to be able to ‘return in safety and dignity to their homes without harassment, arbitrary detention or physical threats during or after return’.⁸⁵

In 1992, the Executive Committee maintained this traditional language, but emphasized also that UNHCR’s involvement with internally displaced persons and related approaches, ‘should not undermine the institution of asylum, as well as other basic protection principles, notably the principle of *non-refoulement*’.⁸⁶

More recently, the Executive Committee reiterated that the principle applies to asylum seekers, ‘whether or not they have been formally granted refugee status’, and extends to ‘persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment’.⁸⁷ In 2005, the Executive Committee adopted a Conclusion on complementary forms of protection, affirming that ‘relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *call[ing]* upon States to respect the fundamental principle of *non-refoulement*’.⁸⁸

The Conclusions adopted by the UNHCR Executive Committee do not have force of law and do not, of themselves, create binding obligations. They may contribute, however, to the formulation of *opinio juris*—the sense of legal obligation with which States approach the problems of refugees and asylum seekers. Some Conclusions aim to lay down standards of treatment, or to resolve differences of interpretation between States and UNHCR, while others are more hortatory, repeating and reaffirming basic principles without seeking to expand their field of application.⁸⁹ They must therefore be reviewed in the context of States’ expressed opinions, and in light of what they do in practice.

2.4 State views and State practice

2.4.1 State views

The views and comments of States in the Executive Committee fall into two broad categories: first, general endorsements of the principle of *non-refoulement*, which usually say little about content or scope; and secondly, more focused comments, by which States seek to show where, in their opinion or practice, the limits of obligation lie.⁹⁰ Comments have ranged from support for the idea that *non-refoulement* is a long-standing rule of customary international law⁹¹ and even a rule of *jus cogens*,⁹² to its fundamental importance in situations of mass influx,⁹³ to concern at current challenges to the related ‘principle of first asylum’,⁹⁴ to regret at reported instances of non-observance of fundamental obligations,⁹⁵ to the need, before implementing any form of compulsory return,

to define objective criteria ‘to determine whether security concerns had been fully met’, and further, with respect to the cessation clauses, ‘to ensure that refugees were not forced to return to unsafe countries’.⁹⁶

More focused comments have addressed issues of specific application. In 1987, the Turkish representative raised a particularly serious question:

The principle of *non-refoulement* ... had to be scrupulously observed. Nevertheless ... countries of first asylum or transit ... faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard *refoulement* as the only possible way out. If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole.⁹⁷

This same point emerged again in 1989, when the Turkish representative remarked that the refugee problem ‘was such that it was no longer possible to disassociate international protection from international co-operation and assistance’.⁹⁸ Commenting on developments in Iraq in April 1991 and the arrival on the border of some half-million Kurdish asylum seekers, the Turkish representative noted that while his country had tried to meet the needs of those concerned, ‘[t]he scale of the operation had ... been prohibitive, and Turkey had been compelled to call for urgent international assistance ... As a result of the subsequent international cooperation, virtually all those displaced persons had now been resettled in the security zone established in the north of Iraq.’⁹⁹ If the reference to ‘security’ can be taken as controlling, then the rather unique situation of the Kurdish people in search of refuge might still be interpreted consistently with a variant of *non-refoulement* that permits only limited exceptions, conditioning return or rejection in situations of mass influx on the availability of alternative forms of safety. This is not particularly persuasive, but the ‘solution’ imposed on northern Iraq remains unique, so far, although similar responses have been hinted at in other scenarios.¹⁰⁰ In cases not involving ‘mass migrations’, no such exception could apply,¹⁰¹ although the ‘internal flight alternative’ is a variant of the safe haven concept which may be lawful in limited circumstances.¹⁰²

During the 1980s, a number of States stressed that *non-refoulement* did not apply to people who did not fall squarely within the terms of the 1951

Convention, even if they had protection needs. In 1988, the Swiss representative was apprehensive that the ‘dilution’ of the refugee concept ‘would ... weaken the basic principle of *non-refoulement*’. While others might be allowed to remain for humanitarian reasons, this would not be based on a Convention obligation, so much as on ‘considerations of humanitarian law or international solidarity, in other words, on a free decision by the State concerned’.¹⁰³

By the 1990s, however, there was increasing recognition of States’ *non-refoulement* obligations beyond article 33 of the 1951 Convention. Several States called attention to the fact that they were parties to the 1984 United Nations Convention against Torture, and consequently also bound by that treaty’s provision prohibiting the return of individuals to situations of torture, irrespective of the character or legal status of the individuals concerned. In 1996, the United States described States’ responsibility to protect persons from *refoulement* to persecution *and* torture as both a legal and a moral duty,¹⁰⁴ while Sweden and Egypt noted that there should be flexibility,¹⁰⁵ including for ‘victims of armed conflict, torture and other inhumane treatment’.¹⁰⁶ In 1998, Belgium stipulated for the first time that all asylum seekers’ claims for protection be assessed according to article 3 ECHR 50, in addition to article 1A(2) of the 1951 Convention.¹⁰⁷ In the same year, France gave legislative force to two new forms of asylum: ‘constitutional asylum’, for persecution based on ‘actions intended to promote freedom, even if such persecution had not been State-instigated’, and ‘territorial asylum’, a previously ad hoc French procedure, to be ‘granted to an alien who risked being subjected to inhuman or degrading treatment or whose personal safety would be in serious danger if he were to be refused entry to France’.¹⁰⁸ Meanwhile, the United Kingdom reiterated that States ‘should offer protection in line with international human rights standards and obligations’.¹⁰⁹ Since 2000, many States have adopted domestic legislation extending complementary protection to people who fall outside the terms of the Refugee Convention.¹¹⁰

On other occasions, States have described practices which, in their view, did not amount to *refoulement*, such as normal immigration controls, visa policies, and carrier sanctions. In 1988, for instance, the UK representative declared his country’s intention to abide fully by the principle, but stated that this did not prevent the return of ‘failed asylum seekers’ or removals to ‘safe third countries’.¹¹¹ The representative for Argentina, in contrast, was careful to stress that practices such as ‘the refusal of admission at a border for purely

administrative reasons vitiated the principle of *non-refoulement*'.¹¹² Over the past two decades in particular, some States have sought to justify restrictive entry policies on account of the mixed character of migratory flows. Many have invoked 'migration management' mechanisms as tools to prevent abuses of the asylum system and thereby preserve the integrity of international protection.¹¹³

UNHCR has repeatedly stressed the importance of ensuring that asylum seekers are able to voice their protection claims, noting that 'refugees do not lose their protection needs and entitlements just because they are part of a mixed flow'.¹¹⁴ Similarly, it has explained that refugees may resort to people smugglers to leave their countries of origin,¹¹⁵ sometimes out of desperation and sometimes because there is no means of obtaining a visa to enter legally. It has noted that the following practices may violate the principle of *non-refoulement*: obstructing access to territory, including denial of admission at the border;¹¹⁶ denial of access to asylum procedures (or an absence of such procedures);¹¹⁷ pushbacks at sea;¹¹⁸ failure to distinguish between asylum seekers and irregular immigrants, including in interception measures;¹¹⁹ the inappropriate application of the safe third country concept;¹²⁰ extradition of refugees or asylum seekers without proper regard to international law;¹²¹ removal of asylum seekers suspected of supporting terrorist activities without proper regard to international law;¹²² readmission agreements that do not contain exceptions for asylum seekers and refugees;¹²³ and involuntary returns (sometimes called 'informal deportations').¹²⁴

In its 2001 Note on International Protection, UNHCR framed the challenge as finding a way of controlling illegal migration 'in a manner which does not have the effect of enhancing opportunities for smugglers and traffickers, but which ensures that the needs of refugees and asylum-seekers, including access to protection, are properly met'.¹²⁵ UNHCR expressed concern that increased processes and regulations concerning entry were 'ever less compatible with the prevailing protection framework'.¹²⁶

Security issues have also emerged at times as an excuse for denying protection. In 1997, the Turkish representative observed that: 'The right to seek asylum was a sacred right, but, like any category of human rights, it should also be protected from abuses that could impair the general welfare of host societies or destroy other rights and freedoms'.¹²⁷ Following the 11 September 2001 terrorist attacks, some States began casting 'terrorists' as likely abusers of the asylum system.¹²⁸ Just a month after the attacks, the High Commissioner

expressed concern that certain States had already increased practices to counter irregular migration, ‘resulting in non-admission, denial of access to asylum procedures and even cases of refoulement’.¹²⁹ The Indian delegation said that while the attacks on the United States should not dilute international protection, ‘it was important to guard against abuse by States that, unwittingly or otherwise, sheltered terrorists’.¹³⁰ During the so-called refugee ‘crisis’ in Europe during 2015–16, a number of States sought to close their borders, partly citing security concerns.¹³¹

Where States claim not to be bound by any obligation, their arguments either dispute the character of the individuals in question, or invoke exceptions to the principle of *non-refoulement*, particularly on the basis of threats to national security. Such considerations were dominant in the March/April 1995 decision by Tanzania to close its border to Rwandan refugees;¹³² in the *refoulement* of Rwandans carried out by Zaire the following September; and in Turkey’s response to Kurdish refugees in the aftermath of the first Gulf War.¹³³ Likewise, in 2015–16 in Europe, some States argued that refugees who travelled on from Jordan, Lebanon, and Turkey were ‘economic migrants’ seeking a better future, and were not owed protection.¹³⁴

It is in this vein that accusations of *refoulement* have been strongly refuted in the Executive Committee. In response to an Eritrean allegation that its nationals had been deported by Ethiopia, the Ethiopian delegation stated that it ‘in fact abided strictly by the principles of international law, despite the challenge it was facing’.¹³⁵ While admitting that it had closed borders, the Congolese representative sought to blame UNHCR for failings in its own protection duties, rather than attempting to justify *refoulement*.¹³⁶

In the past two decades, no State in the Executive Committee has sought to justify *refoulement*, and States have repeatedly reiterated their commitment to and respect for the principle of *non-refoulement*.¹³⁷ In 1997, the United States did so¹³⁸ despite earlier attempts (in the context of the Haitian interdiction programme) to distinguish between legally binding obligations and non-binding ‘generally-accepted moral and political principles of refugee protection’.¹³⁹ In the same year, Denmark noted that it regarded the principle as applying to States ‘which had not yet acceded to the Convention or its Protocol and to those which had made ... reservations or limitations’.¹⁴⁰ Belgium echoed this view in 2001,¹⁴¹ and Thailand—a non-signatory State—expressed its understanding that ‘in line with the principle of *non-refoulement*, asylum countries were under an obligation

to allow all refugees and displaced persons to enter their territory notwithstanding their limited resources and underdeveloped infrastructure'.¹⁴² In 2016, Thailand announced that '[a] new law to incorporate the principle of non-refoulement in domestic legislation was also being drafted',¹⁴³ while Lebanon, another non-signatory State, emphasized that it 'was the country with the largest number of refugees relative to its population and size, and that, although not a party to the 1951 Convention, it applied the principles thereof, including that of non-refoulement'.¹⁴⁴

Although States continued to express strong rhetorical support for the principle of *non-refoulement*, UNHCR observed their increasing reluctance to openly condemn other governments for violations of the principle. From late March 1999, the Former Yugoslavian Republic of Macedonia periodically closed its borders to large numbers of refugees seeking to leave Kosovo,¹⁴⁵ in some cases using violence to prevent border crossings.¹⁴⁶ These acts of *refoulement* were protested by the United Kingdom and the Netherlands as breaches of international law, and initially also by UNHCR, although UNHCR framed its opposition in terms of a failure to admit asylum seekers to the territory rather than expressly invoking the principle of *non-refoulement*.¹⁴⁷ At the 1999 Executive Committee meetings, Canada objected to border closures generally, but refrained from mentioning Macedonia.¹⁴⁸ More recently, in relation to Syria, the United States emphasized that the 'principle of non-refoulement must be upheld and borders kept open in crisis situations'.¹⁴⁹

During the 1990s, some of the most serious instances of large-scale *refoulement* occurred in the Great Lakes of Africa, yet very few States publicly protested against them at the annual Executive Committee meetings. One of the strongest protests came from the Irish delegation in 1997, which was 'deeply concerned' by the violation of the principle of *non-refoulement* by the Democratic Republic of Congo. The delegation acknowledged the 'pain and complexity' of the Great Lakes context, but argued that 'the international community could not fail to speak out when Governments violated their obligations under international law if it was not to erode the fundamental human rights and humanitarian principles which were the bedrock of policy'.¹⁵⁰

The Director of UNHCR's Department of International Protection acknowledged that the lack of formal protests to *refoulement* in the Great Lakes may have stemmed from the politicized context of that particular refugee situation, but also 'perhaps because the domestic refugee policies of many States

fell short of international standards'.¹⁵¹ Although, as a general matter of customary international law, States' failure to protest against breaches of international law may indicate acquiescence,¹⁵² the institutional role of UNHCR adds complexity to this traditional approach. Given UNHCR's responsibility to provide protection and to oversee the application of refugee law, it can be assumed to act on behalf of the international community. Given the political sensitivity of many refugee flows, States may be more inclined to give tacit support to UNHCR's condemnation of breaches of *non-refoulement*, and certainly no State has protested against UNHCR's actions in this regard. Thus, if States fail to protest openly at breaches of the principle of *non-refoulement*, they should not necessarily be viewed as acquiescing in such breach, particularly where UNHCR does so protest.¹⁵³ Furthermore, States have consistently maintained a position of respect for and commitment to the principle of *non-refoulement*. No State claims that *refoulement* is permissible under international law, but the State instead goes to great lengths to characterize instances of return or removal as standard immigration control, as exclusion, or as not involving refugees.¹⁵⁴

Finally, to upset an existing rule of customary international law, States must consistently demonstrate both through their actions and official statements the emergence of a new rule. The United States' 1989 departure from the accepted meaning of *non-refoulement* came too late to alter its obligations under international law.¹⁵⁵ Similarly, Australia's response to the *Tampa* incident in 2001 attracted no support from other States, and consequently had no effect on the established scope of the principle of *non-refoulement* under international law.¹⁵⁶

2.4.2 State practice: some aspects

Despite States' continued support for the principle of *non-refoulement* as a cornerstone of the international protection regime, State practice does not always conform with international law.¹⁵⁷ There have been frequent violations of the principle, well documented by UNHCR and human rights organizations such as the US Committee for Refugees and Immigrants, Amnesty International, and Human Rights Watch. In 2009, for example, UNHCR noted that people fleeing countries where a *prima facie* need for international protection was likely (such as Somalia) were at times denied admission at the border.¹⁵⁸ It expressed concern that in South-East Asia, large groups of asylum seekers travelling by boat were being intercepted and towed back out to sea, resulting in loss of life, while in

Central Asia, Afghan refugees were being forcibly returned from Uzbekistan.¹⁵⁹

UNHCR has repeatedly stressed that failures in protection stem not from the international protection regime itself, but rather from ‘the persistent failure of States to respect treaty obligations’.¹⁶⁰ The problem is one of implementation, not standards.¹⁶¹ In this regard, the US delegate to the Executive Committee stated that when protection principles are not upheld by governments, ‘the response should not be to lower them, but jointly to seek ways of bringing practice into line with them’.¹⁶²

As noted in the previous section, States tend to ‘re-characterize’ breaches of *refoulement*, thus supporting the argument that such States are *not* seeking to develop a counter-norm of customary international law to challenge the fundamental principle.¹⁶³ For example, following the 1994 Rwandan genocide, there were a number of serious instances of large-scale *refoulement* in the Great Lakes region (despite protests by States and UNHCR).¹⁶⁴ Significantly, however, the Tanzanian authorities maintained their support for the importance of the principle of *non-refoulement*, arguing that those expelled ‘were not refugees’, but illegal aliens or former refugees whose status has ceased.¹⁶⁵ At other times, they sought to excuse removals on the basis that local officials had misunderstood national policy.¹⁶⁶ Other States have invoked their lack of resources, threats to national security, and fears of political destabilization.¹⁶⁷ While such concerns may be bona fide, the international protection regime provides the basis for a response grounded in responsibility sharing and the rule of law.

According to UNHCR, instances of *refoulement* have also resulted from ‘physical and administrative barriers to accessing safe territory’¹⁶⁸ (including interception, pushbacks and land border closures¹⁶⁹); inappropriate application of the safe third country concept;¹⁷⁰ the deportation of refugees for breaching conditions;¹⁷¹ the granting of extradition requests without due process safeguards in place;¹⁷² failures to distinguish between asylum seekers and other irregular migrants;¹⁷³ the enforcement of strict security measures aimed at preventing terrorism, without the necessary safeguards to safeguard the principle of *non-refoulement*;¹⁷⁴ ‘legislation or practices allowing asylum applicants or refugees suspected of supporting terrorist activities to be expelled or extradited to their countries of origin in a manner inconsistent with substantive and procedural standards under international law’;¹⁷⁵ and States’ ignoring interim measures imposed by the European Court of Human Rights and removing people.¹⁷⁶ Such risks are compounded by ‘a lack of screening systems in many countries, legal

admissibility bars to asylum procedures, readmission agreements implemented without protection safeguards, “pushbacks” of vessels carrying asylum-seekers at sea, and border closures'.¹⁷⁷ At times, legislative exceptions exceeding the permissible limits in article 33(2) of the Refugee Convention have resulted in breaches of the principle.¹⁷⁸

3. The scope of the principle of *non-refoulement* in the 1951 Convention

3.1 Personal scope

The principle of *non-refoulement*, as it appears in article 33 of the 1951 Convention, applies clearly and categorically to refugees within the meaning of article 1. It also applies to *asylum seekers*, at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection. Those seeking refuge or with a presumptive or *prima facie* claim to refugee status are therefore entitled to protection, as the UNHCR Executive Committee has stressed, for example, in Conclusion No. 6 (1977), reaffirming ‘the fundamental importance of the principle of *non-refoulement* ... irrespective of whether or not individuals have been formally recognized as refugees'.¹⁷⁹ This has also been affirmed by the General Assembly.¹⁸⁰ Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter *how* the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the actions of State agents once he or she does. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is *refoulement* contrary to international law.

The status or personal circumstances of the asylum seeker may nevertheless control the options open to the receiving State. In the case of asylum seekers rescued at sea, for instance, a categorical refusal of disembarkation can only be equated with *refoulement* if it actually results in the return of refugees to persecution. This is not the only relevant legal issue at play, however, and other obligations may be violated if a coastal State does not permit disembarkation at the nearest safe port.¹⁸¹ From a practical perspective, a refusal to take account of their claims to be refugees (for example, by failing to examine their claims through a status determination process) would not suffice to avoid liability for breach of the principle of *non-refoulement*.¹⁸² This means that measures such as interceptions and turnbacks at sea entail inherent risks of violating the

principle.¹⁸³

3.2 The question of risk

The legal, and to some extent logical, relationship between article 33(1) and article 1 of the 1951 Convention/1967 Protocol is evident in the correlation established in State practice, where entitlement to the protection of *non-refoulement* is conditioned simply upon satisfying the well-founded fear criterion. So far as the drafters of the 1951 Convention were aware of a divergence between the words defining refugee status and those requiring *non-refoulement*, they gave little thought to the consequences. Mr Rochefort, the French representative, suggested that article 1 referred to examination at the frontier of those wishing to enter a contracting State, whereas article 33 was concerned with provisions applicable at a later stage. The co-existence of these two possibilities was perfectly feasible, though he detected a distinct and somewhat uncomfortable inconsistency between article 33(1) and article 1.¹⁸⁴ This related not to the presence of conflicting standards of proof, however, or to issues of extraterritorial application, but to the class and extent of those, principally criminals, who were to be excluded from refugee status and/or denied the benefit of *non-refoulement*.

The intimate link between articles 1 and 33 was nevertheless recognized;¹⁸⁵ in both, the status of ‘refugee’ was to be governed by the criterion of well-founded fear, and denial of status or *refoulement* would always be exceptional and restricted.¹⁸⁶ The *travaux préparatoires* do not explain the different wording chosen for the formulations respectively of refugee status and *non-refoulement*; but neither do they give any indication that a different standard of proof was intended to be applied in one case, rather than in the other. In practice, the same standard is accepted at both national and international levels, reflecting the sufficiency of serious risk, rather than any more onerous standard of proof, such as the clear probability of persecution.¹⁸⁷

At the international level, no distinction is recognized between refugee status and entitlement to *non-refoulement*. In only one instance were articles 1 and 33, as a coherent structure of protection, severed by a judicial ruling on literal meaning; and on that occasion, the executive branch of government took steps by regulation to bridge the gap between the refugee eligible for the discretionary grant of asylum and the refugee with a right to the benefit of *non-refoulement*.¹⁸⁸ Over the years, however, the gap was widened again, and the US appears to be

the only State party to the 1951 Convention/1967 Protocol which applies a higher standard of proof than well-founded fear to the *non-refoulement* obligation. The interpretation adopted by the Supreme Court in 1984 in *INS v Stevic* was even then out of line with that of other States, and the Trump administration did its best to make asylum unattainable by effectively requiring an applicant with a well-founded fear of persecution to show also that he or she merits asylum as a matter of discretion.¹⁸⁹

The relation of refugee status and *non-refoulement* was described more coherently by the UK House of Lords in 1987, in *R v Secretary of State for the Home Department, ex parte Sivakumaran*:

It is ... plain, as indeed was reinforced in argument ... with reference to the *travaux préparatoires*, that the *non-refoulement* provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention.¹⁹⁰

Non-refoulement extends in principle, therefore, to every individual who has a well-founded fear of persecution (or other serious harm, as detailed in Chapter 7), if returned to a particular country.

4. Exceptions to the principle of *non-refoulement* in the 1951 Convention

No reservations are permitted to article 33 of the 1951 Convention, but limited exceptions to the principle's application are set out in article 33(2).¹⁹¹ It provides that the benefit of *non-refoulement* may not be claimed by a refugee, 'whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.¹⁹² The exceptions are framed in terms of the individual, and whether he or she may be considered a security risk is necessarily left very much to the judgement of the State authorities.¹⁹³ This, at least, was the intention of the British representative at the 1951 Conference, who proposed the inclusion of article 33(2), and such an approach to security cases is supported both by article 32(2) of the Convention and by immigration law and practice generally.¹⁹⁴ Moreover, an exception may only be applied following an individual assessment.¹⁹⁵

'National security' and 'public order' have long been recognized as potential exceptions to the principle of *non-refoulement*, even prior to the drafting of the Refugee Convention.¹⁹⁶ Yet, the inherent nature of *national* security, considered

within a community of ‘sovereign’ States, means that the concept remains undefined in international law, although its area of operation can be inferred, to some extent, from the right of every State freely to choose its political, economic, social, and cultural system, to its *prima facie* exclusive competence in the ‘reserved domain of domestic jurisdiction’, and to its right to use force in self-defence. Grahl-Madsen suggested the following approach to ‘security’:

If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g., falsification of election results, coercion of voters, etc), or if he engages in activities which are directed against a foreign Government, which as a result threaten the Government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to national security. Generally speaking, the notion of ‘national security’ or ‘the security of the country’ is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned.¹⁹⁷

Historically, it was uncommon for either ‘national security’ or ‘danger to national security’ to be defined in domestic asylum legislation. More recently, some States have sought to do so, often linking ‘security’ to ‘terrorism’ and locating both issues in the procedures for determining refugee status and granting asylum.¹⁹⁸ Also, legislation on national security mechanisms and agencies may indicate typical issues of concern to State authorities charged with protecting security; this in turn may give an indication of the sorts of activities which States have in mind, and allow a sense of ‘danger to security’ to be inferred.¹⁹⁹

Article 33(2) expressly refers to a danger to the security or community of the host State. Lauterpacht and Bethlehem argue that it would be inappropriate for a State to remove an individual pursuant to that provision on the grounds that he or she constituted a threat to *another* State or the international community generally.²⁰⁰ Hathaway, however, argues that ‘there is no good reason’ to restrict the interpretation of article 33(2) to risks directed only at the host State.²⁰¹ In *Suresh*, the Supreme Court of Canada found that a risk to national security ‘may be grounded in distant events that indirectly have a real possibility of harming Canadian security’,²⁰² and, clearly influenced by the attacks of 11 September

2001 on the United States, noted that ‘the security of one country is often dependent on the security of other nations’.²⁰³ This would not necessarily require targets to be geographically located in the host State, but could extend to terrorist acts abroad which have an impact on that State’s interests.²⁰⁴

Lauterpacht and Bethlehem note that States’ margin of appreciation in security cases is limited by two requirements. First, the State must demonstrate ‘reasonable grounds’ for believing that the particular refugee is a danger to that country’s security by adducing evidence of a future risk.²⁰⁵ The standard of proof is the same as with respect to article 1F.²⁰⁶ Secondly, given the serious individual consequences of *refoulement*, the threshold for establishing an exception to *non-refoulement* ought to be very high. Accordingly, only a very serious danger to national security should justify *refoulement*.²⁰⁷ They draw support for their conclusion from article 1F, noting that ‘[s]ince the threshold of prospective danger in Article 33(2) is higher than that in Article 1F, it would hardly be consistent with the scheme of the Convention more generally to read the term “danger” in Article 33(2) as referring to anything less than very serious danger.’²⁰⁸

It is not immediately clear to what extent, if at all, one convicted of a particularly serious crime must *also* be shown to constitute a danger to the community. The jurisprudence is relatively sparse and the notion of a ‘particularly serious crime’ is not a term of art,²⁰⁹ but principles of natural justice and due process of law require something more than mere mechanical application of the exception. Lauterpacht and Bethlehem regard the critical factor as the danger the individual poses, rather than a painstaking classification of the ‘particularly serious crime’.²¹⁰ Reflecting on the drafting history, Grahl-Madsen wrote that ‘the important factor is that the act is “particularly serious”, so that its perpetration justly may be described as “a danger to the community”’.²¹¹ Zimmermann and Wennholz argue that ‘[d]angerousness cannot be simply considered to be indicated by the severity of a penal sentence for the crime committed, even if a national provision sets a specific minimum sentence for the clause to apply.’²¹²

A number of States now prescribe crimes that are to be regarded as ‘particularly serious’ for the purposes of article 33(2) of the 1951 Convention, such as rape, homicide, drug trafficking, and armed robbery.²¹³ An approach in terms of the penalty imposed alone will likely be arbitrary.²¹⁴ In our view, and as a matter of international law, the interpretation and application of this concept in

the context of an exception to *non-refoulement* ought necessarily to involve an assessment of all the circumstances,²¹⁵ including the nature of the offence, the background to its commission, the behaviour of the individual, and the actual terms of any sentence imposed. As in the case of article 1F(b),²¹⁶ a priori determinations of seriousness by way of legislative labelling or other measures substituting executive determinations for judicial (and judicious) assessments are inconsistent with the *international* standard which is required to be applied, and with the humanitarian intent of the Convention.²¹⁷ After all, what is at issue here is action by the State in manifest disregard of what is recognized as serious danger (persecution) to the life or liberty of a refugee. It is the nature of presumptions that they disregard context and circumstances, and therefore also the principle of individual assessment.

This approach has not always been understood by national tribunals, and legislation in some States has tended expressly to override this dimension. For example, section 55 of the UK's Immigration, Nationality and Asylum Act 2006²¹⁸ permits the Secretary of State to certify 'that the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention', either because article 1F applies or because article 33(2) applies on grounds of national security, in each case whether or not the individual concerned would otherwise be entitled to protection. Likewise, section 34 of the Anti-Terrorism, Crime and Security Act precludes consideration of the gravity of any individual threat to the person concerned. The proportionality approach has been rejected by the NZ Supreme Court in *Attorney-General v Zaoui*²¹⁹ (reversing the decision of the Court of Appeal on this point²²⁰), and Australian courts have held that neither the structure nor the text of article 33(2) permits any balancing exercise.²²¹ In the US, the Immigration and Nationality Act contains a non-rebuttable presumption that anyone 'engaging in terrorist activity' is a danger to security.²²²

By contrast, courts in Belgium,²²³ Canada,²²⁴ and the UK (pre-2006 legislation) have employed a balancing test.²²⁵ In 2017, the Kenyan High Court observed that article 33(2) 'should be applied with the greatest caution'. '[G]iven the seriousness of an expulsion for the refugee, such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared',²²⁷ and 'any mitigating factors and the possibilities of rehabilitation and reintegration within society' should be taken into account.²²⁸ This is supported by UNHCR, which argues that article 33(2) demands an

‘individualized and prospective’ assessment.²²⁹

Yet, some commentators also endorse the ‘effective *refoulement*’ approach, although the conclusory manner of presentation can often fail expressly to disclose a range of necessarily preceding assessments in which individual circumstances and proportionality can and ought to have been considered. For instance, Hathaway argues that the risk to the individual refugee should not be taken into account once the criteria of article 33(2) are met.²³⁰ This approach is inconsistent with (among other things) States’ protection obligations under human rights law.²³¹

Lauterpacht and Bethlehem suggest that proportionality in the article 33(2) context necessitates consideration of factors such as:

- (a) the seriousness of the danger posed to the security of the country;
- (b) the likelihood of that danger being realized and its imminence;
- (c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;
- (d) the nature and seriousness of the risk to the individual from *refoulement*;
- (e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.²³²

From a due process perspective, whether a refugee is a danger to the community or a danger to the security of the country is a matter to be determined on the basis of the evidence relating to that individual, considered against an understanding of the concept of security.²³³ ‘Seriousness’, ‘security’, and ‘danger’ are not self-applying concepts and their application in a particular case requires, as a matter of due process, that the individual should know and be able to meet the case against him or her, and have the opportunity to show why, in the circumstances, applying the exception would be disproportionate.²³⁴

The International Court of Justice has made clear that, while the essential interests of the State may include its own and its population’s security, the threat occasioned by a grave and imminent peril must be objectively established and not merely apprehended. The response of the State will be excluded, however, if other lawful means are available, even if more costly and less convenient. Moreover, as that Court has emphasized elsewhere, the concept of necessity

implies and permits only what is strictly necessary for the purpose.²³⁵

Finally, has the broadened principle of *non-refoulement* under human rights law, which proscribes removal to persecution as well as to torture or cruel, inhuman, or degrading treatment or punishment, rendered article 33(2) redundant?²³⁶ A person who fears ‘persecution’ necessarily also fears at least inhuman or degrading treatment or punishment, if not torture.²³⁷ As Chetall notes, the absolute nature of the prohibition on *refoulement* under human rights law applies to those denied Convention protection pursuant to article 33(2), although in practice, this ‘concerns a highly marginal number of persons compared to the total population of refugees and other persons in need of protection’.²³⁸

The Joint Committee on Human Rights was aware of this in 2004 when it considered the UK’s classification of a wide range of crimes as ‘particularly serious’ for the purposes of article 33(2). It thought it ‘likely that an individual who is treated as being within the scope of Article 33(2) ... would nevertheless still be protected against return by the operation of Article 3 ECHR’.²³⁹ In its view, the effect of applying article 33(2) was not necessarily *refoulement* but ‘the deprivation of an opportunity to establish refugee status, and the various concomitant advantages which come with such status’.²⁴⁰ These comments suggest that article 33(2) was being used primarily as a mechanism for denying asylum to asylum seekers who had not been excluded, but who had committed a crime in the United Kingdom and whose status remained to be finally determined.²⁴¹

If article 33(2) is applied to a refugee, but his or her removal is precluded by virtue of the widened operation of *non-refoulement* under human rights law, what effect does that have on the refugee’s legal status? The logic behind the distinction between article 1F and article 33(2) is that a refugee touched by article 33(2) *retains* his or her status as a Convention refugee,²⁴² whereas a person who is excluded by article 1F never was, or can be, a Convention refugee.

5. Relationship of the principle of *non-refoulement* to other contexts

5.1 *Non-refoulement* and ‘illegal entry’

In view of the normative quality of *non-refoulement* in international law, the precise legal status of refugees under the immigration or aliens law of the State of refuge is irrelevant, although a State seeking to avoid responsibility will often

classify them as prohibited or illegal immigrants.²⁴³ The protection applies not only to those ultimately accorded refugee status, but also to those persons claiming asylum in good faith,²⁴⁴ including those travelling on false documents.²⁴⁵ Refugees who flee commonly have no time for immigration formalities, and are in any case unlikely to be eligible for visas sought through official migration channels.²⁴⁶ Allowance for this is contained in article 31 of the Convention, which of all articles comes closest to dealing with the controversial question of admission. This is not formally required; instead, penalties on account of illegal entry or presence must not be imposed on refugees ‘coming directly from a territory where their life or freedom was threatened ... provided they present themselves without delay ... and show good cause for their illegal entry or presence’.²⁴⁷ Refugees are not required to have literally come directly from their country of origin,²⁴⁸ but other countries or territories passed through should also have constituted actual or potential threats to life or freedom. Indeed, the drafters of the provision expressly noted that someone who had spent a fortnight or so elsewhere before reaching the country in which he or she claimed asylum should not be precluded from the protection of article 31,²⁴⁹ and this was endorsed by an Expert Roundtable in 2001.²⁵⁰ Costello argues that there is considerable support for the interpretation that all refugees are ‘coming directly’ unless they have been granted asylum elsewhere.²⁵¹ Hathaway argues that ‘the “coming directly” gloss is largely an unnecessary distraction, adding no clear value to the core criterion to show “good cause for their illegal entry or presence.”’²⁵²

In *Adimi*, Simon Brown LJ recognized that refugees have ‘some element of choice’ as to where they claim asylum:

[A]ny merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and ... the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.²⁵³

What remains less clear is whether the refugee is entitled to invoke article 31 when continued flight has been dictated more by the refusal of other countries to grant asylum, or by the operation of exclusionary provisions such as those on

safe third country, safe country of origin, or time limits.²⁵⁴ Whether these constitute ‘good cause’ for illegal entry would seem to rest with the State authorities, subject to the controlling impact of *non-refoulement*.²⁵⁵ However, having a well-founded fear of persecution is generally recognized in itself as constituting ‘good cause’.²⁵⁶ It may further be constituted by apprehension on the part of the refugee or asylum seeker in seeking protection, a lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party. Costello argues that ‘the meaning of “good cause” refers to the good cause for the illegal entry or stay in the particular case’, which may include ‘the impossibility of legal entry due to visa requirements’. Since refugees typically have few lawful options for travel, ‘it should generally be accepted that they have “good cause” for illegal entry or presence’.²⁵⁷

Indeed, international law does not impose a duty on the asylum seeker to lodge a protection claim at any *particular* stage of flight. That said, domestic law may preclude asylum seekers from lodging an asylum claim if they have transited through other ‘safe’ countries.²⁵⁸ States may legislatively confine the meaning of ‘without delay’ in article 31 by requiring that asylum seekers lodge an asylum claim within a prescribed period, or else lose entitlements to particular benefits.²⁵⁹ However, the drafting history reveals that the purpose of that requirement was to deny protection only in limited circumstances. Thus, if a refugee does not claim asylum because of unfamiliarity with procedures, for instance, this should not preclude the protection of article 31.²⁶⁰

The term ‘penalties’ is not defined in article 31, prompting the question whether it encompasses only criminal sanctions, or whether it also extends to administrative penalties (such as administrative detention), and to other or subsequent limitations on social and economic rights.²⁶¹ In line with the Human Rights Committee’s reasoning that the term ‘penalty’ in article 15(1) ICCPR 66 must be interpreted in light of that provision’s object and purpose,²⁶² article 31 warrants a broad interpretation reflective of its aim to proscribe sanctions on account of illegal entry or presence.²⁶³ An overly formal or restrictive approach is inappropriate, since it may circumvent the fundamental protection intended.²⁶⁴ In *B010 v Canada (Citizenship and Immigration)*, the Supreme Court of Canada rejected the government’s argument that article 31 only applied to criminal penalties, stating that: ‘[t]his interpretation runs counter to the purpose of art. 31(1) and the weight of academic commentary ... The generally accepted view is that denying a person access to the refugee claim process on account of his

illegal entry, or for aiding others to enter illegally in their collective flight to safety, is a “penalty” within the meaning of art. 31(1).²⁶⁵

Thus, measures such as arbitrary detention²⁶⁶ or procedural bars on applying for asylum may constitute ‘penalties’.²⁶⁷ This is supported by Executive Committee Conclusion No. 22 (1981), which states that asylum seekers should ‘not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful’.²⁶⁸ In Conclusion No. 97 (2003), the Executive Committee made clear that intercepted asylum seekers ‘should not become liable to criminal prosecution under the *Protocol against the Smuggling of Migrants by Land, Sea and Air* for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met’.²⁶⁹ In one case, the court quashed a trafficking victim’s conviction for possession of false documents with intent, taking particular account of the level of compulsion she was under. Immigration offences were frequently committed by victims of trafficking, there was a clear connection between the use of a false passport and her experience, and she could hardly have been expected to extricate herself and promptly claim asylum.²⁷⁰

Although administrative detention is technically permissible under article 31(2), it will be equivalent to a penal sanction whenever basic safeguards are lacking (with respect to conditions, duration, review, and so on). In this context, the distinction between administrative and criminal sanctions becomes irrelevant, and the key issue is whether the measures taken are reasonable and necessary, arbitrary or discriminatory, or a breach of human rights law.²⁷¹ The Human Rights Committee has found on successive occasions that Australia’s system of mandatory detention breaches article 9 ICCPR 66 because it is automatic, indiscriminate, and non-reviewable.²⁷²

Detention that is punitive and imposed on account of illegal entry or presence will violate article 31. This requires, among other things, an assessment of its purpose and character, the intent of the State resorting to detention, ‘and whether the objective is similar to that of penal law, i.e. retribution or deterrence. As a result, detention used as a deterrent violates Article 31(1)’.²⁷³

To impose penalties in the absence of *individual* assessment of the asylum seeker’s claim not only breaches article 31(1), but is also likely to violate the State’s obligation to ensure and protect the human rights of everyone within its

territory or subject to its jurisdiction.²⁷⁴ A conviction may only be executed once it has been determined that the individual is not a Convention refugee; this has not always been respected in State practice.²⁷⁵

At the 1951 Conference, several representatives considered that the undertaking not to impose penalties did not exclude the possibility of resort to expulsion.²⁷⁶ Article 31 does not require that refugees be permitted to remain, and paragraph 2 emphasizes this point indirectly, by providing:

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and ... [they] shall only be applied *until their status in the country is regularized or they obtain admission into another country*. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country (emphasis added).

Given that the principle of *non-refoulement* remains applicable, the freedom of the State finally to refuse regularization of status can well be circumscribed in practice. Article 31, on its face, nevertheless appears to allow the State to continue to keep the unsettled refugee under a regime of restricted movement, for example, in prison, camp, or settlement, or subject to other restrictions, such as denial of access to employment, social security, or equivalent support. For many States, however, their human rights obligations will limit their freedom of action, and require that refugees not be rendered destitute or otherwise subject to inhuman or degrading treatment.²⁷⁷

5.2 *Non-refoulement* and extradition

The 1951 Convention says nothing specifically about the extradition of refugees, namely, the surrender of alleged offenders to the authorities of another State for the purposes of criminal prosecution. In principle, *non-refoulement* should also apply in this context, for other provisions of the Convention already recognize the interests of the State of refuge in not committing itself to the reception of serious criminals.²⁷⁸ Furthermore, article 33(1) prohibits removal ‘in any manner whatsoever’. In 1951, however, a number of States were of the view that article 33 did not prejudice extradition.²⁷⁹ One suspected of a serious non-political crime would in any event be excluded from the benefits of refugee status,²⁸⁰ but one suspected or guilty of a non-serious non-political crime would remain liable to extradition, even to the State in which he or she had a well-founded fear of persecution. Any conflict of treaty obligations might be further dependent upon

which obligation was contracted first.

This issue today requires analysis of State practice since 1951, in light of the object and purpose of the Convention and the development of the principle of *non-refoulement*. If States had reservations about the relationship between extradition and article 33 in 1951, these have been displaced by subsequent regional, bilateral, and multilateral State practice.²⁸¹ Today, it is clear that the principle of *non-refoulement* protects refugees from extradition.²⁸²

Extradition in violation of the principle of *non-refoulement* is clearly prohibited under human rights law.²⁸³ Article 3 of CAT 84, for instance, provides that: ‘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.’²⁸⁴ The same approach applies with respect to cruel, inhuman, or degrading treatment or punishment, arbitrary deprivation of life, the death penalty, and a flagrant denial of justice,²⁸⁵ and is reflected in many extradition treaties.²⁸⁶ Any obligation a State may have under a bilateral or multilateral extradition agreement to surrender a person is overridden by its *non-refoulement* obligations under international refugee and human rights law.²⁸⁷

Although in theory, persons excluded from refugee status (or those to whom article 33(2) applies) ‘can potentially be extradited’ if other international law guarantees are respected,²⁸⁸ in most cases persecution will also amount to cruel, inhuman, or degrading treatment and return will thus be precluded.²⁸⁹ Furthermore, many multilateral and bilateral extradition treaties contain a so-called ‘discrimination clause’ which provides for the possibility to refuse extradition where there are substantial grounds for believing that this may expose a person to prosecution, punishment, or discrimination on account of race, religion, nationality, or political opinion.²⁹⁰

For instance, the 1981 Inter-American Convention on Extradition expressly provides that ‘[n]o provision of this Convention may be interpreted as a limitation on the right of asylum when its exercise is appropriate’,²⁹¹ and precludes 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 these reasons’.²⁹² Similarly, the 1957 European Convention on Extradition prohibits extradition, ‘if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the

purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, *or that that person's position may be prejudiced for any of those reasons*'.²⁹³ This provision served as a model for bilateral treaties and municipal laws,²⁹⁴ clearly influencing the Scheme for the Rendition of Fugitive Offenders adopted in 1966 by the Meeting of Commonwealth Law Ministers²⁹⁵ (and implemented in many Commonwealth countries since then²⁹⁶), and article 3(b) of the UN Model Treaty on Extradition.²⁹⁷ It is likewise reflected in a number of other multilateral agreements.²⁹⁸

The inclusion of the principle *aut dedere aut judicare* in instruments aimed at suppressing certain crimes with an international dimension²⁹⁹ is further acknowledgement that even the most serious criminal may deserve protection against persecution or prejudice, while not escaping trial or punishment.³⁰⁰ Where non-extradition in such cases is prescribed as an *obligation*, the discretion of the State is significantly confined. *Non-refoulement* is obligatory³⁰¹ in respect of a class of alleged serious offenders, and no less should be required for the non-serious criminal who would otherwise fall within the exception.³⁰² Anxious to ensure not only the protection of refugees, but also the prosecution and punishment of serious offences, the Executive Committee stressed 'that protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded by virtue of Article 1(F)(b)' of the Convention.³⁰³

Judicial decisions from different jurisdictions support this approach. In the United Kingdom, a serious risk of prejudice has been considered sufficient to justify protection in extradition and refugee cases, certainly since the decision of the House of Lords in *Fernandez v Government of Singapore*.³⁰⁴ Courts in other States have also consolidated the basic principle of protection against extradition in favour of the refugee.³⁰⁵ Importantly, the Swiss *Bundesgericht* ruled that an extradition order would be given suspensive effect until refugee status had been finally determined, so as to avoid a conflict between Switzerland's extradition obligations and its duties under the 1951 Convention.³⁰⁶ Extradition is also barred if there is a risk that the requesting State may expose the individual to *refoulement* by surrendering him or her to a third State.³⁰⁷

In *Németh*, the Supreme Court of Canada held that there is no requirement in international law that '[e]xtradition may only be ordered if a previous finding that a person is a refugee has been formally set aside ... provided that the extradition authorities give due weight to the obligation of *non-refoulement* by

fairly examining the question of whether the risk of persecution persists'.³⁰⁸ However, 'there should be no burden on a person who has refugee status to persuade the Minister that the conditions which led to the conferral of refugee protection have not changed': this would be inconsistent with Canada's domestic law on cessation of refugee status, as well as with Canada's international undertakings with respect to the principle of *non-refoulement*.³⁰⁹ Thus, '[w]here a person has been found, according to the processes established by Canadian law, to be a refugee and therefore to have at least a *prima facie* entitlement to protection against *refoulement*, that determination must be given appropriate weight by the Minister in exercising his duty to refuse extradition on the basis of risk of persecution'.³¹⁰ The Minister must refuse to extradite a person if he or she is satisfied that the conditions which led to conferral of refugee status continue and it is not shown that the person has become ineligible for such status.

In the 2012 case of *Othman (Abu Qatada) v United Kingdom*, the European Court of Human Rights found that the applicant could not be removed to Jordan because of the real risk that evidence obtained by torture would be admitted in his criminal trial, amounting to a 'flagrant denial of justice' in violation of article 6 ECHR 50.³¹¹ Although this bar on extradition had been recognized as far back as *Soering* in 1989,³¹² this was the first case in which it successfully prevented removal.

State practice increasingly reflects an acceptance of 'conditional' extradition, based on guarantees (or 'assurances') by the receiving State that the transfer will not constitute *refoulement*. An assurance by the receiving State not to impose the death penalty, for example, even where that would be permissible under domestic law, is regarded by many States as sufficient to enable extradition within the framework of their human rights obligations.³¹³ However, this practice has been criticized as incompatible with the absolute nature of States' *non-refoulement* obligations under article 3 ECHR 50, article 3 CAT 84, and article 7 ICCPR 66, which cannot be 'contracted out of' by guarantees.³¹⁴ Some commentators suggest that guarantees may be appropriate to ensure that the individual will not be exposed to capital punishment or an unfair trial, but will generally be insufficient to relieve the State of its *non-refoulement* obligations with respect to torture or cruel, inhuman, or degrading treatment or punishment, especially if there is a pattern of abuse in the receiving State.³¹⁵ The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed concern that some States use diplomatic assurances and memoranda of

understanding to circumvent the absolute prohibition on torture under international law, noting that such agreements may be contrary to CAT 84 and undermine the monitoring system provided by the UN treaty bodies. Furthermore, the fact that such agreements are sought ‘is already an indicator of the systematic practice of torture in the requested States’, yet they seek only to ensure that particular individuals are not tortured, rather than condemning the system of torture.³¹⁶ The Committee against Torture likewise has stated that diplomatic assurances ‘should not be used as a loophole to undermine the principle of non-refoulement’.³¹⁷

5.3 *Non-refoulement* and expulsion

The protection afforded by article 32 is similar, but not identical, to article 33. The latter applies to any person present in the territory of a State, whereas the former applies only to those lawfully present.³¹⁸

Notwithstanding that States are bound by the principle of *non-refoulement*, they retain considerable discretion as regards both the grant of ‘durable asylum’ and the conditions under which it may be enjoyed or terminated. However, the 1951 Convention/1967 Protocol acknowledge that the expulsion of refugees raises special problems, and under article 32 States undertake not to ‘expel a refugee lawfully in their territory save on grounds of national security or public order’.³¹⁹ Additional procedural limitations required by article 32 include that decisions to expel must be in accordance with due process of law and, ‘except where compelling reasons of national security otherwise require’, refugees must be accorded the right of appeal.³²⁰ Moreover, refugees under order of expulsion are to be allowed a reasonable period within which to seek legal admission into another country, though States retain discretion to apply ‘such internal measures as they may deem necessary’.³²¹

The restricted grounds of expulsion have been adopted in the laws of many States,³²² and have been taken into account in a number of judicial decisions.³²³ The benefit is limited to refugees who enjoy what might loosely be called ‘resident status’ in the State in question, and one admitted temporarily remains liable to removal in the same way as any other alien.³²⁴ Some commentators argue that the drafting records show that the provision was intended to be interpreted broadly, such that even a brief stay (rather than residence, *per se*) would suffice for the protection of article 32 to attach.³²⁵ The permitted power of expulsion, however, does not include the power to return the individual to the

country in which his or her life or freedom may be threatened, unless the further exacting provisions which regulate exceptions to the principle of *non-refoulement* are also met.³²⁶ In 2005, the Executive Committee again expressed deep concern that ‘refugee protection is seriously jeopardized by expulsion of refugees leading to refoulement’, and called on States ‘to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of non-refoulement’.³²⁷ Article 32 thus supplements, but is limited by, the principle of *non-refoulement* under both article 33 and human rights law, which applies to all refugees and asylum seekers, not just those ‘lawfully in’ the territory.

Article 32 may yet have both advantages and disadvantages for the refugee. Thus, one expelled for the serious reasons stated in article 32(1) is likely to face major difficulties in securing admission into any other country.³²⁸ Return to the country of origin being ruled out, the refugee may be exposed to prosecution and detention for failure to depart. As only the State of nationality is obliged to admit the refugee,³²⁹ the expelling country may find itself frustrated in its attempts at removal. For these reasons, in 1977, the Executive Committee recommended that expulsion should be employed only in very exceptional cases. Where execution of the order was impracticable, it further recommended that States consider giving refugee delinquents the same treatment as national delinquents, and that the refugee be detained only if absolutely necessary for reasons of national security or public order.³³⁰

6. Non-refoulement in cases of mass influx

Though commonly invoked in the refugee context, the term ‘mass influx’ is not mentioned in any of the key international or regional refugee instruments, apart from the EU Temporary Protection Directive where it is described as the arrival of ‘a large number of displaced persons, who come from a specific country or geographical area’.³³¹ UNHCR suggests that a ‘mass influx’ should not be defined in numerical terms alone, but rather by the impact it has on the host State’s capacity to respond. Thus, what constitutes a mass influx will vary from context to context, conditional on the ability of the host State to provide protection and assistance in the usual way.³³²

A 2004 Executive Committee Conclusion on large-scale influx and international cooperation noted that mass influx situations may have 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.³³³

On this understanding, a mass influx exists only when the combination of the flow's size and suddenness makes individual refugee status determination procedurally impractical, placing strains on the host State's institutions and resources.

The principle of *non-refoulement* applies irrespective of the number of refugees who arrive.³³⁴ Nothing in the 1951 Convention, relevant human rights treaties, or the regional refugee instruments suggests that the principle is inapplicable in situations of mass influx.³³⁵ This has been clearly affirmed by States in successive Executive Committee Conclusions,³³⁶ the 2018 Global Compact on Refugees,³³⁷ and by UNHCR.³³⁸ Thus, in a situation of mass influx, States must ensure that their actions or omissions do not expose people to a risk of persecution or other serious harm, no matter how debilitating a sudden influx of refugees might be on a State's resources, economy, or political situation.

However, while the legal principles are the same, the procedures put in place to deal with a large number of arrivals may differ for purely practical reasons. Moreover, in some contexts, respect for the principle of *non-refoulement* comes at a price: the trade-off for accepting the obligation to admit large numbers is 'a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention'.³³⁹

While national security concerns have sometimes been used to justify restrictions on admission and rights in mass influx situations,³⁴⁰ a mass influx alone does not permit *refoulement*; it must additionally jeopardize the safety or security of the local population, which is itself likely to be offset by an international response to the situation.³⁴¹ To argue that an exception to the principle of *non-refoulement* exists in situations of mass influx³⁴² clearly overstates the case.

In the New York Declaration for Refugees and Migrants, adopted by consensus at the General Assembly in 2016, States 'recognize[d] the burdens that large movements of refugees place on national resources, especially in the case of developing countries',³⁴³ and 'acknowledge[d] a shared responsibility to

manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner'.³⁴⁴ The ensuing [Global Compact on Refugees, adopted in 2018](#), calls on all States and relevant stakeholders to 'tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict',³⁴⁵ and seeks to 'operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities' particularly affected by a large refugee movement or a protracted refugee situation.³⁴⁶ The Comprehensive Refugee Response Framework (CRRF), which is an integral part of the Compact, relates specifically to large refugee situations and details the actions required by different stakeholders from the outset of a large-scale influx through to finding durable solutions.

6.1 Some aspects of State practice

The views of States, and to some extent their practice, indicate an uncertain dimension to the principle of *non-refoulement* in mass influx situations, particularly where there is concern that the influx may constitute a threat to the security of the receiving State.³⁴⁸ Reservations with respect to the security aspects of mass influxes have not died away since they were formally recognized in the 1967 UN Declaration on Territorial Asylum, and continue to surface in the discourse of many 'frontline' States. Clearly, from 1979 onwards, resettlement guarantees and substantial financial contributions were a major factor in preserving the so-called principle of 'first asylum'.³⁴⁹

For instance, in October 1979, Thailand announced the reversal of a policy that had earlier led to the forcible return of some 40,000 Kampuchean; henceforth, all asylum seekers were to allowed to enter.³⁵⁰ Likewise, the unnerving prospect of a repeat operation on behalf of Kurdish refugees imminently leaving northern Iraq for Turkey was a factor in the decision to establish a security zone, thereby removing or attenuating the factor of risk that would otherwise have triggered the principle of *non-refoulement*, if not its application, in the particular circumstances.³⁵¹ In 1999, in response to threatened border closures by the Former Yugoslavian Republic of Macedonia, UNHCR took the unprecedented move of coordinating an international Humanitarian Evacuation Programme (and later a Humanitarian Transfer Programme) for thousands of refugees fleeing Kosovo. This novel strategy in international protection, and the shift in UNHCR's traditional practice of keeping refugees

within the region of displacement, saw the temporary hosting of 92,000 refugees by 29 States.³⁵² UNHCR described it as an example of solidarity and burden-sharing, evidencing ‘an exemplary political will to avert a risk of destabilisation created by the presence of large numbers of refugees in precarious circumstances’.³⁵³ Others criticized it as ‘an acceptance and therefore implicit condoning of Macedonian policy to reject refugees at the border until their transfer had been arranged’.³⁵⁴

While UNHCR must be attuned to the political realities of a given situation and should not insist on abstract legal norms at the expense of compromise protection responses, it is also important that UNHCR maintain focus on its independent responsibility to provide international protection and properly characterize acts of *refoulement*, instead of reverting to the language of admission. In the case of the former Yugoslavia, UNHCR ultimately favoured practical solutions and compromises to secure protection over legal principle.³⁵⁵

What UNHCR’s strategy there demonstrated in practice was the principle of *non-refoulement* as international cooperative endeavour.³⁵⁶ Indeed, as an obligation through time, continuing compliance with the principle of *non-refoulement* may well depend on a normative context of cooperation, particularly in situations of large-scale influx.³⁵⁷ Events in Europe over the course of 2015 and 2016 showed the precariousness of protection when States fail to cooperate, and the minimal results of attempts by UNHCR to encourage greater global responsibility-sharing on the admission of Syrian refugees did not inspire much hope.³⁵⁸ A report by the European Commission noted that the ‘large-scale, uncontrolled arrival of migrants and asylum seekers in 2015 ... put a strain not only on many Member States’ asylum systems, but also on the Common European Asylum System as a whole’, since the place of their physical arrival placed ‘responsibility, in law, for the vast majority of asylum seekers on a limited number of individual Member States, a situation which would stretch the capacities of any Member State’.³⁵⁹

The New Pact on Migration and Asylum, proposed in late 2020, was posited as a ‘durable’ European framework ‘to manage the interdependence between Member States’ policies and decisions and to offer a proper response to the opportunities and challenges in normal times, in situations of pressure and in crisis situations’.³⁶⁰ It remains to be seen whether this will be effective in practice.

Conflict in Syria and elsewhere over the past decade also provoked calls for

cooperation, particularly from ‘frontline’ and industrialized States. In 2013, Libya stated that the international community was ‘duty-bound’ to contribute sufficient funds to house, feed, and care for Syrian refugees in host countries.³⁶¹ Brazil argued that ‘countries which [do] not share borders with Syria’ have ‘a duty to improve access to their territories by Syrian refugees’,³⁶² taking steps to facilitate the grant of visas to those fleeing the conflict.³⁶³ In 2015, Jordan noted that while it had proudly shared its ‘limited resources’ with Syrian refugees, ‘the world must share the burden with us, because we are performing that humanitarian duty on behalf of all humankind’.³⁶⁴ More generally, Luxembourg ‘called for solidarity and reinforced cooperation at all levels in order to support Jordan, Turkey, Lebanon, Ethiopia, the Islamic Republic of Iran, Pakistan and other host countries’.³⁶⁵

Within the EU, Germany emphasized ‘the importance of European solidarity and a common European approach to the refugee crisis, as well as the need to establish a permanent relocation mechanism in the European Union, which would serve as a pillar of Europe’s asylum system’.³⁶⁶ The Netherlands advocated ‘a shared responsibility on the part of European Union member States for asylum seekers in Europe’, and called for ‘close partnerships between the countries in the region that received large flows of refugees, as well as the more active involvement of development actors, such as the World Bank, in emergency situations’.³⁶⁷ In 2014, Greece drew attention to ‘the scourge of human trafficking by sea in the Mediterranean’, and asserted that it ‘must be addressed in the spirit of burden-sharing and solidarity’.³⁶⁸ The New Pact on Migration and Asylum thus proposes ‘a new solidarity mechanism for situations of search and rescue, pressure and crisis’.³⁶⁹ Through a proposed new Regulation on Asylum and Migration Management, Member States will be obligated either to accept individuals for relocation or to assist other Member States with returns (‘return sponsorship’).³⁷⁰

Industrialized States have countered claims that the principle of *non-refoulement* is contingent on assistance by insisting that ‘there should be no mitigation of the absolute responsibility of States to observe the international principles of behaviour towards refugees, [but] there must also be a greater commitment to preventive approaches and increased readiness to help receiving countries cope’.³⁷¹ The EU has emphasized that responsibility-sharing ‘must not be a prerequisite for respecting the fundamental principles of refugee and human rights law, including asylum, non-refoulement and family unity’,³⁷² and the

Council of Europe has affirmed that States' obligation to respect the principle of *non-refoulement* 'is not dependent on burden-sharing arrangements between states'.³⁷³ While, as a matter of law, international protection is not *contingent* on burden-sharing, there is some acknowledgement that practical responses to alleviate the pressure on countries of first asylum may be necessary to ensure that the principle is not violated. The Humanitarian Evacuation Programme in Kosovo was one such example.³⁷⁴

Despite concerns about providing protection to large numbers of refugees, most States faced with a mass influx will respect the principle of *non-refoulement*, if nothing else. Although such States voice a desire for burden-sharing, in practice their response to large numbers of refugees has not been made contingent on it. The element of contingency tends to relate to what *other* rights are granted apart from *non-refoulement*, and these may depend on the level of international assistance offered. It is therefore important to distinguish carefully between situations of mass influx and other situations where a failure to apply the principle has led to protest.

7. Temporary protection

Temporary protection³⁷⁵ is not defined in international law, since it is a 'political instrument developed to cope with specific situations of mass-influx'.³⁷⁶ It is commonly understood to describe the exceptional, emergency, time-bound response of granting protection to a mass influx of asylum seekers fleeing persecution, armed conflict, endemic violence, disasters, or other serious human rights violations.³⁷⁷ It is therefore best understood as 'a practical device for meeting urgent protection needs in situations of mass influx'.³⁷⁸

Temporary protection is different from the common African practice of granting *prima facie* refugee status to members of a mass influx.³⁷⁹ That is based on the 'readily apparent, objective circumstances in the country of origin',³⁸⁰ and the obvious refugee character of the displaced, which render an individualized assessment of harm unnecessary.³⁸¹ It is widely acknowledged that 'refugees recognised on a *prima facie* basis are entitled to the same rights as refugees recognised under an individual refugees status determination scheme'.³⁸²

Whereas temporary protection is similarly premised on the refugee character of the flow in light of conditions in the country of origin, unlike *prima facie* status, it does not result in recognition of refugee status (which may take place in

a subsequent process).³⁸³ UNHCR argues that temporary protection should be conditional on the normal asylum procedure being overwhelmed by the influx, such that the combination of the flow's size and suddenness makes individual refugee status determination procedurally impractical.³⁸⁴ This is not currently a prerequisite in EU law,³⁸⁵ although would become so if the proposed regulation on crisis and *force majeure* is adopted. That instrument defines a 'situation of crisis' as 'an exceptional situation of mass influx' (or 'an imminent risk of such a situation'³⁸⁶) that is 'of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional'.³⁸⁷

While temporary protection can partly be seen as another link in the historical chain of protecting people fleeing from generalized violence and civil war,³⁸⁸ it is not synonymous with the norm of temporary refuge (discussed in section 7.1 below).³⁸⁹ It can be distinguished from temporary refuge in South-East Asia during the Indochinese refugee exodus of the 1970s and 1980s (and the notion of temporary protection developed in Executive Committee Conclusion No 22 for that context) in at least three significant respects. First, temporary protection in Europe was 'conceived by and for' States parties to the Refugee Convention,³⁹⁰ whereas in South-East Asia it was devised for frontline States that were not parties to that treaty.³⁹¹ Secondly, in the European context, temporary protection is premised on (eventual) return,³⁹² based on the rather optimistic view that 'international efforts to resolve the crisis' would render repatriation possible and thus the need for protection short-lived.³⁹³ By contrast, in South-East Asia, temporary protection was tolerated 'on an understanding that Western states would screen and grant distant resettlement to a significant percentage of the influx'; indeed, '[t]he promise of resettlement was the defining "temporary" element in the refuge offered'.³⁹⁴ This was only later joined by voluntary or involuntary repatriation following the Comprehensive Plan of Action.³⁹⁵ Thirdly, and related to the second point, whereas temporary protection in Europe is linked to admission to the territory and temporary stay, temporary refuge in South-East Asia was contingent on guarantees by other States that the host country would not bear the cost or any residual burden.³⁹⁶

The term 'temporary protection' gained prominence during the 1990s in relation to the crisis in the former Yugoslavia.³⁹⁷ The ad hoc and uncoordinated response at that time, combined with policymakers' desire for flexible and pragmatic protection mechanisms, led to 'a watershed in the formalization of

temporary protection’ in Europe, with the eventual adoption in 2001 of the EU Temporary Protection Directive.³⁹⁸

Temporary protection was not intended to displace or renegotiate the 1951 Convention’s rules and standards, but rather was created as a pragmatic response to clarify the application of the principle of *non-refoulement* in certain circumstances, and to prioritize the granting of particular rights to persons arriving *en masse*.³⁹⁹ The Directive makes clear that anyone encompassed by the definition in article 2(c) (such as those ‘who have fled areas of armed conflict or endemic violence’ or are ‘at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights’) retains the right to make an individual asylum claim at any time⁴⁰⁰ (although Member States are not obliged to adjudicate the claim until after the period of temporary protection expires).⁴⁰¹

To date, the Temporary Protection Directive has never been activated—not even in response to the comparatively large influx of Syrian refugees reaching Europe in 2015–16.⁴⁰² It seems unlikely that it will ever be utilized, especially now that it has been slated for removal.⁴⁰³

In 2014, UNHCR issued Guidelines on Temporary Protection or Stay Arrangements to assist States to respond to ‘humanitarian crises and complex or mixed population movements, particularly in situations where existing responses are not suited or adequate’.⁴⁰⁴

The guidelines have been critiqued for muddying an already ambiguous concept and failing to articulate a convincing temporary protection doctrine.⁴⁰⁵ As noted above, the concept of temporary protection can mean many different things, from an emergency protection response to a mass influx, through to a restrictive domestic status imposed by States unwilling to guarantee full Convention rights to refugees.⁴⁰⁶ The rationales for its use are similarly divergent: whereas the former is premised on ensuring that asylum seekers have immediate protection from *refoulement* and access to basic minimum standards of treatment, the latter is about deterrence and (hence) the withholding of rights from Convention refugees. Yet, the guidelines seem to ignore this, instead grouping these various concepts together, and failing to distinguish between the different protection gaps that each scenario creates. Rather than clarifying States’ obligations in relation to different groups, the guidelines obfuscate them.⁴⁰⁷

In this sense, the guidelines seem in part to be an unfortunate concession to the reticence of some States to implement their existing international obligations,

and thus a second-best approach to protection. A better approach would have been to maintain the paramountcy of States' duties under international law, and confine the idea of temporary protection to an exceptional, time-bound, emergency response.⁴⁰⁸

Nevertheless, the guidelines do reinforce a number of key standards which are particularly instructive for States that are not parties to relevant refugee and/or human rights treaties. For instance, there must be proper systems in place for the identification, registration, and documentation of beneficiaries. There must be appropriate reception arrangements, including access to territory and protection from direct or indirect *refoulement*, as well as mechanisms to meet the immediate needs of new arrivals (e.g. medical treatment, shelter, food, family tracing), and to identify those with specific protection needs. Building on Executive Committee Conclusion No. 22, the guidelines set out minimum standards of treatment for beneficiaries of temporary protection, including *inter alia* permission to stay for the designated period; protection against arbitrary or prolonged detention; treatment that is non-discriminatory, humane, and dignified; special care for separated and unaccompanied children, guided by the best interests of the child; respect for family unity and tracing, and opportunities for reunification with separated family members.

Durieux argues that 'temporary protection' should be understood purely as a term of art in the context of the EU Temporary Protection Directive, but otherwise be abandoned in favour of a renewed focus on the Refugee Convention itself.⁴⁰⁹ He suggests that in mass influx emergencies, a preferable approach would be to permit States to temporarily suspend their Convention obligations in a manner that is strictly monitored in accordance with international law standards,⁴¹⁰ and which cannot continue beyond the exigencies of the situation. There is, of course, no provision in the Convention that would permit this, and any such change would require agreement of all the parties, or practice that is sufficient to indicate that this is what the parties agree.⁴¹¹

7.1 The norm of temporary refuge

In the mid-1980s, Perluss and Hartman, subsequently supported by Goodwin-Gill, traced the development of a customary norm of 'temporary refuge', which prohibited States from forcibly repatriating foreigners who had fled generalized violence and other threats caused by internal armed conflict within their own State, until the violence ceased and the home State could assure the security and

protection of its nationals.⁴¹² It was based partly on a general duty of States to rescue those in distress, and partly on an enlarged concept of *non-refoulement*,⁴¹³ a position that reflected the UNHCR's view that *non-refoulement* demanded that 'no person shall be subjected to such measures as rejection at the frontier, or, if he has already entered the territory, expulsion or compulsory return to any country where he may have reason to fear persecution or serious danger resulting from unsettled conditions or civil strife'.⁴¹⁴

A decade later, the second edition of this work argued that 'the impact on State competence of the broader developments relating to human rights and displacement would have been better served by characterizing State responsibilities in terms of a general principle of *refuge*'.⁴¹⁵ The third edition (in 2007) claimed that this practice had come to be encompassed by the concept of 'complementary protection', and (in cases of mass influx) by the notion of 'temporary protection',⁴¹⁶ although in contexts characterized by temporary protection discourse, the complementary protection that flows from human rights is necessarily an integral part of any principled response.

In 2014, Goodwin-Gill revisited some of these issues and re-examined the relationship between the principle of *non-refoulement* (in refugee law and human rights law) and the norm of temporary refuge.⁴¹⁷ For Perluss and Hartman in 1986, the obligation not to return those displaced by armed conflict was conceptually distinct from refugee law and from international humanitarian law. The object and purpose of temporary refuge, in their scheme of analysis, was general protection against the risk of relevant harm, irrespective of the style or type of armed conflict; and, in their view, it ought not to be subsumed within the principle of *non-refoulement*, even if, from time to time, it might cover the same ground and benefit some of the same individuals.

Today, the core obligations of the principle of temporary refuge are firmly rooted in customary international law.⁴¹⁸ A not inconsiderable body of longstanding State practice can be combined with a substantial number of statements on the rules to be followed, which in turn can be found in declarations and resolutions adopted in the UNHCR Executive Committee and the UN General Assembly. The practice is dense, the expectation is high, and the exceptions are few and regularly protested by UNHCR and by individual States.

For understandable reasons, the impact of the principle of temporary refuge on issues of admission and non-return means that it continues to be associated with the principle of *non-refoulement*. This can be advantageous, so far as *non-*

refoulement acts as a powerful brake on the State. However, it can also be a drawback. While the principle of temporary refuge is closely integrated into the international refugee regime, it operates across a broader spectrum than *non-refoulement*.⁴¹⁹ Further, the obligation is particular: to admit those in need of international protection and not to return them to a situation of danger; protection cannot cease with the fact of admission, of course, but temporary refuge is not an obligation to grant permanent asylum. A good case can therefore be made for de-linking the concepts of refuge and *non-refoulement*, and in developing refuge itself as the overarching principle of protection, sufficient to accommodate all those instances where States are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms.

Of course, temporary refuge is not a complete answer to the problems of displacement, any more than the Refugee Convention is a complete answer to the protection needs of those in fear of persecution. But it is a critical normative first step in the effective international protection of those displaced by armed conflict, massive violations of human rights, disasters, or indiscriminate violence; and it is firmly and soundly based in customary international law, in the practice of States, and in their understanding of obligation.

8. Non-refoulement through time

However labelled, the concept of temporary refuge as the practical consequence of *non-refoulement* through time provides, first, the necessary theoretical nexus between the admission of refugees and the attainment of a lasting solution. It establishes, *a priori*, no hierarchy in the field of solutions, but allows a pragmatic, flexible, yet principled approach to the idiosyncrasies of each situation. So, for example, it does not rule out the eventual local integration or third country resettlement of all or a proportion of a mass influx in the State of first refuge, acting in concert with others and pursuant to principles of international solidarity and equitable burden-sharing.⁴²⁰ Secondly, the concept provides a platform upon which to build principles of protection for refugees pending a durable solution, whereby minimum rights and standards of treatment may be secured.

Without underestimating the necessity to ensure that regimes for the reception and treatment of refugees and asylum seekers conform with the requirements of international law, words such as ‘refuge’ and ‘protection’ may offer some

advantages over any comparable use of the word ‘asylum’ in situations of mass influx. Asylum is undefined; it can be used broadly to signify protection of refugees, or it can be used in the narrow sense of a durable or permanent solution, involving residence and lasting protection against the exercise of jurisdiction by the State of origin. A receiving State called upon to grant ‘asylum’ to large numbers may well demur; admission is more likely to be facilitated by reference to the norm of *non-refoulement* and to its manifestation as refuge or protection in the dynamic sense, through time, pending arrangements for whatever solution is appropriate to the particular problem. The high normative character of *non-refoulement* makes it independent of principles of solidarity and burden-sharing, but these cannot be ignored in a society of interdependent States.⁴²¹ In situations of large-scale influx, protection cannot cease with the fact of admission; on the contrary, it must move towards solutions in full knowledge of the political and practical consequences which result from a State abiding by *non-refoulement*.

The political and legal reality of mass influx is that States generally have not undertaken, and foreseeably will not undertake, an obligation to grant asylum in the sense of a lasting solution.⁴²² The incontrovertible norm of *non-refoulement* secures admission and, in the individual case, may raise the presumption or at least a reasonable expectation that a local durable solution will be forthcoming. In the case of large-scale movements, however, no such presumption is raised. In attaining its present universal and high normative character, *non-refoulement* has separated itself from asylum in the sense of a lasting solution. *Non-refoulement* through time is nonetheless the core element both promoting admission and protection, and simultaneously emphasizing the responsibility of nations at large to find the solutions. Thus, in admitting large numbers of persons in need of protection and in scrupulously observing *non-refoulement*, the State of first admission can be seen as acting on behalf of the international community.

The concept of temporary refuge/temporary protection in the context of large movements thus stands, paradoxically, as both the link and the line between the normative aspects of *non-refoulement* and the continuing discretionary aspect of a State’s right in the matter of asylum as a permanent or lasting solution, and in the treatment to be accorded to those in fact admitted. As Fitzpatrick observed:

For refugee agencies such as the United Nations High Commissioner for Refugees, TP [temporary protection] serves as a short-term strategy to secure the immediate physical safety of refugees and a way station to more durable protection. But where TP is offered as a diluted substitute protection for Convention refugees, it represents a threat to the 1951 refugee regime ... States, especially those under pressure from domestic constituencies preoccupied with migration, hope that TP will help them save costs on status determination, reduce social and economic benefits to asylum seekers, resist full integration of those who are granted asylum, and prioritize their rapid repatriation ... Yet states also remain skeptical about formalizing temporary protection, since international TP obligations might expand the numbers of forced migrants eligible for legal protection against repatriation and pledges of international solidarity may create unpredictable and politically costly future burdens.⁴²³

It would appear, therefore, that the real argument against full applicability of the Convention regime to refugees in mass influx situations is a legal-political one.⁴²⁴

9. *Non-refoulement* as a principle of customary international law

The principle of *non-refoulement* now forms part of customary international law.⁴²⁵ Accordingly, even States that are not parties to the relevant refugee and human rights treaties are bound by the principle⁴²⁶ and, on the whole, respect it.⁴²⁷ In 2001, States parties to the Refugee Convention acknowledged that the principle of *non-refoulement* was ‘embedded in customary international law’,⁴²⁸ and a year later all the UN member States unanimously affirmed in a General Assembly resolution the importance of the principle generally.⁴²⁹ In the 2009 Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, member States of the African Union undertook ‘to deploy all necessary measures to ensure full respect for the fundamental principle of non-refoulement as recognised in International Customary Law as enunciated in Article 33 of the 1951 UN Geneva Convention relating to the Status of Refugees and in Article 2 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’.⁴³⁰

There is a considerable body of long-standing State practice and *opinio juris*, which in turn is reflected in declarations and resolutions adopted in the UNHCR Executive Committee and the UN General Assembly. Such declarations and resolutions are not only juridically significant in themselves, but also permit the necessary inferences to be drawn regarding the character of State practice.⁴³¹

Most international refugee law scholars accept that the customary law content of the principle of *non-refoulement* parallels its treaty-based sources in the Refugee Convention and international human rights law, encompassing non-removal to persecution, torture, death, and other serious violations of fundamental human rights.⁴³²

In 1954, twenty-seven States participating in the UN Conference on the Status of Stateless Persons unanimously expressed the view that the *non-refoulement* provision of the 1951 Convention was ‘an expression of the generally accepted principle’ of non-return; for that reason, it was considered unnecessary to include an equivalent article for stateless persons.⁴³³ That assessment was premature, but the principle of *non-refoulement* has since been reiterated and refined, included in a range of regional refugee, human rights, and extradition treaties, repeatedly endorsed in a variety of international fora, and its violation protested by UNHCR and States.

Both article 33 of the 1951 Convention and article 3 of the 1984 Convention against Torture are of a ‘fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’, as that phrase was used by the International Court of Justice in the *North Sea Continental Shelf Cases*.⁴³⁴ The prohibition on *refoulement* to torture or cruel, inhuman, or degrading treatment or punishment is absolute.⁴³⁵ That *refoulement* may be permitted under the 1951 Convention in exceptional circumstances does not deny this premise, but rather indicates the boundaries of discretion. So far as both provisions are formally addressed to the contracting parties, the universality of the principle of *non-refoulement* has nevertheless been a constant emphasis of other instruments, including declarations, recommendations, and resolutions at both international and regional levels. The proof of international customary law requires consistency and generality of practice, but no particular duration; complete uniformity and consistency are not required, but the practice must be accepted as law. In many cases, *opinio juris* may be inferred from a general practice, scholarly consensus, or the determinations of international courts or tribunals.⁴³⁶

The evidence relating to the meaning and scope of *non-refoulement* in its treaty sense amply supports the conclusion that today the principle forms part of general international law.⁴³⁷ There is substantial, if not conclusive, authority that the principle is binding on all States, independently of specific assent. Some of the largest refugee-hosting States are not parties to the Convention or its Protocol, yet their practice over many years ‘is in line with the requirement of the

principle of *non-refoulement*'.⁴³⁸ State practice before 1951 may be equivocal as to whether, in that year, article 33 of the Convention reflected or crystallized a rule of customary international law.⁴³⁹ However, State practice since then provides persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement at the international level.⁴⁴⁰

In this context, special regard should be had to the practice of international organizations, such as the UN General Assembly and UNHCR. General Assembly resolutions dealing with the annual report of the High Commissioner—and consistently endorsing the principle of *non-refoulement*—tend to be adopted by consensus. While consensus decision-making denotes the absence of formal dissent,⁴⁴¹ it still allows States the opportunity to express opposing views in debate and in summary records.⁴⁴² No formal or informal opposition to the principle of *non-refoulement* is to be found, and where objection has been made on occasion to the protection and assistance activities of UNHCR, it has been founded on a challenge to the status as refugees of the individuals involved. UNHCR has recounted numerous instances when it has made representations to States not party to the 1951 Convention or 1967 Protocol, relying on the principle of *non-refoulement* as part of customary international law. States' responses have 'almost invariably' reflected an acceptance of the principle's normative character, and have frequently 'sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle'.⁴⁴³ Although a number of commentators have disagreed as to the legal inferences to be drawn from the practice of States, none has been able to dispute the factual record.⁴⁴⁴ Indeed, as the Hong Kong Court of Appeal stated in *C v Director of Immigration*, ever since the adoption of the Refugee Convention,

no State has explicitly asserted that it is entitled, *solely as a matter of legal right in public international law*, to return genuine refugees to face a well-founded fear of persecution, and has openly done so. Clearly the RC [Refugee Convention] has had an impact, even on non-signatory States, and has helped to create a CIL [customary international law principle] of non-refoulement of refugees.⁴⁴⁵

Lauterpacht and Bethlehem's comprehensive study of the scope and content of the principle of *non-refoulement* further supports these conclusions, and proposes

an even wider formulation of the principle based on the proscription of return to torture or cruel, inhuman, or degrading treatment or punishment under human rights law.⁴⁴⁶ They conclude that *non-refoulement* has crystallized as a norm of customary international law in the following terms:

- (a) No person shall be rejected, returned, or expelled in any manner whatsoever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman, or degrading treatment or punishment. This principle allows of no limitation or exception.
- (b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.
- (c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman, or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.⁴⁴⁷

While there is ample support in treaty law and jurisprudence for the widened scope of *non-refoulement* on the basis of torture, whether non-return to cruel, inhuman, or degrading treatment or punishment has also become part of customary international law is contested by some. Lauterpacht and Bethlehem base their conclusions on the customary law scope of *non-refoulement* on the fact that over 150 States are party to at least one binding international instrument proscribing torture *and* cruel, inhuman, or degrading treatment or punishment.⁴⁴⁸

The OAU Convention and the Cartagena Declaration both extend States' protection responsibilities beyond article 1A(2) of the 1951 Convention to

encompass flight from ‘external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality’,⁴⁴⁹ and ‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’.⁴⁵⁰ On the basis of their treaty obligations, many States also proscribe *refoulement* to torture or cruel, inhuman, or degrading treatment or punishment in their domestic law.⁴⁵¹ *Non-refoulement* under customary international law encompasses non-return to persecution *as well as* to torture, arbitrary deprivation of life, and cruel, inhuman, or degrading treatment or punishment. While a small minority of commentators continues to deny the existence of *non-refoulement* as a principle of customary international law, the overwhelming consensus is that it has now attained that status.⁴⁵²

However, *non-refoulement* does not yet amount to a peremptory or *jus cogens* norm,⁴⁵³ even though the principle itself evinces an imperative character.⁴⁵⁴ Article 53 of the 1969 Vienna Convention on the Law of Treaties offers a strict definition of the peremptory norm as one ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.⁴⁵⁵ Since then, the category of *jus cogens* has been widely accepted as including the prohibition of aggression, the prohibition of slavery, genocide, and racial discrimination, crimes against humanity, the principle of self-determination, as well as torture.⁴⁵⁶ On the last-mentioned point and in addition to findings by domestic courts,⁴⁵⁷ both the International Tribunal for the Former Yugoslavia and the European Court of Human Rights have accepted that the prohibition of torture enjoys peremptory status.⁴⁵⁸ This, in turn, has led the Inter-American Court of Human Rights to conclude that *non-refoulement* in that context ‘is an obligation derived from the prohibition of torture’, and therefore a matter of *jus cogens* as well.⁴⁵⁹

However, the issue is more nuanced, particularly when *non-refoulement* is considered in the round. To suggest, like one commentator,⁴⁶⁰ that anything less than *jus cogens* status would open the way to States ‘legalizing’ returns to countries where those concerned may face serious violations of human rights, mis-characterizes the principle, failing also to capture its breadth, depth, and scope, no less than its capacity to cover both actuality and risk. Clearly, there is a difference between exposing someone to a risk of ill-treatment, and actually subjecting someone to such treatment, or knowingly aiding and assisting to the

point of complicity.⁴⁶¹ In practice, knowledge or some degree of knowledge will be essential, even though it may be a variable, in determining whether complicity in torture or *refoulement* to the risk of torture is in issue.⁴⁶² While the prohibition of torture is clearly a peremptory norm, the point about *non-refoulement* in this context is precisely that it steps back from the peremptory threshold and settles international responsibility more widely, on acts and omissions attributable to the State that expose the individual to the risk of a range of relevant harm. Of course, in any particular case, *refoulement* may shade into or be subsumed by the greater internationally wrongful act, but concentrating on that possibility risks losing sight of the principle in its broader application. A sound case can be made for the customary international law status of the principle of *non-refoulement*, but its claim to be part of *jus cogens* is less certain, and in practice little is likely to be achieved by insisting on its status as such.⁴⁶³

Described as a principle and not just a rule, *non-refoulement* is a composite that, in contrast with peremptory norms in general, comprises a mix of obligations of conduct and result. Insofar as its fulfilment requires the exercise of judgement (*not* discretion), the principle necessarily implies the addition of secondary rules (status determination, risk assessment, effective remedy, among others) that are essential to ensure compliance with the primary obligation of no return or surrender to the risk of relevant harm.

¹ Historically, many bilateral agreements have institutionalized the practice; see the ‘conventions de prise en charge à la frontière’ discussed in Batiffol, H. & Lagarde, P., *Droit international privé* (5th edn., 1970) vol. i, 198; and the ‘Übernahme-’ or ‘Schubabkommen’ discussed in Schiedermaier, R., *Handbuch des Ausländerrechts der Bundesrepublik Deutschland* (1968) 178, 227–30. For their more modern counterparts, see UNHCR, ‘Overview of Re-Admission Agreements in Central Europe’ (Sep. 1993); Inter-Governmental Consultations, ‘Working Paper on Readmission Agreements’ (Aug. 1994); van Selm, J., ‘Access to Procedures: “Safe Third Countries”, “Safe Countries of Origin” and “Time Limits”’ (Background paper to UNHCR Global Consultations, 2001) s. 1.A.7; Freier, L. F., Karageorgiou, E., & Ogg, K., ‘The Evolution of Safe Third Country Law and Practice’, in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021).

² Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 143 fn 2.

³ On the relationship between the two, see McAdam, J., ‘Rethinking the Origins of

“Persecution” in Refugee Law’ (2013) 25 *IJRL* 667; Kälin, W., Caroni, M., & Heim, L., ‘Article 33, para. 1’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1335.

⁴ See, for example, 6 *British Digest of International Law* 53–54, 64–5.

⁵ See further Bashford, A. & McAdam, J., ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309; see also Shaw, C., *Britannia’s Embrace: Modern Humanitarianism and the Imperial Origins of Refugee Relief* (2015).

⁶ See 2 LoN OJ 1006 (1921), 1011 (France); 3 LoN OJ 385, Annex, 321(b), *Russian Refugees in Constantinople, Report by Sir Samuel Hoare* (24 Mar. 1922) 403.

⁷ See LoN doc. C.126(a).M.72(a).1921.VII (1 Aug. 1921); LoN doc. C.323.M.233.1921.VII (14 Sep. 1921) 7–8 (France). Under the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees (30 Jun. 1928) 89 LNTS 53 No. 2005, States adopted a recommendation (No. 7), ‘that measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner’. The recommendation was not to apply to a refugee who had entered a State in intentional violation of national law.

⁸ 1933 Convention relating to the International Status of Refugees (28 Oct. 1933) 159 LNTS 199 No. 3663; official text in French.

⁹ 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany (4 Jul. 1936) 171 LNTS 75 No. 3952, art. 4 (official text in English and French). The arrangement was signed by seven States; the United Kingdom excluded refugees subject to extradition proceedings from the ambit of art. 4, and likewise, for most purposes, refugees admitted for a temporary visit or purpose. See also 1938 Convention concerning the Status of Refugees coming from Germany (10 Feb. 1938) 192 LNTS 59 No. 4461, art. 5; official texts in English and French. The Convention was ratified by only three States; the United Kingdom repeated its 1936 reservations.

¹⁰ The 1938 Convention substituted ‘measures of expulsion or reconduction’.

¹¹ The 1936 arrangement read: ‘refugees shall not be sent back across the frontier of the Reich’; the 1938 Convention provided that States parties ‘undertake’ not to reconduct refugees to German territory.

¹² Kiss notes, for example, that in 1939 France admitted 400,000 refugees from Spain in just ten days: Kiss, A. C., *Répertoire de la pratique française en droit international public*, vol. 4 (1966) 433–45. See also, Dreyfus-Armand, G. & Temime, E., *Les camps sur la plage, un exil espagnol* (1995); ‘La Retirada ou l’exil républicain espagnol d’après guerre’ <https://www.histoire-immigration.fr/dossiers-thematiques/caracteristiques-migratoires-selon-les-pays-d-origine/la-retirada-ou-l-exil>.

¹³ UNGA res. 8(1) (12 Feb. 1946) para. (c)(ii).

¹⁴ On the International Refugee Organization (IRO) and post-Second World War practice,

see Marrus, M. R., *The Unwanted: European Refugees from the First World War through the Cold War* (2nd edn., 2002); Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990); Skran, C., *Refugees in Inter-War Europe: The Emergence of a Regime* (1995). State practice in the immediate postwar period, however, is somewhat inconclusive. Writing in 1954, Weis found that *refoulement* was rare, save ‘in the case of some Russians and Ukrainians covered by certain wartime agreements’: Weis, P., ‘The International Protection of Refugees’ (1954) 48 *AJIL* 193, 196. The later release of relevant documents to public scrutiny showed the full extent of a forcible repatriation policy which meant death or horrific treatment for well over two million people, by no means all of them covered by those wartime agreements: see Tolstoy, N., *Victims of Yalta* (1977, rev. edn., 1979); Bethell, N., *The Last Secret* (1974); also, Corsellis, J. & Ferrar, M., *Slovenia 1945: Memories of Death and Survival* (2005).

¹⁵ ECOSOC res. 248(IX)B (8 Aug. 1949).

¹⁶ The Committee decided to focus on the refugee, and duly produced a draft convention. In August 1950, ECOSOC returned the draft for further review, before consideration by the General Assembly, and finalized the Preamble and refugee definition. In December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to complete the draft: UNGA res. 429(V) (14 Dec. 1950). See generally *Report of the Ad hoc Committee on Refugees and Stateless Persons, Second Session*: UN doc. E/1850 (1950). The Committee had been renamed in the interim. The most important United Nations documents from this period are usefully collected in Takkenberg, A. & Tahbaz, C. C., *The Collected Travaux Préparatoires of the 1951 Convention relating to the Status of Refugees*, 3 vols. (1988). The full *travaux préparatoires* may be found online at <http://www.unhcr.org/en-au/1951-refugee-convention.html>.

¹⁷ UN doc. E/1850 (1950), para. 30. Cf. Louis Henkin, United States delegation: ‘Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same ... Whatever the case might be ... he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp’: *Ad hoc Committee on Statelessness and Related Problems*: UN doc. E/AC.32/SR.20 (1950) paras. 54–5. The Israeli delegate reiterated that the prohibition on return ‘must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance’; he concluded that ‘[t]he Committee had already settled the humanitarian question of sending any refugee whatever back to a territory where his life or liberty might be in danger’, *ibid.*, paras. 60–1. The British delegate also concluded from the discussion that the notion of *refoulement* ‘could apply to ... refugees seeking admission’: UN doc. E/AC.32/SR.21 (1950) para. 16.

¹⁸ For analysis of the UDHR discussions, see, for example, Bashford and McAdam (n 5) 343–50.

¹⁹ The change in the international situation between the meeting of the *Ad hoc* Committee in Aug. 1950 and the Conference in July 1951 is usually cited as the reason for the introduction of exceptions; see UN doc. A/CONF.2/SR.16 (1951) 8 (views of the United Kingdom).

²⁰ The *Ad hoc* Committee reported in its comments that the draft article referred ‘not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened’: see UN doc. E/AC.32/SR.20 (1950) 3, for the United Kingdom’s proposal and views; UN doc. E/1618, E/AC.32/5 (Feb. 1950) 61, for the *Ad hoc* Committee comment. Sweden proposed a more specific rule against the return of a refugee to a country ‘where he would be exposed to the risk of being sent to a territory where his life or freedom’ would be threatened, for example, by extradition or expulsion: see UN docs. A/CONF.2/70 (11 Jul. 1951) A/CONF.2/SR.16 (11 Jul. 1951) 9. This was withdrawn, on the assumption that art. 33 covered at least some of the ground. The Danish representative noted that a government expelling a refugee to an intermediate country could not foresee how that State might act. But if expulsion presented a threat of subsequent forcible return to the country of origin, then the life or liberty of the refugee would be endangered, contrary to the principle of *non-refoulement*: see UN doc. A/CONF.2/SR.16, 9 f. In *Re Musisi* [1987] 2 WLR 606, at 620, the UK House of Lords struck down a decision to deny asylum to a Ugandan refugee and return him to Kenya, his country of first refuge. The reasons given by the Secretary of State indicated that he had failed to take into account, or to give sufficient weight to, a relevant consideration, namely, that on a number of occasions Kenya had handed over Ugandan refugees to the Ugandan authorities.

²¹ Executive Committee Conclusion No. 6 (1977) para. (c); Executive Committee Conclusion No. 79 (1996) para. (j); Executive Committee Conclusion No. 81 (1997) para. (i); Executive Committee Conclusion No. 82 (1997) para. (d)(i); Executive Committee Conclusion No. 85 (1998) para. (q); Executive Committee Conclusion No. 94 (2002) para. (c)(i); Executive Committee Conclusion No. 99 (2004) para. (l); Executive Committee Conclusion No. 100 (2004) para. (i); Executive Committee Conclusion No. 102 (2005) para. (j); and Executive Committee Conclusion No. 108 (2008) para. (a) reaffirm the principle of *non-refoulement*, irrespective of formal recognition of refugee status; see also [UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees](#) (1979, reissued with Guidelines, 2019) para. 24. The 1979 Arusha Conference on the Situation of Refugees in Africa observed, among other matters, that refugee status procedures might be impractical in the case of large-scale movements of asylum seekers in Africa, and that special arrangements might be necessary. As a minimum, however, the conference recommended that the protection of individuals by virtue of the principle of *non-refoulement* be ensured: UN doc. A/AC.96/INF.158 (May 1979) 9; see also Executive Committee Conclusion No. 19 (1980) para. (a).

²² See Ch. 2, s. 8 and Ch. 7.

²³ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011)

para. 28.

²⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1145 (2 Jul. 2015) para. 39; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011) para. 30.

²⁵ Cf. 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts. 31(1), (2).

²⁶ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1110 (4 Jul. 2012) para. 13: ‘The obligation of *non-refoulement* includes non-rejection at the frontier.’

²⁷ In 1953, the French Minister of the Interior, advising the Parliament that asylum seekers from Spain were still arriving, gave assurances that none was refused admission; all were allowed to remain pending determination of refugee status, when those not recognized were invited to return to their country: Kiss ([n 12](#)) 434–5. In 1956, following the Hungarian crisis, some 180,000 were granted immediate first asylum in Austria, and a further 20,000 in Yugoslavia: UNHCR, *A Mandate to Protect and Assist Refugees* (1971) 67–77.

²⁸ *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2004] UKHL 55, [2005] 2 AC 1, para. 26 (Lord Bingham). Kälin, Caroni, & Heim ([n 3](#)) 1376 state that: ‘From the moment the refugee has approached a border guard or post, he or she is under the (effective) control of the country of refuge.’

²⁹ UN doc. A/CONF.2/SR.16 (1951) 6; see also Weis, P., ‘Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees’ (1953) 30 BYIL 478, 482.

³⁰ See [n 32](#) below.

³¹ UN doc. A/CONF.2/SR.16 (1951) 10. On extradition and *non-refoulement*, see s. 5.2.

³² For the Dutch delegate’s comments, see UN doc. A/CONF.2/SR.35 (1951) 21. Baron van Boetzelaer of the Netherlands ‘recalled that at the first reading the Swiss representative had expressed the opinion that the word “expulsion” related to a refugee already admitted into a country, whereas the word “return” (“refoulement”) related to a refugee already within the territory but not yet resident there ... At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation ... In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33 ... There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be *placed on the record*’ (emphasis added). Earlier, the Dutch delegate explained that his concern was that of ‘a country bordering on others ... about assuming unconditional obligations as far as mass influxes of refugees were concerned ... unless international collaboration was sufficiently organized to deal with such a situation’: UN doc. A/CONF.2/SR.16 (1951), 11 (emphasis added). The Dutch comments are thus neither an ‘official’ interpretation of the Convention, nor a binding limitation on the plain language.

³³ Cf. Robinson, N., *The 1951 Convention relating to the Status of Refugees: A*

Commentary (1953) 163: art. 33 ‘concerns refugees who have gained entry into the territory of a contracting State, legally or illegally, but not refugees who seek entrance into this territory’; Weis ([n 29](#)) 482–3: *non-refoulement* ‘leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, i.e. it shall grant him at least temporary asylum ... if non-admission is tantamount to surrender to the country of persecution’; Schnyder, F. (High Commissioner for Refugees), ‘Les aspects juridiques actuels du problème des réfugiés’ (1965-I) 114 *Hague Recueil* 339, 381: the principles of non-rejection and temporary asylum are becoming more and more recognized; Aga Khan, S. (High Commissioner for Refugees), ‘Legal Problems Relating to Refugees and Displaced Persons’ (1976-I) 149 *Hague Recueil* 287, 318–22, concluding that States do not accept the rule of non-rejection. See also Weis, P., ‘Territorial Asylum’ (1966) 6 *Indian Journal of International Law* 173, 183, arguing for extension of the principle to non-rejection at the frontier, otherwise protection becomes dependent on ‘the fortuitous circumstance’ that the refugee has successfully entered State territory. Grahl-Madsen consistently argued that art. 33 is limited to those present, lawfully or unlawfully, in the territory of contracting States, that protection depends upon having ‘set foot’ in that territory: Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 2 (1972) 94–9; Grahl-Madsen, A., [*Territorial Asylum \(1980\)*](#) 40 ff. In their comprehensive analysis, Lauterpacht and Bethlehem argue that *non-refoulement* encompasses non-rejection at the frontier, noting that: ‘where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1)’: Lauterpacht, E. & Bethlehem, D., ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) para. 76. See also Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011) [Ch. 3](#).

³⁴ See, for example, the elaborations of Lord Denning in *R v Governor of Brixton Prison, ex parte Soblen* [1963] 2 QB 243; also the United States decisions cited by Pugash, J. Z., ‘The Dilemma of the Sea Refugee: Rescue without Refuge’ (1977) 18 *HarvILJ* 577, 592 ff.; *A Study on Statelessness* (UN doc. E/1112 and Add. 1, 60 (1949)) defines *reconductio* as ‘the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein irregularly’ and *expulsion* as ‘the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country’. See also [Ch. 6](#), s. 1.2.

³⁵ Noll, G., ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17 *IJRL* 542, 548. Durieux argues that the Convention’s focus is on admission as a positive duty: Durieux, J.-F., ‘Three Asylum Paradigms’ (2013) 20 *International Journal on Minority and Group Rights* 147, 155; developed in Durieux, J.-F., ‘The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection’, in Lambert, H.,

McAdam, J., & Fullerton, M., eds., *The Global Reach of European Refugee Law* (2013).

³⁶ Gammeltoft-Hansen, T. & Hathaway, J. C., ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235, 238. See also Gammeltoft-Hansen (n 33) 27; Hathaway, J. C., *The Rights of Refugees under International Law* (2nd edn., 2021) 339: ‘where there is a real risk that rejection will expose the refugee “in any manner whatsoever” to the risk of being persecuted for a Convention ground, Art. 33 amounts to a de facto duty to admit the refugee’, referring also to Kälin, Caroni, & Heim (n 3) 1335: ‘While a right to asylum would create a positive obligation, the prohibition of *refoulement* imposes a negative duty to refrain from certain actions.’

³⁷ Gammeltoft-Hansen and Hathaway (n 36) 239.

³⁸ Inter-American Court of Human Rights, Advisory Opinion on Rights and Guarantees of Children in the context of Migration and/or in Need of International Protection (2014) Series A, No. 21, para. 38; Committee on the Rights of the Child, ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin’, UN Doc CRC/GC/2005/6 (1 September 2005) para. 20.

³⁹ See Ch. 7.

⁴⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of 12 August 1949), art. 4.

⁴¹ 1001 UNTS 45. At 30 April 2021, 46 States were party to the Convention; see Lists of States, xix. In July 2004, the African Union Summit of Heads of State confirmed the OAU Convention’s continuing relevance.

⁴² 1889 Montevideo Treaty on Penal Law, *OAS Official Records*, OEA/Ser.X/1, Treaty Series 34, revised by the 1940 Montevideo Treaty on International Penal Law, art. 20; 1954 Caracas Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 19, art. 3 (‘No State is under the obligation to surrender to another State, or to expel from its own territory, persons persecuted for political reasons or offenses’).

⁴³ Other relevant provisions include 1981 Inter-American Convention on Extradition (concluded 25 February 1981, entered into force 28 March 1982) 1752 UNTS 177, art. 4(5); 1957 European Convention on Extradition, ETS No. 24, art. 3(2).

⁴⁴ *OAS Official Records*, OEA/Ser.K/XVI/1.1. For analysis of its scope, see Inter-American Court of Human Rights, Advisory Opinion OC-25/18 of 30 May 2018 requested by the Republic of Ecuador: The Institution of Asylum and Its Recognition as a Human Rights in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7, and 22.8 in relation to Article 1(a) of the American Convention on Human Rights) paras. 164–99; Cantor, D. J. & Barichello, S. E., ‘The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?’ (2013) 17 *International Journal of Human Rights* 689.

⁴⁵ See Ch. 7 for detailed analysis. For an overview of the European system, see Tsourdi, E., ‘Regional Refugee Regimes: Europe’, in Costello, Foster, & McAdam (n 1).

⁴⁶ See, for example, UNHCR, ‘Advisory Opinion on the Extraterritorial Application of

Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (Jan. 2007) paras. 5–22; Advisory Opinion OC-25/18 of 30 May 2018 ([n 44](#)) paras. 99, 107, 188.

[47](#) Global Compact on Refugees: UN doc. A/73/12 (Part II) (2 Aug. 2018) para. 5; see also para. 87.

[48](#) New York Declaration for Refugees and Migrants: UN doc. A/RES/71/1 (3 Oct. 2016) para. 67; see also paras. 24, 58. Note also the remarks of Denmark in UNHCR’s Executive Committee that ‘[i]t was impossible to overemphasize the importance of the legal foundation of the work of UNHCR, namely the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which had created a legal framework around human and humanitarian values and standards related to the protection of those with a well-founded fear of being persecuted and the principle of non-refoulement’: UNHCR Executive Committee, ‘Summary Records of the 693rd Meeting’ (3 Oct. 2016) 2 (Chair, Mr Staur, Denmark).

[49](#) Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees: HCR/MMSP/2001/09 (16 Jan. 2002) para. 4, contained in UNHCR, *An Agenda for Protection* (3rd edn., 2003).

[50](#) UNGA res. 2312 (XXII) (14 Dec. 1967) art. 3(1). Note that art. 3(2) provides that an exception may be made to the basic 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’. In such circumstances, the State contemplating such exception, ‘shall consider the possibility of granting to 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’: art. 3(3). See further Goodwin-Gill, G. S., ‘The 1967 Declaration on Territorial Asylum’ (UN Audiovisual Library of International Law, 2012) http://legal.un.org/avl/pdf/ha/dta/dta_e.pdf.

[51](#) *Report of the Eighth Session of the Asian–African Legal Consultative Committee*, Bangkok (8–17 Aug. 1966) 355.

[52](#) Final Text of the Asian–African Legal Consultative Organization’s 1966 Bangkok Principles on Status and Treatment of Refugees, 40th Session, New Delhi (adopted 24 Jun. 2001); see also RES/ 40/3 (24 Jun. 2001): <http://www.aalco.org>.

[53](#) UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/989 (7 Jul. 2004) para. 10.

[54](#) ASEAN Human Rights Declaration (18 Nov. 2012) para. 16. The signatory ASEAN member States were Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Viet Nam.

[55](#) See further Ramasubramanyam, J., ‘Regional Refugee Regimes: South Asia’ and Muntarbhorn, V., ‘Regional Refugee Regimes: Southeast Asia’, in Costello, Foster, & McAdam ([n 1](#)); Blay, S., ‘Regional Developments: Asia’, in Zimmermann ([n 3](#)); Francis, A. & McGuire, R., eds., *Protection of Refugees and Displaced Persons in the Asia Pacific*

Region (2013); Davies, S. E., *Legitimising Rejection: International Refugee Law in Southeast Asia* (2008); Oberoi, P., *Exile and Belonging: Refugees and State Policy in South Asia* (2006).

⁵⁶ African Union, Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (23 October 2009), Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, art. 6. For an overview of African refugee law and practice, see Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018); Sharpe, M., ‘Regional Refugee Regimes: Africa’ and Wood, T., ‘The International and Regional Refugee Definitions Compared’, in Costello, Foster, & McAdam (n 1); van Garderen, J. & Ebenstein, J., ‘Regional Developments: Africa’, in Zimmermann (n 3); UNHCR, ‘Key Legal Considerations on the Standards of Treatment of Refugees Recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2018) 30 *IJRL* 166; Wood, T., ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *IJRL* 555; Wood, T., ‘The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention’s Expanded Refugee Definition’, in Cantor, D. J. & Durieux, J.-F., eds., *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (2014); Beyani, C., *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (2013); Edwards, A., ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204; Rankin, M. B., ‘Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal on Human Rights* 406; Rutinwa, B., ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21(1–2) *RSQ* 12; Okoth-Obbo, G., ‘Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20(1) *RSQ* 79.

⁵⁷ Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, (22 Nov. 1984), conclusion III(5). In our view, the assessment of the principle as *jus cogens* is premature. For an overview of Latin American refugee law and practice, see, for example, Fischel de Andrade, J. H., ‘Regional Refugee Regimes: Latin America’, in Costello, Foster, & McAdam (n 1); Fischel de Andrade, J. H., ‘The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance’ (2019) 38 *RSQ* 341; Piovesan, F. & Jubilut, L. L., ‘Regional Developments: Americas’, in Zimmermann (n 3); Cantor, D. J. & Rodríguez Serna, N., eds., *The New Refugees: Crime and Displacement in Latin America* (2016); Cantor, D. J., Freier, L. F., & Gauci, J.-P., eds., *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America* (2015); Barichello, S., *The Evolving System of Refugees’ Protection in Latin America* (2015); Fischel de Andrade, J. H., ‘Forced Migration in South America’ and Bradley, M., ‘Forced Migration in Central America and the Caribbean’, in Fiddian-Qasmiyah, E. and others, eds., *The Oxford Handbook of Refugee and Forced Migration Studies* (2014). See also Wood, ‘The International and Regional Refugee Definitions Compared’ (n 56).

⁵⁸ Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (16 Nov. 2004) Preamble; Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (11 Nov. 2010) Preamble; Brazil Declaration ‘A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean’ (3 Dec. 2014) Preamble.

⁵⁹ Mexico Declaration and Plan of Action ([n 58](#)). Note also the Declaration adopted on the 10th anniversary of the Cartagena Declaration: San Jose Declaration on Refugees and Displaced Persons (5–7 Dec. 1994).

⁶⁰ Brasilia Declaration ([n 58](#)) Preamble.

⁶¹ Protection of Asylum Seekers and Refugees in the Americas, AG/RES 2758 (XLII-O/12) (5 Jun. 2012) recital 12, para. 1.

⁶² See generally [Ch. 7](#). See also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/989 (7 Jul. 2004) para. 20, welcoming the African Court on Human and Peoples’ Rights, given the many linkages between human rights and refugee issues.

⁶³ UNGA res. 44/162 (15 Dec. 1989) para. 5. See also ECOSOC res. 1989/65 (24 May 1989), recommending that the principles annexed to the resolution be taken into account and respected by governments.

⁶⁴ UNGA res. 47/133 (18 Dec. 1992); see art. 8(1).

⁶⁵ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art. 16(1). At 30 April 2021, 63 States were party to the Convention.

⁶⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 Nov. 2000, entered into force 28 Jan. 2004) 2241 UNTS 507, art. 19(1); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 Nov. 2000, entered into force 25 Dec. 2003) 2237 UNTS 319, art. 14(1). At 30 April 2021, 150 States were party to the Smuggling Protocol and 178 to the Trafficking Protocol.

⁶⁷ CETS No. 197 (opened for signature 16 May 2005, entered into force 1 February 2008). At 30 April 2021, 47 States were party to the Convention, including one non-Council of Europe State (Belarus).

⁶⁸ See, in particular, the General Assembly’s annual resolutions on the ‘Office of the United Nations High Commissioner for Refugees’, including, most recently, UNGA res. 75/163 (16 Dec. 2020) paras. 4, 31.

⁶⁹ For recent examples, see respectively: UN docs. A/72/335 (2017); A/HRC/38/41 (2018); A/HRC/40/59 (2019).

⁷⁰ UN doc. A/HRC/34/54/Add.3 (24 Feb. 2017). See also UN doc. A/HRC/31/57/Add.1 (communications to Australia, Hungary, India, Malaysia, Thailand, Turkey, United Kingdom, and United States).

⁷¹ UN doc. A/HRC/32/39/Add.3 (17 Jun. 2016) Tabulation (A). See also, for example, UN doc A/HRC/29/37/Add.5 (3 Jun. 2015) Tabulation of communications and replies (noting two such communications to the United Kingdom); UN doc A/HRC/26/36/Add.2 (2 Jun. 2014) Tabulation of communications and replies (Norway, Sweden, Switzerland, and Turkey); UN doc A/HRC/23/47/Add.5 (27 May 2013) Tabulation of communications and replies (Malaysia); UN doc A/HRC/20/22/Add.4 (18 Jun. 2012) Tabulation of communications and replies (China and Malaysia).

⁷² ‘Joint Statement on Andaman Sea/Bay of Bengal by SRSG Peter Sutherland, HCR António Guterres, HCHR Zeid Ra’ad Al Hussein, DG William Lacy Swing’ (19 May 2015).

⁷³ On which, see further Ch. 9, s. 1.1.2.

⁷⁴ Executive Committee Conclusion No. 6 (1977). Importantly, this Conclusion was adopted *after* the 1977 Conference on Territorial Asylum. States’ failure to agree on a Convention on Territorial Asylum was not due to any rejection of the principle of *non-refoulement* and its extension to non-rejection at the frontier, as was erroneously suggested by the UK Court of Appeal in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, [2004] QB 811, para. 44 (Simon Brown LJ) and apparently accepted by Lord Bingham in *Roma Rights* (n 28) para. 17, but rather because States were not prepared at that time to accept an individual right to asylum.

⁷⁵ Executive Committee Conclusions No. 85 (1998) and No. 99 (2004).

⁷⁶ The Human Rights Committee has noted that although ICCPR 66 does not recognize the right of aliens to enter or reside in the territory of a State party, ‘in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise’: Human Rights Committee, ‘General Comment No. 15’ (1986). See also Executive Committee Conclusion No. 108 (2008) Preamble.

⁷⁷ See also Ch. 8.

⁷⁸ Executive Committee Conclusion No. 19 (1980).

⁷⁹ Executive Committee Conclusion No. 22 (1981) para. II(A)(2); Executive Committee Conclusion No. 108 (2008) para. (a) calls on States ‘to scrupulously respect the principle of *non-refoulement*’.

⁸⁰ Report of the 33rd Session: UN doc. A/AC.96/614, para. 70.

⁸¹ See, for example, Executive Committee Conclusions Nos. 3 (1977); 11 (1978); 14 (1979); 16 (1980); 21 (1981); 25 (1982); 33 (1984); 41 (1986); 46 (1987); 50 (1988); 61 (1990); 68 (1992); 71 (1993); 74 (1994); 79 (1996); 85 (1998); 89 (2000); 102 (2005).

⁸² UN doc. A/AC.96/728 (2 Aug. 1989) para. 19.

⁸³ Executive Committee Conclusion No. 55; Report of the 40th Session: UN doc. A/AC.96/737 (19 Oct. 1989) para. 22(d).

⁸⁴ Executive Committee Conclusion No. 58 (1989) paras. (f), (g).

⁸⁵ Executive Committee Conclusion No. 65 (1991); Report of the 42nd Session: UN doc.

A/AC.96/783 (21 Oct. 1991) para. 21(c), (j).

⁸⁶ Executive Committee Conclusion No. 68 (1992); *Report of the 43rd Session*: UN doc. A/AC.96/804 (15 Oct. 1992) paras. 21(e), (f), (r). See also Executive Committee Conclusions No. 74 (1994); *Report of the 45th Session*: UN doc. A/AC.96/839, para. 19; No. 77 (1995); *Report of the 46th Session*: UN doc. A/AC.96/860, para. 19.

⁸⁷ Executive Committee Conclusion No. 81 (1997) para. (i); Executive Committee Conclusion No. 82 (1997) para. (d)(i); see also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/882 (2 Jul. 1997) para. 17.

⁸⁸ Executive Committee Conclusion No. 103 (2005) para. (m). The Conclusion itself deals with the protection of individuals whose removal is prohibited by human rights law; see further Ch. 7. See also Executive Committee Conclusion No. 99 (2004), which refers to the importance of respecting the ‘fundamental principle of *non-refoulement*’ in the broader context of persecution, generalized violence, and violations of human rights causing and perpetuating displacement.

⁸⁹ See McAdam, J., ‘Interpretation of the Refugee Convention’, in Zimmermann (n 3) 112–14. See also Goodwin-Gill, G. S., ‘The Search for the One, True Meaning ...’, in Goodwin-Gill, G. S. & Lambert, H., eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010); Sztucki, J., ‘The Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme’ (1989) 1 *IJRL* 285; Lewis, C., ‘UNHCR’s Contribution to the Development of International Refugee Law: Its Foundations and Evolution’ (2005) 17 *IJRL* 67; Deschamp, B. & Dowd, R., ‘Review of the Use of Executive Committee Conclusions on International Protection’, UNHCR Policy Development and Evaluation Service, PDES/2008/03 (Apr. 2008).

⁹⁰ For a detailed overview of State views up until 2007, see the first and second editions of this work.

⁹¹ For examples, see the references to the summary records of various meetings of the UNHCR Executive Committee, here and below: UN doc. A/AC.96/SR.552 (2001) para. 50 (Belgium). See further Ch. 7.

⁹² UN doc. A/AC.96/SR.431 (1998) para. 32 (Observer for Malawi). See further Ch. 7.

⁹³ UN doc. A/AC.96/SR.522 (1997) para. 8 (International Committee of the Red Cross); UN doc. A/AC.96/SR.541 (1999) para. 13 (Switzerland); on flexibility of the Convention in mass influx, see UN doc. A/AC.96/SR.545 (2000) para. 6 (India); UN doc. A/AC.96/SR.563 (2002) para. 17 (China).

⁹⁴ UN doc. A/AC.96/SR.437 (1989) para. 49 (United States).

⁹⁵ ‘The *refoulement* of refugees must not be allowed to occur under any circumstances’: UN doc. A/AC.96/SR.439 (1989) para. 9 (Austria).

⁹⁶ UN doc. A/AC.96/SR.475 (1992) para. 83 (Brazil), commenting on temporary protection and its eventual termination as a possible alternative to asylum in mass influx situations.

⁹⁷ UN doc. A/AC.96/SR.418 (1987) para. 74 (Turkey). As Goodwin-Gill later noted, ‘continuing compliance with *non-refoulement* may well depend on a normative context of cooperation, particularly in situations of large-scale influx’: Goodwin-Gill, G. S., ‘Editorial. Asylum: The Law and Politics of Change’ (1995) 7 *IJRL* 1, 7.

⁹⁸ UN doc. A/AC.96/SR.442 (1989) para. 92 (Turkey); see also UN doc. A/AC.96/SR.456 (1991) para. 7 (Turkey). On several occasions, the Turkish representatives have both upheld the fundamental character of *non-refoulement* while simultaneously supporting the right of the asylum seeker to choose in which country to seek asylum, thereby staking a claim for a form of ‘natural’ burden-sharing. On ‘mass influx’ see further s. 6.

⁹⁹ UN doc. A/AC.96/SR.468 (1991) para. 18 (Turkey).

¹⁰⁰ See, generally, Adelman, H., ‘Humanitarian Intervention: The Case of the Kurds’ (1992) 4 *IJRL* 4; Gilbert, G. & Rüsch, A. M., *Creating Safe Zones and Safe Corridors in Conflict* (Kaldor Centre for International Refugee Law, Policy Brief 5, Jun. 2017). Today, faced with an imminent refugee exodus, States are more likely to consider humanitarian intervention or containment, as in Kosovo, rather than waiting for people to flee. In 2004, the High Commissioner welcomed the Sudanese government’s agreement to the idea of ‘safe havens’ for the internally displaced, since it indicated some commitment to the peace process; however, for many persons, ‘such areas were more like prisons than safe areas’: UN doc. A/AC.96/SR.581 (2004) para. 6 (Mr Lubbers, High Commissioner).

¹⁰¹ Although Turkey’s formal reservations have focused on mass influx, its record on individual cases has not always been perfect; see Amnesty International, ‘Turkey: Selective Protection. Discriminatory Treatment of Non-European Refugees and Asylum Seekers’ (1994); Kirisci, K., ‘Asylum Seekers and Human Rights in Turkey’ (1992) 10 *NethQHR* 447. Note, however, that Turkey maintains the geographical limitation to its obligations under the 1951 Convention.

¹⁰² See Ch. 3, s. 6.2.1. See *Januzi v Secretary of State for the Home Department* [2006] 2 WLR 397 for discussion of the application of the internal flight alternative. Coleman argues that returns to safe havens in Croatia in 1992 constituted *refoulement* because they were effected before refugee status determination could occur: Coleman, N., ‘Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law’ (2003) 5 *EJML* 23, 29.

¹⁰³ UN doc. A/AC.96/SR.430 (1988) para. 42 (Switzerland). For example, in 1997, Italy argued that the majority of Albanian asylum seekers who had fled to Italy had not qualified for asylum under the 1951 Convention, but the Italian government ‘had decided to admit them temporarily on humanitarian grounds’: UN doc. A/AC.96/SR.518 (1997) para. 12 (Italy).

¹⁰⁴ UN doc. A/AC.96/SR.507 (1996) para. 60 (United States). See further Ch. 7.

¹⁰⁵ UN doc. A/AC.96/SR.511 (1996) para. 6 (Observer for Egypt).

¹⁰⁶ UN doc. A/AC.96/SR.508 (1996) para. 5 (Sweden).

¹⁰⁷ UN doc. A/AC.96/SR.527 (1998) para. 40 (Belgium).

¹⁰⁸ Ibid, para. 44 (France).

¹⁰⁹ Ibid, para. 9 (United Kingdom). For a review of European State practice with respect to non-Convention refugees, see Bouteillet-Paquet, D., ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’, in Bouteillet-Paquet, D., ed., *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002).

¹¹⁰ See Ch. 7.

¹¹¹ UN doc. A/AC.96/SR.430 (1988) para. 53 (United Kingdom). This interpretation was reiterated the following year; see UN doc. A/AC.96/SR.442 (1989) para. 51.

¹¹² UN doc. A/AC.96/SR. 442 (1989) para. 46 (Argentina).

¹¹³ UN doc. A/AC.96/SR.546 (2000) para. 18 (Hungary); UN doc. A/AC.96/SR.546 (2000) para. 44 (Spain); UN doc. A/AC.96/SR.545 (2000) para. 54 (Poland); UN doc. A/AC.96/SR.581 (2004) para. 76 (Italy). Cf. UN doc. A/AC.96/SR.549 (2000) para. 8 (Norway).

¹¹⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/989 (7 Jul. 2004) para. 25; see also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/975 (2 Jul. 2003) para. 13.

¹¹⁵ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/989 (7 Jul. 2004) para. 25.

¹¹⁶ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1066 (26 Jun. 2009) para. 20; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25.

¹¹⁷ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/951 (13 Sep. 2001) para. 20; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1038 (29 Jun. 2007) para. 10; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1066 (26 Jun. 2009) para. 20; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25.

¹¹⁸ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1066 (26 Jun. 2009) para. 20; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1134 (9 Jul. 2014) para. 25; see also UN Committee against Torture, ‘General Comment No. 4 on the Implementation of Article 3 of the Convention in the context of Article 22’ (2017) para. 4: ‘the term “deportation” includes, but is not limited to, expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations (including at sea) of a person or group of individuals from a State party to another State.’

¹¹⁹ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1038 (29 Jun. 2007) paras. 10–11; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 13; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011) para. 30.

¹²⁰ UNHCR, ‘Note on International Protection’ UN doc. A/AC.96/951 (13 Sep. 2001) para.

20; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25.

¹²¹ Ibid.

¹²² UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1038 (29 Jun. 2007) para. 10; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 13.

¹²³ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 13; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011) para. 30; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25.

¹²⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1085 (30 Jun. 2010) para. 19.

¹²⁵ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/951 (13 Sep. 2001) para. 11. In 2011, the Canadian representative stated that his government had tabled new legislation to reduce pull factors for both people smugglers and asylum seekers ‘without impinging on the State’s obligations on non-refoulement’: UNHCR Executive Committee, ‘Summary Record of the 653rd Meeting’ (5 Oct. 2011) 11 (Canada).

¹²⁶ UN doc. A/AC.96/SR.548 (2000) para. 78 (Ms Feller, UNHCR, Department of International Protection).

¹²⁷ UN doc. A/AC.96/SR.518 (1997) para. 72 (Turkey).

¹²⁸ UN doc. A/AC.96/SR.554 (2001) para. 36 (Turkey); see also UN doc. A/AC.96/SR.563 (2002) para. 48 (Turkey).

¹²⁹ UN doc. A/AC.96/SR.561 (2002) para. 22 (Mr Lubbers, High Commissioner).

¹³⁰ UN doc. A/AC.96/SR.554 (2001) para. 38 (India). In 2007, France expressed concern about acts of *refoulement* carried out to uphold security or prevent irregular migration: UN doc. A/AC.96/SR.615 (2007) 4 (France).

¹³¹ Hungarian Government website, ‘Reinforcement of Legal Border Closure is a Measure to Serve Hungarian People’s Security’ (13 Feb. 2017) <http://www.kormany.hu/en/news/reinforcement-of-legal-border-closure-is-a-measure-to-serve-hungarian-people-s-security>; Hungarian Prime Minister Says Migrants Are “Poison” and “Not Needed”, *Guardian* (27 Jul. 2016) <https://www.theguardian.com/world/2016/jul/26/hungarian-prime-minister-viktor-orban-praises-donald-trump>. See also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 13.

¹³² Kiley, S., ‘Tanzania Closes Border to 100,000 Rwanda Refugees’ *The Times* (1 Apr. 1995).

¹³³ See nn 99, 100 and accompanying text.

¹³⁴ See comments of Hungarian and Slovakian Prime Ministers in ‘How Many Migrants to Europe Are Refugees?’, *The Economist* (8 Sep. 2015)

<http://www.economist.com/blogs/economist-explains/2015/09/economist-explains-4>. In 2016, Macedonia, Serbia, and Croatia also closed their borders: Kingsley, P., ‘Balkan Countries Shut Borders as Attention Turns to New Refugee Routes’, *Guardian* (10 Mar. 2016) <https://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders>.

¹³⁵ UN doc. A/AC.96/SR.529 (1998) para. 49 (Ethiopia).

¹³⁶ UN doc. A/AC.96/SR.519 (1997) para. 84 (Democratic Republic of Congo).

¹³⁷ UN doc. A/AC.96/SR.508 (1996) para. 34 (Brazil); UN doc. A/A.96/SR.511 (1996) para. 26 (Observer for Benin); UN doc. A/AC.96/SR.518 (1997) para. 51 (China); UN doc. A/AC.96/SR.518 (1997) para. 71 (Turkey); UN doc. A/AC.96/SR.526 (1998) para. 4 (Netherlands); UN doc. A/AC.96/SR.526 (1998) para. 31 (Norway); UN doc. A/AC.96/SR.526 (1998) para. 56 (Germany); UN doc. A/AC.96/SR.527 (1998) para. 9 (United Kingdom); UN doc. A/AC.96/SR.527 (1998) para. 34 (Sweden); UN doc. A/AC.96/SR.530 (1998) para. 56 (South Africa); UN doc. A/AC.96/SR.532 (1998) para. 11 (Observer for Uganda); UN doc. A/AC.96/SR.545 (2000) para. 10 (Australia); UN doc. A/AC.96/SR.545 (2000) para. 19 (Sweden); UN doc. A/AC.96/SR.547 (2000) para. 47 (Observer for the Republic of Moldova); UN doc. A/AC.96/SR.552 (2001) para. 50 (Belgium); UN doc. A/AC.96/SR.555 (2001) para. 16 (Brazil); UN doc. A/AC.96/SR.555 (2001) para. 52 (Observer for Ecuador); UN doc. A/AC.96/SR.556 (2001) para. 21 (Observer for Myanmar); UN doc. A/AC.96/SR.558 (2001) para. 3 (India); UN doc. A/AC.96/SR.562 (2002) para. 62 (Argentina); UN doc. A/AC.96/SR.563 (2002) para. 61 (India); UN doc. A/AC.96/SR.563 (2002) para. 70 (Venezuela); UN doc. A/AC.96/SR.564 (2002) para. 46 (Mexico); UN doc. A/AC.96/SR.566 (2002) para. 15 (Nigeria); UN doc. A/AC.96/R.581 (2004) para. 97 (Observer for the Congo); UN doc. A/AC.96/SR.583 (2004) para. 49 (Mexico); UN doc. A/AC.96/SR.600 (2006) para. 17 (Austria); UN doc. A/AC.96/SR.601 (2006) para. 52 (Chile); UN doc. A/AC.96/SR.601 (2006) para. 56 (India); UN doc. A/AC.96/SR.602 (2006) para. 53 (Mexico); UN doc. A/AC.96/SR.610 (2007) para. 18 (Republic of Korea); UN doc. A/AC.96/SR.611 (2007) para. 12 (Lesotho); UN doc. A/AC.96/SR.612 (2007) para. 43 (India); UN doc. A/AC.96/SR.615 (2007) paras. 2–3 (United States); UN doc. A/AC.96/SR.615 (2007) para. 9 (France); UN doc. A/AC.96/SR.619 (2008) para. 16 (Brazil); UN doc. A/AC.96/SR.621 (2008) para. 10 (Mexico); UN doc. A/AC.96/SR.621 (2008) para. 28 (India); UN doc. A/AC.96/SR.623 (2008) para. 25 (Switzerland); UN doc. A/AC.96/SR.633 (2009) para. 51 (Netherlands); UN doc. A/AC.96/SR.639 (2010) para. 33 (United States); UN doc. A/AC.96/SR.650 (2011) para. 23 (Togo); UN doc. A/AC.96/SR.651 (2011) para. 26 (Republic of Korea); UN doc. A/AC.96/SR.653 (2011) para. 65 (Thailand); UN doc. A/AC.96/SR.658 (2012) para. 19 (Turkey); UN doc. A/AC.96/SR.659 (2012) para. 41 (Spain); UN doc. A/AC.96/SR.659 (2012) para. 55 (Bulgaria); UN doc. A/AC.96/SR.661 (2012) para. 17 (Togo); UN doc. A/AC.96/SR.661 (2012) para. 47 (Israel); UN doc. A/AC.96/SR.662 (2012) para. 14 (Turkey); UN doc. A/AC.96/SR.662 (2012) para. 20 (Republic of Korea); UN doc. A/AC.96/SR.668 (2013) para. 22 (Republic of Moldova); UN doc. A/AC.96/SR.669 (2013)

para. 18 (Namibia); UN doc. A/AC.96/SR.672 (2013) para. 9 (United States); UN doc. A/AC.96/SR.672 (2013) para. 15 (Republic of Korea); UN doc. A/AC.96/SR.677 (2014) para. 9 (Mexico); UN doc. A/AC.96/SR.682 (2014) para. 14 (Canada); UN doc. A/AC.96/SR.685 (2015) para. 36 (Observer for Gabon); UN doc. A/AC.96/SR.689 (2015) para. 24 (Hungary); UN doc. A/AC.96/SR.695 (2016) para. 22 (Lebanon); UN doc. A/AC.96/SR.697 (2016) para. 9 (Democratic Republic of the Congo); UN doc. A/AC.96/SR.697 (2016) para. 31 (New Zealand); UN doc. A/AC.96/SR.699 (2016) para. 6 (United States); UN doc. A/AC.96/SR.704 (2017) para. 13 (Rwanda); UN doc. A/AC.96/SR.704 (2017) para. 16 (Switzerland); UN doc. A/AC.96/SR.710 (2018) para. 25 (Colombia); UN doc. A/AC.96/SR.710 (2018) para. 36 (Switzerland); UN doc. A/AC.96/SR.712 (2018) para. 25 (New Zealand).

¹³⁸ UN doc. A/AC.96/SR.516 (1997) para. 53 (United States).

¹³⁹ UN doc. A/AC.96/SR.442 (1989) paras. 78–9 (United States). See also the second and third editions of this work.

¹⁴⁰ UN doc. A/AC.96/SR.522 (1997) para. 65 (Denmark).

¹⁴¹ UN doc. A/AC.96/SR.552 (2001) para. 50 (Belgium).

¹⁴² UN doc. A/AC.96/SR.554 (2001) para. 60 (Thailand).

¹⁴³ UN doc. A/AC.96/SR.699 (2016) 3 (Thailand).

¹⁴⁴ UN doc. A/AC.96/SR.695 (2016) 6 (Lebanon).

¹⁴⁵ Within five days of the NATO bombings, 130,000 Kosovars had fled Kosovo; nine weeks later, 860,000 people had fled: see Suhrke, A. and others, *The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response* (UNHCR, Feb. 2000) para. 31. For a critique of that report, see European Council on Refugees and Exiles (ECRE), ‘The Kosovo Refugee Crisis: ECRE’s Observations on the Independent Evaluation of UNHCR’s Emergency Preparedness and Response’ <http://www.ecre.org/statements/koseval.shtml>. More generally, see Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (2000).

¹⁴⁶ See Amnesty International, *Former Yugoslav Republic of Macedonia: The Protection of Kosovo Albanian Refugees* (1999) (AI Index EUR 65/03/99).

¹⁴⁷ Coleman (n 102) 38, citing Suhrke and others (n 145). (Coleman’s references do not match the publicly available version of this report: see paras. 447–50.) See also House of Commons Select Committee on International Development, *Kosovo: The Humanitarian Crisis* (3rd Report, 1999) HC 422, para. 79.

¹⁴⁸ UN doc. A/AC.96/SR.535 (1999) para. 42 (Canada). Amnesty International suggested that ‘[t]he rush of the international community to evacuate refugees as soon as possible tacitly accept[ed] this Macedonian position’: Amnesty International (n 146) s. 5.5.

¹⁴⁹ UN doc. A/AC.96/SR.672 (2013) 3 (United States).

¹⁵⁰ UN doc. A/AC.96/SR.518 (1997) para. 4 (Ireland).

¹⁵¹ UN doc. A/AC.96/SR.522 (1997) para. 57 (UNHCR).

¹⁵² Crawford, J., *Brownlie's Principles of Public International Law* (9th edn., 2019) 23–7; UNGA res. 73/203, 'Identification of Customary Law' (20 Dec. 2018) Annex, Conclusion 15; International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law', *Report of the 69th Conference* (2000) 734 ff.; see also International Law Association, Res. No. 16/2000, *Report of the 69th Conference* (2000) 39.

¹⁵³ This approach is supported by the positions adopted by States. See, for example, comments in UN doc. A/AC.96/SR.526 (1998) para. 31 (Norway); UN doc. A/AC.96/SR.536 (1999) para. 1 (Sweden); UN doc. A/AC.96/SR.537 (1999) para. 24 (Ireland); UN doc. A/AC.96/SR.554 (2001) para. 12 (Switzerland).

¹⁵⁴ In 2012, Israel stated that it complied strictly with international conventions, including the principle of *non-refoulement*, but it had recently implemented measures to prevent people arriving whom it asserted were not genuine refugees: UN doc. A/AC.96/SR.661 (2012) paras. 46–8.

¹⁵⁵ See further Ch. 6, s. 1.1 and the third edition of this work, Ch. 5, s. 3.3.1.

¹⁵⁶ For discussion of the *Tampa* incident, see the third edition of this work, Ch. 5, s. 4.3.

¹⁵⁷ For examples of State practice between 1997 and 2007, see the second and third editions of this work.

¹⁵⁸ UNHCR, 'Note on International Protection': UN doc. A/AC.96/1066 (26 Jun. 2009) para. 20.

¹⁵⁹ Ibid.

¹⁶⁰ UN doc. A/AC.96/SR.522 (1997) para. 57 (Mr McNamara, UNHCR).

¹⁶¹ Ibid., para. 61.

¹⁶² Ibid., para. 85 (United States).

¹⁶³ See further s. 9 below.

¹⁶⁴ UNHCR, 'Note on International Protection': UN doc. A/AC.96/898 (3 Jul. 1998) para. 13.

¹⁶⁵ US Committee for Refugees and Immigrants, *World Refugee Survey*, Tanzania (1998).

¹⁶⁶ US Committee for Refugees and Immigrants, *World Refugee Survey*, Tanzania (2000).

¹⁶⁷ UNHCR, 'Note on International Protection': UN doc. A/AC.96/951 (13 Sep. 2001) para. 18; Türk, V., 'Forced Migration and Security' (2003) 15 *IJRL* 113, 115.

¹⁶⁸ UNHCR, 'Note on International Protection': UN doc. A/AC.96/1134 (9 Jul. 2014) para. 18.

¹⁶⁹ UNHCR, 'Note on International Protection': UN doc. A/AC.96/1098 (28 Jun. 2011) para. 29. In 2004, Jordan declared its border closed to new refugees. Although immigration officers were stationed at 114 airports and borders in the Russian Federation, not one person was granted asylum in 2004 and no appeals were permitted: US Committee for Refugees and Immigrants, *World Refugee Survey* (2005). In 2003, Tanzania closed certain border crossing

points, denying access to new asylum seekers, and Iran summarily deported people arriving at the border: US Committee for Refugees and Immigrants, *World Refugee Survey* (2004). In 2015, Hungary closed its borders to refugees fleeing the Middle East, including by constructing a fence, but argued that it ‘had had to take immediate action in order to conform to European Union regulations and prevent irregular border crossings’. It suggested that ‘the temporary border security fence along the Hungarian and Serbian border was not a wall and did not mean that Hungary closed its borders. Regular border crossing points would remain open. Hungary fully respected the principles of non-refoulement and non-discrimination of asylum seekers’: UN doc. A/AC.96/SR.689 (2015) 7 (Hungary). By contrast, UNHCR praised West Africa’s open borders in response to an outflow of refugees from Côte d’Ivoire in 2011, for instance: UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011) para. 28.

¹⁷⁰ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1110 (4 Jul. 2012) para. 12; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1134 (9 Jul. 2014) para. 18.

¹⁷¹ Tanzania deported refugees found outside camp areas: US Committee for Refugees and Immigrants, *World Refugee Survey* (2005).

¹⁷² UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25; UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1134 (9 Jul. 2014) para. 18.

¹⁷³ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1038 (29 Jun. 2007) para. 10.

¹⁷⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1156 (12 Jul. 2016) para. 14.

¹⁷⁵ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1038 (29 Jun. 2007) para. 10.

¹⁷⁶ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1122 (3 Jul. 2013) para. 25.

¹⁷⁷ Ibid.

¹⁷⁸ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 13. On measures taken by the Trump administration that had an impact on *non-refoulement* (‘withholding of removal’), see Schoenholtz, A. I., Ramji-Nogales, J., & Schrag, P. A., *The End of Asylum* (2021), 80–6, 88–9, and *passim*.

¹⁷⁹ See also Executive Committee Conclusions No. 79 (1996), No. 81 (1997), No. 82 (1997).

¹⁸⁰ UNGA res. 51/75 (12 Dec. 1996) preambular para. 6; UNGA res. 52/103 (12 Dec. 1997) preambular para. 5; UNGA res. 69/154 (18 Dec. 2014) operative para. 17.

¹⁸¹ See, for example, Mallia, P., ‘The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal’ (2014) 18 *ASIL Insights*

<https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal>.

¹⁸² See further s. 4.

¹⁸³ See further Ch. 6, s. 1.1.2.

¹⁸⁴ United Nations Conference of Plenipotentiaries, Summary Records: UN doc. A/CONF.2/SR.35 (1951) 23.

¹⁸⁵ Ibid., 22.

¹⁸⁶ UN doc. A/CONF.2/SR.16 (1951) 4.

¹⁸⁷ Support for the principle of serious risk as the determinant for refugee status and consequently also for *non-refoulement*, can be found in numerous national decisions; see Ch. 3, s. 6.2.

¹⁸⁸ See the US Supreme Court decisions in *INS v Stevic*, 467 US 407 (1984) and *INS v Cardoza-Fonseca*, 480 US 421 (1987); for comment, see Goodwin-Gill, G. S., ‘Comment’ (1990) 2 *IJRL* 461. The remedy was provided by the Asylum and Withholding of Deportation Procedures, Final Rule, 55 *Federal Register* 30674 (1990) 8 CFR §208.

¹⁸⁹ See Schoenholtz, Ramji-Nogales, & Schrag (n 178) 38–9, 93–4.

¹⁹⁰ *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1989] 1 AC 958, 1001 (Lord Goff). See also Kälin, Caroni, & Heim (n 3) 1342.

¹⁹¹ See further Ch. 4. Under human rights law, however, the principle is absolute: see Ch. 7. In contrast to the 1951 Convention, art. II of the 1969 OAU Convention declares the principle of *non-refoulement* without exception. No formal concession is made to overriding considerations of national security, although in cases of difficulty ‘in continuing to grant asylum’ appeal may be made directly to other member States and through the OAU. Provision is then made for temporary residence pending resettlement, although its grant is not mandatory. The absence of any formal exception is the more remarkable in view of the dimensions of the refugee problems that individual African States have faced.

¹⁹² Although national security is mentioned in arts. 9, 28, 32, and 33 of the 1951 Convention, these provisions do not give any indication of the content of the concept. By contrast to the exclusion clauses, a refugee removed under art. 33(2) remains a refugee, but has lost the right to claim on-going protection from the host State by reason of his or her conduct. On the distinction, see, for example, *Pushpanathan v Canada* [1998] 1 SCR 982, para. 58; *T v Secretary of State for the Home Dept* [1996] 2 All ER 865; *Attorney-General v Zaoui (No. 2)* [2005] 1 NZLR 690 (CA) para. 166; *Moses Allueke*, 188981, France, Conseil d’Etat (3 nov. 1999). The ‘particularly serious crime’ in art. 33(2) must have been committed *after* the individual’s admission as a refugee (on which, see Ch. 4). See also Lauterpacht & Bethlehem (n 33) para. 149; cf. Hathaway (n 36) 417.

¹⁹³ The reference to ‘reasonable grounds’ was interpreted by one representative at the 1951 Conference as allowing States to determine whether there were sufficient grounds for regarding the refugee as a danger and whether the danger likely to be encountered by the refugee on *refoulement* was outweighed by the threat to the community: UN doc.

¹⁹⁴ See Goodwin-Gill ([n 2](#)) 241–2, 247–50. Hathaway takes a different approach to this issue: Hathaway ([n 36](#)) 418 ff.

¹⁹⁵ For analysis, see Lauterpacht & Bethlehem ([n 33](#)) paras. 100–2.

¹⁹⁶ See, for example, 1933 Convention relating to the International Status of Refugees ([n 8](#)) art. 3; 1938 Convention concerning the Status of Refugees coming from Germany n 9 art. 5(2). At the first session of the *Ad hoc* Committee, the British delegate suggested that *non-refoulement* should not apply when national security was involved: UN doc. E/AC.32/SR.20 (1950) paras. 10–12. In the context of ‘public order’, the French representative had suggested limiting ‘protected opinions’ to those not contrary to the purposes and principles of the United Nations: *ibid.*, paras. 8, 19. Several States thought this a too drastic qualification: Belgium, Israel, and the United States: *ibid.*, paras. 13, 15, 16, and generally, while others remained concerned to protect public order, even if the concept were somewhat ambiguous: cf. Venezuela: *ibid.*, paras. 38–43. The concept of public order was discussed further at the second session; see UN doc. E/AC.32/SR.40 (1950) 10–30; *Report of the Ad hoc Committee*: UN doc. E/AC.32/8 (1950) para. 29. See further Zimmermann, A. & Wennholz, P., ‘Article 33, para. 2’, in Zimmermann ([n 3](#)) 1399–1406.

¹⁹⁷ Grahl-Madsen, A., *Commentary on the Refugee Convention 1951: Articles 2–11, 13–37* (1962–63, pub. by UNHCR 1997) art. 33, para. 8.

¹⁹⁸ See, for example, Migration Act 1958 (Cth) ss. 36(1C), 202, 500, 502 (Australia); Immigration and Refugee Protection Act 2001, ss. 3, 34, 115 (Canada); *Code de l’entrée et du séjour des étrangers et du droit d’asile*, art. L711-6 (France); *Zuwanderungsgesetz*, §§ 5(1)(3), 25(3), 54(1)(2), 60(8) (Germany); EU Qualification Directive (original) recital (28) and Qualification Directive (recast) recital (37): ‘The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.’

¹⁹⁹ For attempts to define the concept of national security in domestic law, see Security Intelligence Organisation Act 1979 (Cth), s. 4 (Australia); Canadian Security Intelligence Service Act 1985, s. 2 (Canada) (see also *Suresh v (Minister of Citizenship and Immigration* [2002] 1 SCR 3)); Security Service Act 1989, s. 1 (UK); Terrorism Act 2000, s. 1 (UK) (which defines ‘terrorism’ rather than ‘national security’); *Loi fédérale instituant des mesures visant au maintien de la sûreté intérieure*, arts. 2–3 (RS 120: Switzerland); EU Qualification Directive (original) recital (28) and Qualification Directive (recast) recital (37).

²⁰⁰ Lauterpacht & Bethlehem ([n 33](#)) para. 165.

²⁰¹ Hathaway ([n 36](#)) 409.

²⁰² *Suresh* ([n 199](#)) para. 88. Note the US view: *A-H-*, 23 I&N Dec. 774, 788 (AG, 2005): ‘the phrase “danger to the security of the United States” is best understood to mean a risk to the Nation’s defense, foreign relations, or economic interests.’

²⁰³ *Suresh* ([n 199](#)) para. 90. See also *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

²⁰⁴ See *Suresh* (n 199) para. 91; *DJ*, 23 I&N Dec. 572 (AG, 2003). See also Crépeau, F., ‘Anti-Terrorism Measures and Refugee Law Challenges in Canada’ (2010) 29(4) *RSQ* 31.

²⁰⁵ Lauterpacht & Bethlehem (n 33) para. 168. See, for example, *A-H-* (n 202) 789: ‘The “reasonable grounds for regarding” standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security.’

²⁰⁶ Note that the French text of the Refugee Convention uses the same language for both provisions. Cf. Hathaway & Harvey, who argue that the test under art. 33(2) is higher: Hathaway, J. C. & Harvey, C., ‘[Framing Refugee Protection in the New World Disorder](#)’ (2001) 43 Cornell International Law Journal 288. See also Lauterpacht & Bethlehem (n 33) para. 147; [Ch. 4](#) above.

²⁰⁷ Lauterpacht & Bethlehem (n 33) para. 169. See also analysis by Zimmermann & Wennholz (n 196) 1417.

²⁰⁸ Lauterpacht & Bethlehem (n 33) para. 170; UNHCR, ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’: HCR/GIP/03/05 (4 Sep. 2003) paras. 10, 44; House of Lords/House of Commons Joint Committee on Human Rights, The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, HL Paper 190/ HC1212 (Nov. 2004) paras. 19–26.

²⁰⁹ With respect to the terms of art. 1F(b), see [Ch.4](#), s. 5.3. [UNHCR, Handbook](#) (n 21) paras. 155–6 Hathaway states that ‘the nature of the conviction and other circumstances must be found to justify the conclusion that the refugee in fact constitutes a danger to the community in which protection is sought’: Hathaway (n 36) 416 (fns omitted).

²¹⁰ Lauterpacht & Bethlehem (n 33) para. 187. In *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227, para. 4, Burchett and Lee JJ expressed the view that the ‘principal statement of exclusion’ in art. 33(2) is that the individual constitutes a danger to the community or to national security, not that he or she has been convicted of a particularly serious crime. See analysis of this case in the third edition of this work, 238–9.

²¹¹ Grahl-Madsen (n 197) art. 33, para. 9 (emphasis added).

²¹² Zimmermann & Wennholz (n 196) 1421.

²¹³ See, for example, in the US: INA ss. 208(b)(2)(A)(ii), 241(b)(3)(B)(ii).

²¹⁴ On legislative classification of ‘serious crimes’ and the use of presumptions, see [Ch. 4](#), s. 4.2.2.

²¹⁵ Lauterpacht & Bethlehem (n 33) paras. 177–9; [UNHCR, Handbook](#) (n 21) para. 156; Zimmermann & Wennholz (n 196) 1421; UNHCR, ‘Advisory Opinion regarding the Scope of the National Security Exception in Article 33(2)’ (6 Jan. 2006); Grahl-Madsen (n 197) art. 33. In *Pushpanathan* (n 192) para. 73, the court noted that domestic legislation provided for weighing the seriousness of the danger posed to Canadian society against the danger of persecution on *refoulement*. However, where a decision on the weighting of the applicant’s conduct is made in the exercise of a ‘broad discretion’, especially by a Minister, that decision

should be respected unless it is patently unreasonable: *Suresh* (n 199) paras. 32, 34, 37; *Rehman* (n 203) para. 62 (Lord Hoffmann). In *Suresh*, the court explained (para. 38) that it is up to the Minister, and not the court, to weigh relevant factors (with appropriate qualification): ‘The court’s task, if called upon to review the Minister’s decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament’s legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision.’

²¹⁶ See Ch. 2, s. 4.2.

²¹⁷ Although the *UNHCR Handbook* does not deal specifically with art. 33(2), it argues for a balancing approach when dealing with exclusion under art. 1F: *UNHCR Handbook* (n 21) paras. 154–6. Gilbert says that it ‘unequivocally assumes’ that balancing is part of the process: Gilbert, G., ‘Current Issues in the Application of the Exclusion Clauses’, in Feller, Türk, & Nicholson (n 33) 462.

²¹⁸ Replacing Anti-Terrorism, Crime and Security Act 2001 (UK), s. 33.

²¹⁹ *Attorney-General v Zaoui* [2005] NZSC 38, para. 42.

²²⁰ *Attorney-General v Zaoui* (No. 2) (n 192) para. 157 (Glazebrook J): ‘In my view, there is a balancing in any decision under art 33.2 ... As discussed above, it is built into the concept of danger to the security of the country that the danger to security posed by the individual must be serious enough to warrant sending a hypothetical person back to persecution ... The weight of authority seems to favour an additional balancing of the consequences for the particular individual if removed or deported against the danger to security.’

²²¹ *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174, para. 49. This part of the judgment was not altered on appeal to the High Court of Australia.

²²² INA, s. 241(b)(3)(B), read together with ss. 237(a)(4)(B), 212(a)(3)(B). See further Fullerton, M., ‘Terrorism, Torture, and Refugee Protection in the United States’ (2010) 29(4) RSQ 4.

²²³ CPRR, W1916 (9 Aug. 1995); CPRR, W4403 (9 Mar. 1998); CPRR, W4589 (23 Apr. 1998). Against the INA presumption, UNHCR argued that an individualized and proportionate assessment is required under art. 33(2): UNHCR, ‘UNHCR Intervention before the United States Court of Appeals for the Fifth Circuit in the case of Tiuang Ling Thang v. Gonzales, Attorney General’ (21 Feb. 2007) 21, relying on Lauterpacht & Bethlehem (n 33) elaborated further in UNHCR, ‘UNHCR Intervention before the United States Court of Appeals for the Tenth Circuit in the case of N- A- M- v. Mukasey, Attorney General’, Case No. 08-9527 & 07-9580 (19 Jun. 2008).

²²⁴ *Pushpanathan* (n 192) para. 73: ‘Article 33(2) as implemented in the Act by ss. 53 and 19 provides for weighing of the seriousness of the danger posed to Canadian society against the danger of persecution upon *refoulement*. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual in fear of persecution

on the one hand, and the legitimate concern of states to sanction criminal activity on the other.'

²²⁵ *Rehman* ([n 203](#)) para. 16 (Lord Slynn): 'Whether there is such a real possibility [of risk to national security] is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made'; and para. 56 (Lord Hoffmann): 'But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.' See also *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, esp. paras. 30, 121, 132, 236.

²²⁶ *Kenya National Commission on Human Rights v Attorney General* [2017] eKLR 12.

²²⁷ *Ibid.*, 11.

²²⁸ *Ibid.*, 12.

²²⁹ UNHCR, 'UNHCR Intervention before the United States Court of Appeals for the Ninth Circuit in the case of *Delgado v. Holder, Attorney General*' (16 Oct. 2010) 9.

²³⁰ Hathaway ([n 36](#)) 413 ff.; Hathaway & Harvey, C., '[Framing Refugee Protection in the New World Disorder](#)' ([2001](#)) 43 *Cornell International Law Journal* 288, ([n 206](#)) 294.

²³¹ See, for example, Hathaway ([n 36](#)) 418, whose suggestion that indefinite incarceration would be an alternative to return is hardly countenanced by human rights.

²³² Lauterpacht & Bethlehem ([n 33](#)) para. 178.

²³³ For a 'democratic conception of security', see Lustgarten, L. & Leigh, I., *In from the Cold: National Security and Parliamentary Democracy* (1994) 32, and generally.

²³⁴ This does not exclude the use of 'security' procedures, provided that they in turn conform with the State's obligations with regard to due process and procedural guarantees; see [Ch. 4](#), s. 5.4.4. See, for example, *FKAG v Australia*, Human Rights Committee: UN doc. CCPR/C/108/D/2094/2011 (26 Jul. 2013). In practice, the opportunities for effective challenge may be reduced by limits on the sharing of 'security' information; see *XP v The Minister for Justice and Equality* [2018] IECA 112; *B and ND v Secretary of State for the Home Department* [2018] EWHC 2651 (Admin).

²³⁵ In *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep. 14 and the *Case Concerning Oil Platforms* [2003] ICJ Rep. 161, the International Court of Justice considered the lawfulness of measures taken, *inter alia*, to protect the 'essential security interests' of one of the parties. It held that the measures taken, 'must not merely be such as *tend* to protect' those interests (emphasis added), but must be necessary for that purpose; and 'whether a given measure is "necessary" is not purely a question for the

subjective judgement of the party ... and may thus be assessed by the Court': *Oil Platforms*, para. 43. See also *Gabčíkovo-Nagymaros Project Case* [1997] ICJ Rep. 7, 40–1, paras. 51–2.

²³⁶ See, generally, Ch. 7; on the scope of *non-refoulement* under customary international law, see s. 9 below; Chetail, V., 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín, R., ed., *Human Rights and Immigration* (2014); Schabas, W. A., 'Non-Refoulement', in Office for Democratic Initiatives and Human Rights and the Office of the UN High Commissioner for Human Rights, *Expert Workshop on Human Rights and International Cooperation in Counter-Terrorism: Final Report*, Doc. ODIHR.GAL/14/07 (21 Feb. 2007) 23 <http://www.statewatch.org/terrorlists/OSCE-UN-feb-2007.pdf>:

'For most countries, a debate about whether there is an implied limitation on *refoulement* contained within the Refugee Convention will be largely academic, however, because in any event the State will be subject to other treaty obligations ... [T]he human rights regime governing *non-refoulement* has largely taken over that of the Refugee Convention, which is gradually becoming virtually superfluous.' See also Farmer, who argues for a highly restrictive interpretation of art. 33(2) on the basis that the principle of *non-refoulement* is a *jus cogens* norm: Farmer, A., 'Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' (2008) 23 *Georgetown Immigration Law Journal* 1.

²³⁷ 'Reality shows that in many cases a real risk of persecution comes along with a real risk of being subjected to torture or inhuman or degrading treatment or punishment': Zimmermann & Wennholz (n 196) 1422.

²³⁸ Chetail (n 236) 37 (fn omitted).

²³⁹ Joint Committee on Human Rights (n 208) para. 30.

²⁴⁰ Ibid., para. 31.

²⁴¹ The Qualification Directive (original and recast) seems to contemplate this possibility: art. 14(5).

²⁴² This is implicit in the decision of the Conseil d'Etat in CE (21 mai 1997) 148.997, *M. P.*, ruling that, while art. 33(2) permits *refoulement* in certain circumstances, it does not imply that the benefit of refugee status can be withdrawn. See also Lambert, H., 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 *ICLQ* 161, 178, who states that while art. 33(2) may deprive an individual of the benefit of *non-refoulement*, 'it does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause'. See also Zimmermann & Wennholz (n 196) 1413. Art. 14(4) of the Qualification Directive (original and recast) provides that Member States may revoke, end, or refuse to renew refugee status where art. 33(2) applies, *but* pursuant to art. 14(6), such refugees remain entitled to the rights set out in the Convention in arts. 3 (non-discrimination), 4 (religion), 16 (access to courts), 22 (public education), 31 (refugees unlawfully in the country), 32 (expulsion), and 33 (*non-refoulement*). By contrast, art. 19 of the Qualification Directive (original and recast) on revocation of subsidiary protection is silent on the question

of resultant rights. See further McAdam, J., *Complementary Protection in International Refugee Law* (2007) Ch. 2.

²⁴³ See also Ch. 8, s. 5.2; Ch. 11, s. 1.2.4.

²⁴⁴ UNHCR, ‘Memorandum to the House of Commons Home Affairs Select Committee’ (1 Dec. 2005) 2; *R v Uxbridge Magistrates’ Court, ex parte Adimi* [2001] QB 667, para. 16 (Simon Brown LJ); Goodwin-Gill, G. S., ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in Feller, Türk, & Nicholson (n 33) 193; Noll, G., ‘Article 31: Refugees Unlawfully in the Country of Refuge’, in Zimmermann (n 3) 1253.

²⁴⁵ *Adimi* (n 244).

²⁴⁶ See further McAdam, J. & Chong, F., *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (2019) 53–4, 56–7.

²⁴⁷ For a comprehensive discussion of art. 31, including an analysis of national laws and State practice, see Goodwin-Gill (n 244) 187; Costello, C., Ioffe, Y. & Büchsel, T., ‘Article 31 of the 1951 Convention relating to the Status of Refugees’ UNHCR Legal and Protection Policy Research Series, PPLA/2017/01 (Jul. 2017); Costello, C. & Ioffe, Y. ‘Non-penalization and Non-criminalization’, in Costello, Foster, & McAdam (n 1.).

²⁴⁸ UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the context of Secondary Movements of Refugees and Asylum-Seekers’ (Lisbon Expert Roundtable (9–10 Dec. 2002) para. 11 (fn omitted) in Feller, Türk, & Nicholson (n 33): ‘There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account.’ See also the jurisprudence cited in Hathaway, J. C. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014) 31 fn 86; 151 (noting that time spent elsewhere is often cast as a credibility issue); Noll (n 244) 1257. The Court of Justice of the European Union has held that it does not have jurisdiction to interpret art. 31 of the Refugee Convention (which has no direct counterpart in EU law): *Qurbani* C-481/13 (17 Jul. 2014) paras. 20, 24, 29.

²⁴⁹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, ‘Summary Record of the 14th Meeting’: UN doc. A/CONF.2/SR.14 (1951) 12 (Belgium). See Hathaway (n 36) 396 for comparative judicial decisions on this issue.

²⁵⁰ Expert Roundtable, ‘Summary Conclusions: Article 31 of the 1951 Convention’ (8–9 Nov. 2001) paras. 10(b)–(d), in Feller, Türk, & Nicholson (n 33). UNHCR notes that there is no minimum or maximum time period, and that each case must be assessed on its merits: UNHCR, ‘Response by the UNHCR Regional Representation for Northern Europe to Request for Guidance on the Interpretation of Certain Elements in Article 31 of the 1951 Convention relating to the Status of Refugees’, Stockholm (3 Mar. 2014) paras. 12–15.

²⁵¹ For further analysis, see Costello, Ioffe, & Büchsel (n 247) 20–1, citing *Adimi* (n 244) para. 17 ff. (Simon Brown LJ); *Mateta* [2013] EWCA Crim 1372, para. 21(iv) (Leveson LJ);

BO1587 [2011] 09/02303 (Supreme Court of the Netherlands) para. 2.4.3; BVerfG, 2 BvR 450/11 (8 Dec. 2014). See also Costello & Ioffe (n 247) 923–4.

²⁵² Hathaway (n 36) 505; ‘coming directly’, of course, is a treaty term and not therefore a ‘gloss’.

²⁵³ *Adimi* (n 244) 678. This is supported by UNHCR Executive Committee Conclusion No. 15 (1979) para. (h)(iii): ‘The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account’; see also para. (h)(iv).

²⁵⁴ Costello & Ioffe (n 247) 925 argue that the suggestion that ‘coming directly’ legitimates safe third country practices and the like ‘is a profound misinterpretation of article 31, undermining the object and purpose of the Convention’. See also Hathaway (n 36) 500 (fn omitted): ‘the practice of deeming refugees who pass through a “safe country” without seeking asylum there not to have “come directly” is unjustified.’

²⁵⁵ See further Ch. 8, s. 5.2; Hathaway (n 36) 46–50.

²⁵⁶ Goodwin-Gill (n 244) 196; ‘Summary Conclusions’ (n 248) para. 10(e); Hathaway (n 36) 393; UNHCR (n 248) para. 16; Costello, Ioffe, & Büchsel (n 247) 30–2.

²⁵⁷ Costello, Ioffe, & Büchsel (n 247) 31.

²⁵⁸ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin Regulation) art. 3. Australian law at one time provided that an individual who had resided for a continuous period of at least seven days in a country in which he or she could have sought and obtained effective protection was ineligible for a permanent protection visa: Migration Regulations 1994, sch. 2, cl. 866.215 (as at 2001), repealed by Migration Amendment Regulations 2008 (No. 5) (Cth) sch. 1 pt. 3. The Minister could waive this requirement, and in practice it was rarely enforced: Crock, M. & Bones, K., ‘Australian Exceptionalism: Temporary Protection and the Rights of Refugees’ (2015) 16 *Melbourne Journal of International Law* 522, 535 fn 76.

²⁵⁹ In the UK, see *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396. Whereas s. 95 of the Immigration and Asylum Act 1999 authorized the Secretary of State to provide support to asylum seekers who appeared to be destitute, s. 55 of the Nationality, Immigration and Asylum Act 2002 revoked that authority where the Secretary of State was not satisfied that the asylum claim had not been made as soon as reasonably practicable after the asylum seeker’s arrival in the UK. In ‘late’ cases, support could nevertheless be provided when the Secretary of State considered it necessary to avoid a breach of the individual’s rights under ECHR 50: s. 55(5). The court held that the Secretary of State had a positive obligation to provide support, ‘when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of

shelter, food or the most basic necessities of life': para. 5 (Lord Bingham). See also *R (M) v Slough Borough Council* [2008] UKHL 52; *R (L) v Westminster City Council* [2013] UKSC 27; Noll (n 244) 1264.

²⁶⁰ Noll (n 244) 1258–60; Hathaway (n 36) 495–507; Expert Roundtable (n 248) para. 10(f). See also *A v Public Prosecutor*, HR-2014-01323-A, Case No. 2014/220 (24 Jun. 2014); BVerfG, 2 BvR 450/11 (8 Dec. 2014), cited in Costello, Ioffe, & Büchsel (n 247) 31–2.

²⁶¹ See Costello, Ioffe, & Büchsel (n 247) 37; Hathaway (n 36) 518.

²⁶² *Van Duzen v Canada*, UN doc. CCPR/C/15/D/50/1979 (7 Apr. 1982) para. 10.2; see also Opsahl, T. & de Zayas, A., ‘The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights’ [1983] *Canadian Human Rights Yearbook* 237.

²⁶³ See, for example, Hathaway (n 36) 515; Noll (n 244) 1262–3; Costello & Ioffe (n 247) 921–3.

²⁶⁴ See, for example, Decision of the Social Security Commissioner in Case No. CIS 4439/98 (25 Nov. 1999) para. 16, where Commissioner Rowland found that *treatment* less favourable than that accorded to others, imposed on account of illegal entry, constitutes a penalty under art. 31, unless it is objectively justifiable on administrative grounds.

²⁶⁵ *B010 v Canada (Citizenship and Immigration)* 2015 SCC 58, [2015] 3 SCR 704, para. 63. This view is reflected in the legislation of many States: see Costello & Ioffe (n 247) 921 fn 31.

²⁶⁶ See ‘Summary Conclusions’ (n 250) para. 11(a). ‘For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied *administratively*, and those ordered or applied *judicially*. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily’ (emphasis added). Cf. the majority’s view in *Al-Kateb v Goodwin* [2004] HCA 37.

²⁶⁷ Note Executive Committee Conclusion No. 15 (1979) para. (i): ‘While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.’

²⁶⁸ Executive Committee Conclusion No. 22 (1981) para. B.2(a).

²⁶⁹ Executive Committee Conclusion No. 97 (2003) para. (a)(vi).

²⁷⁰ *R v GB* [2020] EWCA Crim 2. The claimant had pleaded guilty, was sentenced to 12 months’ imprisonment, but was later granted asylum.

²⁷¹ See further Ch. 8, s. 8 on detention.

²⁷² See, for example, *FKAG v Australia* (n 234) and *MMM v Australia*, UN doc. CCPR/C/108/D/2136/2012 (25 Jul. 2013), which also referenced a long line of earlier cases.

²⁷³ Costello, Ioffe, & Büchsel (n 247) 38, referring to UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/643 (9 Aug. 1984) para. 29.

²⁷⁴ Art. 2(1) ICCPR 66; art. 1 ECHR 50; art. 1 ACHR 69.

²⁷⁵ On State practice, see Goodwin-Gill ([n 244](#)) 197–214; Costello, Ioffe, & Büchsel ([n 247](#)) 32 ff.; Dunstan, R., ‘United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention’ (1998) 10 *IJRL* 205; cf. Immigration and Asylum Act 1999, s. 31.

²⁷⁶ UN doc. A/CONF.2/SR.13 (1951) 12–14 (Canada, United Kingdom). Cf. 1954 Caracas Convention on Territorial Asylum ([n 42](#)), art. 5.

²⁷⁷ Costello & Ioffe ([n 247](#)) argue that ‘there is an emerging general principle of law relating to non-penalization of refugees and other vulnerable migrants’ (929–32). See also s. 8, on the implications of *non-refoulement* through time; and [Ch. 8](#), s. 8 on detention. See further UNHCR, *Safeguards for Asylum Seekers and Refugees in the Context of Irregular Migration into and within Europe: A Survey of the Law and Practice of 31 European States* (Jun. 2001); *FKAG v Australia* ([n 234](#)); *MMM v Australia* ([n 272](#)); Edwards, A., ‘Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants,’ UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1 (Apr. 2011); International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (rev. edn., 2015).

²⁷⁸ See discussion in *Németh v Canada* 2010 SCC 56; *Gavrila v Canada*, 2010 SCC 57. On the risks faced by refugees who may be named in INTERPOL ‘Red Notices’ and other ‘diffusions’, see [Ch. 11](#), s. 5.1.

²⁷⁹ See UN doc. A/CONF.2/SR.24 (1951) 10 (United Kingdom); A/CONF.2/SR.35 (1951) 21 (France). At the abortive 1977 United Nations Conference on Territorial Asylum, one article proposed would have protected refugees against extradition to a country in which they might face persecution. The German Democratic Republic and the USSR, however, both prepared amendments reiterating the paramountcy of States’ extradition obligations. These conflicting approaches were not resolved at the Conference, and have been overtaken by consolidating State practice.

²⁸⁰ See [Ch. 4](#).

²⁸¹ See the third edition of this work for earlier developments, 258 ff.; see also [Ch. 7](#), s. 7.

²⁸² See Executive Committee Conclusion No. 17 (1980) para. (c), which recognized that ‘refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A)(2) of the 1951 Convention’. See also analysis in Lauterpacht & Bethlehem ([n 33](#)) paras. 71–5; Kälin, Caroni, & Heim ([n 3](#)) 1364–7.

²⁸³ For a comprehensive overview, see Affidavit made by Ben Saul on 18 Aug. 2014 (evidence file, folio 6980), *Wong Ho Wing v Peru* (Inter-American Court of Human Rights, 30 Jun. 2015). For detailed analysis, see Kapferer, S., ‘The Interface between Extradition and Asylum’ UNHCR Legal and Protection Policy Research Series, PPLA/2003/05 (Nov. 2003); UNHCR, ‘Guidance Note on Extradition and International Refugee Protection’ (Apr. 2008) (which sets out UNHCR’s position on substantive and procedural issues which arise where

an extradition request concerns a refugee or asylum seeker).

²⁸⁴ The Committee against Torture ([n 118](#)) para. 23 has clarified that if an extradition treaty was concluded prior to ratification of CAT 84, that treaty ‘should be applied in accordance with the principle of non-refoulement’.

²⁸⁵ See Ch. 7; see also the views of the Human Rights Committee in *Judge v Canada*, UN doc. CCPR/C/78/D/829/1998 (5 Aug. 2002); EU Charter on Fundamental Rights, art. 19(2); *Soering v United Kingdom (1989)* 11 EHRR 439, in relation to ECHR 50, art. 3; *Babar Ahmed and Others v United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (10 Apr. 2012) para. 168; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, para. 114.

²⁸⁶ On capital punishment, see, for example, 1957 European Convention on Extradition ([n 43](#)) art. 11; *Einhorn v France*, App. No. 71555/01 (16 Oct. 2001) para. 33 (admissibility decision of the European Court of Human Rights). On cruel, inhuman, or degrading treatment or punishment, see ECHR 50, art. 3; Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, preambular para. 13: ‘No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’ For examples of more general prohibitions, see 1997 International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256, art. 19(1); 1999 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197, art. 21; 2002 Inter-American Convention against Terrorism (2003) 42 ILM 19, art. 15(1). See generally Kapferer ([n 283](#)).

²⁸⁷ ‘In such situations, bars to the surrender of an individual under international refugee and human rights law prevail over any obligation to extradite’: UNHCR ([n 283](#)) para. 21. This is also the case in relation to terrorism treaties; the UN Security Council and General Assembly ‘have stated repeatedly that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law’: para. 23 and citations there.

²⁸⁸ Saul ([n 283](#)) para. 121, for example, fair trial procedures: *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09, Fourth Section (17 Jan. 2012; final (9 May 2012) paras. 258, 260.

²⁸⁹ UNHCR, ‘Note on International Protection’ ([n 164](#)) para. 6; see further Saul ([n 283](#)) paras. 120–1. Extradition in such cases is nearly always impossible: Bolhuis, M. P., Middelkoop, L. P., & van Wijk, J., ‘Refugee Exclusion and Extradition in the Netherlands: Rwanda as Precedent?’ (2014) 12 *Journal of International Criminal Justice* 1115.

²⁹⁰ It was first provided for in the 1957 European Convention on Extradition ([n 43](#)) art. 3(2); see also UN Model Treaty on Extradition (1990, rev. 1997), art. 3(2); Inter-American Convention on Extradition ([n 43](#)) art. 4(5); International Convention for the Suppression of Terrorist Bombings ([n 286](#)) art. 12; International Convention for the Suppression of the

Financing of Terrorism (n 286) art. 15.

²⁹¹ Art. 6.

²⁹² Art. 4(5).

²⁹³ Art. 3(2) (emphasis added). As early as 1953, the Committee of Experts of the Council of Europe had examined non-extradition of refugees, defined by reference to the 1951 Convention and the mandate of the High Commissioner: Council of Europe doc. CM (43) (129) (10 Oct. 1953) paras. 516–9.

²⁹⁴ See, for example, 1979 Austrian Extradition Law (*Auslieferungs- und Rechtshilfegesetz: BGBl Nr. 529/1979*) art. 19, which provides for non-extradition where the proceedings in the requesting State are likely to offend arts. 3 and 6 ECHR 50; where the likely punishment is likely to offend art. 3 ECHR 50; or where the requested person may face persecution or other serious consequences on grounds akin to those in art. 1 of the 1951 Convention. Art. 3 of the 1976 Austria–Hungary Extradition Treaty (*BGBl Nr. 340/1976*) likewise provides for non-extradition (a) in respect of political offences; (b) when the person sought enjoys asylum in the requested State; and (c) when it is not in accord with other international obligations of the requested State. Art. 4 of the 1980 Austria–Poland Extradition Treaty (*BGBl Nr. 146/1980*) is to similar effect. For detailed examples of other municipal laws, see Kapferer (n 2839) para. 226.

²⁹⁵ Home Office, Cmnd. 3008 (1966).

²⁹⁶ For example, Extradition Act 2003 (UK), ss. 13, 81; Extradition Act, 5 LRO 2002, CAP. 189 (Barbados), s. 7; Extradition (Commonwealth Countries) Act, Ch. 77, rev. edn. 2012 (Kenya), s. 6; Papua New Guinea Extradition Act 2005, s. 8; Extradition Act 1974 (Sierra Leone), s. 15; Extradition Act, Ch. 103, rev. edn. 2000 (Singapore), s. 8; Extradition Act Cap. 94 (Zambia), s. 32.

²⁹⁷ UN Model Treaty on Extradition (n 290) art. 3(b). It provides that extradition must not be granted if ‘the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons’.

²⁹⁸ Cf. Inter-American Convention on Extradition (n 43) art. 4, calling for non-extradition, ‘when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is invoked, or that the position of the person sought may be prejudiced for any of these reasons’. See also 1977 European Convention on the Suppression of Terrorism, art. 5, in which non-extradition is optional (‘Nothing in this Convention shall be interpreted as imposing an obligation to extradite if ...’); 1979 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art. 9, which employs the ‘extradition ... shall not be granted’ formula, includes ethnic origin within the list of relevant grounds, and adds one further likely cause of prejudice: ‘the reason that communication with [the person requested] by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected’: art. 9(1)

(b)(ii). Where extradition is not granted, art. 8 provides that the State in which the alleged offender is found ‘shall ... be obliged, without exception whatsoever and whether or not the offence was committed in its territory’ to submit the case for prosecution.

²⁹⁹ See, for example, 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219, art. 16; CAT 84, 1465 UNTS 85, art. 7(1); 1985 Inter-American Convention to Prevent and Punish Torture, OAS TS 67, art. 14; 1994 Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM 1429, art. VI; International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1990), UNGA res. 44/34 (4 Dec. 1989) art. 9(2); 1994 Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363, art. 10(4); European Convention on Extradition (ⁿ 43) art. 7; 1987 South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism (concluded 4 Nov. 1987), art. IV; 1998 Arab Convention on the Suppression of Terrorism (concluded 22 Apr. 1998), art. 6(h); 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism (1 Jul. 1999), Annex to Resolution No. 59/26-P, art. 6(8); 1999 OAU Convention on the Prevention and Combating of Terrorism (adopted 14 June 1999, entered into force 6 December 2002) 2219 UNTS 179, art. 8(4); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, art. 7; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, art. 7; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167, art. 7; International Convention against the Taking of Hostages (ⁿ 298) art. 8(1); 1980 Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101, art. 10.

³⁰⁰ The International Law Commission (ILC) concluded its work on the obligation to extradite or prosecute in 2014: *Yearbook of the ILC* (2014) vol. II (Part Two) Ch. VI; see also, UNGA res. 69/118, *Report of the International Law Commission on the Work of its 66th Session* (10 Dec. 2014). No draft articles were adopted, the report itself being seen as an appropriate conclusion, particularly given outstanding differences on the central issue. The ILC’s work may nonetheless be expected to feed into other topics, for example, on crimes against humanity and on universal jurisdiction; for a topical summary of discussion in the Sixth Committee, see UN doc. A/CN.4/678 (21 Jan. 2015) paras. 102–7. See also Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’, in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999).

³⁰¹ The *non-refoulement* obligation is triggered by evidence of a serious risk of persecution or substantial grounds for believing that a person would be at risk of torture, and so forth. One or other State authority must therefore make a reasoned decision, on the evidence, and

this requires full due process guarantees for the individual concerned (the opportunity to present evidence, to know the contrary case, to have a reasoned decision in writing, based on the evidence and against the appropriate standard of proof, and the opportunity to appeal or seek review). This is not always clear from the way in which municipal legislation is drafted; see, for example, Australia's Extradition Act, which declares that a person may only be surrendered if 'the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture': Extradition Act 1998 (Cth), s. 22(3)(b).

³⁰² Cf. Migration Act 1958 (Cth), s. 197C.

³⁰³ As the Argentine delegate reiterated at the Executive Committee in 1989, '[w]hile extradition was a legitimate practice in combating crime, it was inadmissible in international law in the case of a refugee': UN doc. A/AC.96/SR.442 (1989) para. 46. Later in the same session, the US delegate appeared to qualify his country's position: 'Concerning the extradition of refugees, the United States Government reserved its position on the application of the 1951 Convention and the 1967 Protocol to persons against whom extradition proceedings had been initiated until the courts hearing their cases had taken a formal position on them': ibid, para. 84. Given the ambiguity and general lack of clarity, one cannot be certain whether, in the context of extradition proceedings (which involve both a judicial process and an executive decision), the United States will or will not take refugee status into account. If it chooses to ignore status in the case of one who is not excluded or otherwise within the exceptions to *non-refoulement*, then violation of international obligations will result.

³⁰⁴ *Fernandez v Government of Singapore* [1971] 1 WLR 987.

³⁰⁵ See the third edition of this work for jurisprudence: 260 ff.

³⁰⁶ *Schweizerisches Bundesgericht* (11 Sep. 1996) BGE 122 II 373, 380–1.

³⁰⁷ *Schweizerisches Asylrekurskommission*, EMARK 2001/4; *Conseil d'Etat* (10 Apr. 1991).

³⁰⁸ *Németh* (n 278) para. 52; see also *Gavrila* (n 278).

³⁰⁹ *Németh* (n 278) para. 106. It is also 'a more practical and fair approach'.

³¹⁰ Ibid., para. 105.

³¹¹ See *Othman* (n 288). In fact, *Abu Qatada* elected to return 'voluntarily' to Jordan, the effect of the Mutual Legal Assistance Treaty having been accepted as eliminating the risk of evidence obtained by torture being admitted in trial: Res. CM/Res DH (2013) 198, Execution of the Judgment of the European Court of Human Rights, adopted by the Committee of Ministers (26 Sep. 2013).

³¹² *Soering* (n 285).

³¹³ See, for example, Garcia, M. J. & Doyle, C., 'Extradition to and from the United States: Overview of the Law and Recent Treaties', Congressional Research Service paper (17 Mar. 2010). In principle, member States of the Council of Europe will not extradite or remove anyone to a State in which he or she risks the death penalty (the death penalty is forbidden in

Europe, although Belarus remains a partial exception; see European Convention on Human Rights, Protocol No. 6 and Protocol No. 13). In *Al-Saadoon and Mufdhi v United Kingdom*, for example, the European Court found that, in the absence of a binding assurance from the Iraqi authorities that the death penalty would not be applied and given that there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed, ‘the referral of the applicants’ cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom’s obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13’: App. No. 61498/08, Fourth Section (2 Mar. 2010); final (4 Oct. 2010) para. 143 (see also para. 142). See also, EU Qualification Directive, art. 15(a).

³¹⁴ ECRE, ‘Comments on the Commission Working Document on the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments’ (London, May 2002) para. 2.3.2; see also *Kindler v Canada*, UN doc. CCPR/C/48/D/470/1991 (30 Jul. 1993) para. 6.7; *Wong Ho Wing* (n 283) paras. 182, 184. Of course, there will be an underlying factual question as to whether, if the individual is removed, he or she faces a serious risk that the death penalty will actually be carried out.

³¹⁵ Kapferer (n 283) para. 241; see also paras. 134–7. For political vis-à-vis legal considerations, see *Youssef v Home Office* [2004] EWHC 1884 (QB); Goodwin-Gill, G. S. & Husain, R., ‘Diplomatic Assurances and Deportation’ Paper given at the JUSTICE/Sweet & Maxwell Conference on Counter-Terrorism and Human Rights (28 Jun. 2005).

³¹⁶ UN News Service, ‘Bilateral Deportation Agreements Undermine International Human Rights Law—UN Expert’ (26 Oct. 2005).

³¹⁷ Committee against Torture (n 118) para. 20 (citations omitted).

³¹⁸ Generally on States’ power of expulsion, see Goodwin-Gill (n 2) 201–310, and on expulsion to a particular State, 218–8. See also Hathaway (n 36) 519–20, 811–7; Grahl-Madsen (n 197) art. 32 (for drafting history); Davy, U., ‘Article 32 (Expulsion)’, in Zimmermann (n 3) (for detailed analysis of terms); Stenberg, G., *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* (1989). On collective expulsion, see Ch. 11.

³¹⁹ Article 32 maintains the limitations on expulsion first adopted in art. 3 of the, 1933 Convention relating to the International Status of Refugees (n 8), which in turn were based on the general recommendation in, among others, para. 7 of the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees (n 7) (that expulsion of Russian and Armenian refugees be ‘avoided or suspended’). This was intended to reduce the repeated imprisonment of refugees, ordered to leave, often for minor infractions, who were simply unable to enter another country in a regular manner. Apart from the obvious humanitarian considerations, States recognized the insurmountable difficulties that could arise (‘le conflit de droits souverains’), while nevertheless reserving the right to apply any ‘necessary’ internal measures in such cases. See Office International Nansen pour les Réfugiés, Procès verbaux

de la Conférence Intergouvernementale pour les réfugiés, Genève (26–28 octobre 1944); LoN doc. C.113.M.41.1934 (1 Mar. 1934) 23–4, 47–8, 73–4. For detailed analysis of the procedural aspects of art. 32 of the 1951 Convention, see Davy ([n 318](#)) 1314 ff.

³²⁰ See also ICCPR 66, art. 13; Clark, T., ‘Human Rights and Expulsion: Giving Content to the Concept of Asylum’ (1992) 4 *IJRL* 189; Tiberghien, F., ‘L’expulsion des réfugiés: Problèmes législatifs et jurisprudentiels’, *Doc. réf.*, no. 73 (5/14 mars 1989) Supp., CJ, 1–8. The importance of procedural safeguards is perhaps best illustrated by cases in which they have been denied. Analogously, in *Agiza v Sweden*, UN doc. CAT/C/34/D/233/2003 (20 May 2005), the Committee against Torture found that Sweden had violated art. 3 CAT 84 by expelling a suspected terrorist to Egypt, where he was tortured. The Committee explained that normally, individuals could appeal to the Swedish Migration Board and the Aliens Appeals Board for review of a decision to expel, and that these procedures satisfied art. 3 CAT requirements of an effective, independent, and impartial review. ‘In the present case, however, due to the presence of national security concerns, these tribunals relinquished the complainant’s case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention’s protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3’s requirements of effective, independent and impartial review’ (para. 4.27).

³²¹ Davy ([n 318](#)) 1295–98 notes that similar elements condition the expulsion of aliens in other areas of international law, such as labour law.

³²² See, for example, Asylum Law 1998 (*loi sur l’asile*) of Switzerland, arts. 63–5; Immigration Act 2009 (New Zealand), s. 164(3).

³²³ See, for example, *Yugoslav Refugee (Germany) Case* (1958) 26 ILR 496; *Homeless Alien (Germany) Case* (1958) 26 ILR 503; *Refugee (Germany) Case* (1959) 28 ILR 297; *Expulsion of an Alien (Austria) Case* (1958) 28 ILR 310; *R v Immigration Appeal Tribunal, ex parte Musisi* [1984] Imm AR 175; *Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514 (HL); *Barrera v Canada* (1992) 99 DLR (4th) 264; *Szoma (FC) v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64; *R (on the Application of ST (Eritrea)) (FC) v Secretary of State for the Home Department* [2012] UKSC 12; see generally *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, 213 ALR 668; *Al-Dahas v Attorney-General and Others*, Kenya High Court (1 Mar. 2007) 143 ILR 331; *Secretary for Security v Sakthevel Prabakar* [2004] HKCFA 43, paras. 12, 17, 59. See also Henckaerts, J.-M., *Mass Expulsion in Modern International Law and Practice* (1995) 99–107.

³²⁴ Robinson ([n 33](#)) 157.

³²⁵ Davy ([n 318](#)) 1302; Hathaway ([n 36](#)) 830 ff., who notes that this includes ‘those

undergoing status verification, admitted for a set period of time, or whose claim to refugee status the asylum state has opted not to assess': 830 (fn omitted). However, in our view, there is no textual basis for the argument that art. 32 applies to asylum seekers, nor support for that position in State practice. Art. 3 of the 1933 Convention applied to 'les réfugiés ayant été autorisés à ... séjourner régulièrement', while the recommendation in para. 7 of the 1928 Arrangement did not extend to those who had entered in intentional violation of national law. However, the practical difficulties remain (permission to enter another State), as do the legal limitations flowing from the principle of *non-refoulement*.

³²⁶ See further Ch. 7. In the *Refugee (Germany) Case* (n 323), the Federal Administrative Court held that a refugee unlawfully in the country could be expelled, provided he or she was not returned to the country in which life or freedom would be threatened. An almost identical conclusion was reached in a 1974 US decision, *Chim Ming v Marks*, 505 F.2d 1170 (2nd Cir.). In the *Expulsion of an Alien (Austria) Case* (n 323), the Austrian Supreme Court observed, when upholding an expulsion order, that it merely required a person to leave the State, but did not render him or her liable to be returned to a specific foreign country.

³²⁷ Executive Committee General Conclusion on International Protection No. 102 (2005) para. (j), recalling its earlier Conclusion Nos. 6 (1977) and 7 (1977).

³²⁸ See *Ad hoc Committee on Statelessness and Related Problems*, 'Memorandum by the Secretary-General': UN doc. E/AC.32/2 (3 Jan. 1950) 46.

³²⁹ See Goodwin-Gill (n 2) 20–1, 44–6, 136–7.

³³⁰ Executive Committee Conclusion No. 7 (1977).

³³¹ EU Temporary Protection Directive, art. 2(d). Albert notes that very few domestic laws define the term either: Albert, M., 'Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx' (2010) 29(1) *RSQ* 61, 84–5.

³³² UNHCR, 'UNHCR Commentary on the Draft European Union Directive on Temporary Protection in the Event of a Mass Influx' (2000) 3.

³³³ Executive Committee Conclusion No. 100 (LV) (2004) para. (a).

³³⁴ See, for example, Report of the Human Rights Committee, vol. 1 (1997–98) GAOR, 53rd Session, Supp. No. 40: UN doc. A/53/40, 'United Republic of Tanzania', para. 401. See also UNHCR Global Consultations on International Protection, 'Report of the First Meeting in the Third Track': EC/GC/01/8/Rev.1 (28 Jun. 2001) para. 5; Lauterpacht & Bethlehem (n 33) para. 104; Durieux, J.-F. & McAdam, J., 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 *IJRL* 4, 9, 13; Eggli, A. V., *Mass Refugee Influx and the Limits of Public International Law* (2002) Ch. 5; Durieux, J.-F. & Hurwitz, A., 'How Many Is Too Many? African and European Legal Responses to Mass Influxes and Refugees' (2004) 47 *German Yearbook of International Law* 105; but note UN Declaration on Territorial Asylum, UNGA res. 2312 (XXII) (14 Dec. 1967) para. 3(2).

³³⁵ Lauterpacht & Bethlehem (n 33) para. 104 argue that, given the Refugee Convention's

humanitarian object and purpose, ‘the principle must apply unless its application is clearly excluded’. During the drafting of the Convention, some States favoured a general exemption from art. 33(1) in mass influx situations if this endangered a State’s national security or public order: see discussion in Kälin, Caroni, & Heim ([n 3](#)) 1377.

[336](#) Executive Committee Conclusion No. 22 (1981); Executive Committee Conclusion No. 74 (1994) para. (r); Executive Committee Conclusion No. 100 (LV) (2004) para. (i); Executive Committee Conclusion No. 103 (2005) para. (l).

[337](#) The Compact is ‘grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement’: Global Compact on Refugees ([n 47](#)) para. 5.

[338](#) UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’: EC/GC/01/4 (19 Feb. 2001) paras. 6, 13; Executive Committee Conclusion No. 19 (XXXI) (1980) on Temporary Refuge, para. (a); Executive Committee Conclusion No. 74 (1994) para. (r).

[339](#) Durieux & McAdam ([n 334](#)) 13; see discussion of *non-refoulement* through time in s. 8 below. In 2012, the Turkish representative explained to UNHCR’s Executive Committee that since October 2011, Turkey had applied a temporary protection regime for Syrian refugees, at that time numbering 90,000, while still observing the principles of *non-refoulement* and non-rejection at the frontier: UN doc. A/AC.96/SR.662 (3 Oct. 2012) 4 (Turkey).

[340](#) See, for example, art. 3 of the Declaration on Territorial Asylum, adopted by the General Assembly only two years before the OAU Convention, which not only acknowledges the national security exception, but also appears to authorize further exceptions ‘in order to safeguard the population, as in the case of a mass influx of persons’. For criticism of the terms, see Weis, P., ‘The United Nations Declaration on Territorial Asylum’ (1969) 7 *CanYBIL* 92, 113, 142–3. Weis regards the ‘public order’ exception as too wide and susceptible to different connotations in civil and common law countries. For an examination of the *ordre public* concept in the context of entry and expulsion generally, see Goodwin-Gill ([n 2](#)) 168–9, 229–37, 298–9.

[341](#) On this point, see UNHCR, ‘The Principle of *Non-Refoulement* as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’ (31 Jan. 1994) para. 37. See s. 7 below on temporary protection. For comment on the efficacy of international protection measures, see Mooney, E. D., ‘Presence, *ergo*, Protection? UNPROFOR, UNHCR and the ICRC in Croatia and Bosnia and Herzegovina’ (1995) 7 *IJRL* 407; Thorburn, J., ‘Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe’ (1995) 7 *IJRL* 459; Landgren, K., ‘Safety Zones and International Protection: A Dark Grey Area’ (1995) 7 *IJRL* 436; Higgins, R., ‘The United Nations and Former Yugoslavia’ (1993) 69 *International Affairs* 3. On examples, and so-called ‘preventive protection’, see the second edition of this work, 282–91. On EU external processing proposals, see [Ch. 8](#), s. 6.7.

[342](#) Coleman ([n 102](#)); cf. Lauterpacht & Bethlehem ([n 33](#)) para. 103. Hathaway’s approach

has become more equivocal over the past 15 years, adding a question mark to the section entitled ‘Qualified duty in the case of mass influx’ (see originally Hathaway, J. C., *The Rights of Refugees* (2005) 355–63). He now draws on the doctrine of necessity to argue that it may justify ‘a genuinely exceptional resort to *refoulement* in the case of mass influx’, noting that ‘once a solid and reliable burden and responsibility sharing mechanism is in place, there will be no need for even this exceedingly narrow implied exception to the duty of *non-refoulement*’: Hathaway (n 36) 435.

³⁴³ New York Declaration (n 48) para. 68.

³⁴⁴ Ibid., para. 11.

³⁴⁵ Global Compact on Refugees (n 47) para. 9.

³⁴⁶ Ibid., para. 5.

³⁴⁷ Ibid., para. 11.

³⁴⁸ The practical necessity for UNHCR to involve other States in the provision of material and political support for countries of first asylum has clear implications for the manner in which UNHCR can seek to uphold the basic principle. See Coleman (n 102). However, there is insufficient State practice to conclude, as Coleman does, that a new customary international norm of *non-refoulement* has emerged excepting States from this obligation in situations of mass influx. Instruments such as the EU Temporary Protection Directive seem to negate this proposition. Eggli queries whether a mass influx emergency could ever constitute a ‘public emergency which threatens the life of the nation’, such that it would permit the declaration of a state of emergency and the suspension of fundamental human rights. She notes that for such a condition to be met, the emergency would have to threaten the nation as a whole; measures taken would have to be strictly required by the exigencies of the situation and proportionate to the dangers posed by the emergency, both as a matter of degree and duration: Eggli (n 334) Ch. 5. Durieux & McAdam (n 334) 20 support this view.

³⁴⁹ For a survey of State practice, see the third edition of this work, Ch. 6, s. 6.1.1.

³⁵⁰ See Report of the Secretary-General: UN doc. A/34/627 (1949) para. 48; Annex 1, para. 8.

³⁵¹ Both art. II(4), 1969 OAU Convention and paras. 3 and 4 of Council of Europe Resolution 67(14) acknowledge that States may have difficulty in fulfilling their obligations without international co-operation. Cf. Fonteyne, J.-P. L., ‘Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees’ (1983) 8 *AustYBIL* 162.

³⁵² UN doc. A/AC.96/SR.540 (1999) (IOM).

³⁵³ UNHCR, ‘Annual Theme: Strengthening Partnership to Ensure Protection, Also in relation to Security’: UN doc. A/AC.96/923 (14 Sep. 1999) para. 18.

³⁵⁴ Coleman (n 102) 39, referring also to Amnesty International’s 1999 report on the protection of Kosovo refugees in Macedonia (AI Index EUR 65/03/99) 11; Sahrke and others (n 145) Part 6 (note that the page numbers cited in Coleman do not match those in UNHCR’s report). Coleman argues that European States’ imposition of visa requirements on persons

seeking to flee formed ‘at least a major barrier to entry of this mass influx’, and that the airlift operation for Kosovar refugees ‘condoned mass rejection at the frontier, and formed a participation in a practice contrary to the previous protection-before-burden-sharing tradition’.

³⁵⁵ A US diplomat who led negotiations about refugee admissions during the Kosovo crisis stated: ‘UNHCR was impossibly dogmatic on the Blace question. I told them, you can’t solve that problem by citing chapter and verse from the Convention’: Suhrke and others ([n 145](#)) Part 6 cited in Coleman ([n 102](#)) 39. Suhrke and others also report that some UNHCR staff recognized that its agreement to evacuation programmes could be characterized as submission to host government demands, although the official line was that evacuation was an appropriate burden sharing mechanism: see Briefing to the Security Council, by Mrs Sadako Ogata, United Nations High Commissioner for Refugees (5 May 1999) 2.

³⁵⁶ In 1987, Turkey had argued that international protection could not be disassociated from international cooperation and assistance: see UN doc. A/AC.96/SR.418 (1987) para. 74 (Turkey); UN doc. A/AC.96/SR.442 (1989) para. 92 (Turkey); UN doc. A/AC.96/SR.456 (1991) para. 7 (Turkey).

³⁵⁷ See further Goodwin-Gill, G. S., ‘Editorial. Asylum: The Law and Politics of Change’ ([1995](#)) 7 *IJRL* 1, 7.

³⁵⁸ UNHCR, ‘High-Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees’ (30 Mar. 2016). See also Ferris, E., *In Search of Commitments: The 2016 Refugee Summits* (Kaldor Centre for International Refugee Law, Policy Brief 3, Nov. 2016).

³⁵⁹ European Commission, Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197 final (6 Apr. 2016) 3, 4, respectively.

³⁶⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609 final (23 Sep. 2020) 1. A new regulation on crisis and *force majeure*, which would replace the Temporary Protection Directive, flips the notions of ‘crisis’ and ‘*force majeure*’ on their heads. The terms relate not to the circumstances from which people are fleeing, but rather to the implications for EU Member States’ processing and protection capacity: European Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final 2020/0277 (COD), art. 1(2)(b) (‘crisis’); recital 7 (‘*force majeure*’). Art 1(1) permits Member States to derogate from the proposed Regulations on Asylum and Migration Management and on Asylum Procedures Regulation and the recast Return Directive in such situations. If asylum procedures are suspended in a ‘crisis’ situation, Member States must grant ‘immediate protection status’ – namely, the rights set out in the Qualification Regulation applicable to

beneficiaries of subsidiary protection – to ‘displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin ... unless they represent a danger to the national security or public order of the Member State.’ This is a narrower scope of beneficiaries than under the Temporary Protection Directive, art. 2(c).

³⁶¹ UN doc. A/AC.96/SR.668 (2013) para. 19 (Observer for Libya).

³⁶² UN doc. A/AC.96/SR.667 (2013) para. 39 (Brazil).

³⁶³ Ibid.; see also Calegari, M. & Baeninger, R., ‘From Syria to Brazil’ (2016) 51 *FMR* 96.

³⁶⁴ UN doc. S/PV.7588 (2015) 7 (Jordan).

³⁶⁵ UN doc. A/AC.96/SR.689 (2015) para. 22 (Luxembourg).

³⁶⁶ UN doc. A/AC.96/SR.685 (2015) para. 59 (Germany).

³⁶⁷ UN doc. A/AC.96/SR.689 (2015) para. 37 (Netherlands).

³⁶⁸ UN doc. A/AC.96/SR.682 (2014) para. 7 (Greece).

³⁶⁹ New Pact ([n 360](#)) 2; see European Commission Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final (23 Sep. 2020).

³⁷⁰ See Explanatory Memorandum to the proposed Regulation on Asylum and Migration Management ([n 369](#)) 18. The distribution key will be based half on GDP and half on population.

³⁷¹ UN doc. A/AC.96/SR.518 (1997) para. 5 (Ireland).

³⁷² UN doc. A/AC.96/SR.525 (1998) para. 45 (Austria, on behalf of the EU); see also UN doc. A/AC.96/SR.526 (1998) para. 34 (Norway); UN doc. A/AC.96/SR.528 (1998) para. 1 (Ireland); UN doc. A/AC.96/SR.528 (1998) para. 54 (Denmark).

³⁷³ Council of Europe Committee of Ministers, ‘Recommendation No. R (2000) 9 on Temporary Protection’ (3 May 2000) preambular para. 8.

³⁷⁴ See, for example, Barutciski, M. & Suhrke, A., ‘Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing’ (2001) 14 *JRS* 95, 101–5.

³⁷⁵ For a recent overview, see Ineli-Ciger, M., *Temporary Protection in Law and Practice* (2017); Durieux, J-F., ‘Temporary Protection and Temporary Refuge’, in Costello, Foster, & McAdam ([n 1](#)); Edwards, A., ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13 *Melbourne Journal of International Law* 595, 599–603 (although we do not agree with her characterization of derogation). Some States have created temporary visa regimes, which differ markedly in terms of their purpose, beneficiaries, and entitlement (for example, Australia’s Temporary Protection Visa (TPV) and the United States’ Temporary Protected Status (TPS)). These do not fall within the international law concept of temporary protection. TPS, for example, may be granted to eligible nationals of *designated* countries. It has never been used as an admissions programme: Fitzpatrick, J., ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ (2000) 94 *AJIL* 270, 280 referring to 8 USC §

1254a(c)(5); see also at 285. TPS is only available to persons already in the United States on the date of designation, and is not used to facilitate the admission of persons outside the United States. See further Frelick, B., ‘What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime’ (2020) 8 *Journal on Migration and Human Security* 42. For the South East Asian practice of temporary refuge, see the second edition of this work, Ch. 5.

³⁷⁶ Kälin, W., ‘Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism’ (2001) 44 *German Yearbook of International Law* 202, 202.

³⁷⁷ Temporary Protection Directive, art. 2(a), (c), (d). Curiously, even though the inherent nature of temporary protection is that it is granted in the absence of individual status determination, the Directive provides that certain people may be excluded: art. 28.

³⁷⁸ See, for example, UNHCR ([n 338](#)) para. 13.

³⁷⁹ See also Rutinwa, B., ‘Prima Facie Status and Refugee Protection’ UNHCR New Issues in Refugee Research, Working Paper No. 69 (2002); Durieux, J.-F., ‘The Many Faces of “Prima Facie”: Group-Based Evidence in Refugee Status Determination’ (2008) 25(2) *Refugee* 151; Jackson, I. C., *The Refugee Concept in Group Situations* (1999); Albert ([n 331](#)); Sharpe, M., ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2012) 58 *McGill Law Journal* 95, 120–4. Sharpe notes that prima facie determination ‘is not a product of the 1969 Convention, nor is it inherently or exclusively linked to that instrument. Rather, it arose as a matter of practical necessity in situations of mass influx’, given the urgency to provide assistance to large numbers of people: 122 (fn omitted).

³⁸⁰ UNHCR, ‘Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status’: HCR doc. HCR/GIP/15/11 (24 Jun. 2015) para. 1; see also paras. 13–17.

³⁸¹ See, for example, *ibid.*, para. 18. ‘A prima facie approach operates only to recognize refugee status. Decisions to reject require an individual assessment’: para. 6.

³⁸² UNHCR Global Consultations on International Protection, Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, ‘Chairperson’s Report on Roundtable 2: “International Cooperation to Protect Masses in Flight” (*inter alia* Mass Influx, Burden and Responsibility Sharing, Security and Additional Instruments)’ (13 Dec. 2001) 2. ‘Each refugee recognized on a prima facie basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/instrument. Prima facie recognition of refugee status is not to be confused with an interim or provisional status, pending subsequent confirmation. Rather, once refugee status has been determined on a prima facie basis, it remains valid in that country unless the conditions for cessation are met, or their status is otherwise cancelled or revoked’: UNHCR Guidelines ([n 380](#)) para. 7 (fns omitted); cf. Albert ([n 331](#)), who argues that prima facie refugee status is qualitatively different from Convention refugee status.

³⁸³ Executive Committee Conclusion No. 103 (2005) para. (l) states that: ‘temporary protection, without formally accordin refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency protection from

refoulement, should be clearly distinguished from other forms of international protection'. See also UNHCR Guidelines ([n 380](#)) paras. 26–7.

[384](#) UNHCR ([n 338](#)) para. 14.

[385](#) Art. 2(a) of the Temporary Protection Directive states that temporary protection may apply '*in particular* if there is ... a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation' (emphasis added). This reflects a compromise position, based on the reluctance of Germany, France, Italy, Austria, and the United Kingdom to accept overwhelmed procedures as a prerequisite for temporary protection: Council Docs. 6128/01 ASILE 15 (16 Feb. 2001) 3; 6709/01 ASILE 22 (5 Mar. 2001) 3, as cited in Durieux & Hurwitz ([n 334](#)) 145.

[386](#) Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* ([n 360](#)) art. 1(2)(b).

[387](#) *Ibid.*, art. 1(2)(a).

[388](#) On the principle of temporary refuge, see s. 7.1. Fitzpatrick observed that, in the absence of a harmonized temporary protection regime, States reinvented the system of protection each time a mass influx occurred, tailoring its application and scope to domestic and international pressures, rather than according to a formal and predictable legal regime: Fitzpatrick ([n 375](#)) 281.

[389](#) UNHCR described it as a 'variation' on the practice of temporary refuge: UNHCR, 'Note on International Protection: UN doc. A/AC.96/830 (7 Sep. 1994) para. 46. See further Taylor, S. & Boyd, J., 'The Temporary Refuge Initiative: A Close Look at Australia's Attempt to Reshape International Refugee Law' (2020) 42 *SydLR* 251, on Australia's attempts to institutionalize the practice of temporary refuge within the international protection regime.

[390](#) Durieux, J.-F., 'Temporary Protection: Hovering at the Edges of Refugee Law' (2014) *Netherlands Yearbook of International Law* 221, 232. As such, Durieux describes it as a direct challenge to the time dimensions of that instrument, and a return-oriented mechanism.

[391](#) The standards reflected in Executive Committee Conclusion No. 22 were intended 'to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers' (para. I(3)).

[392](#) Temporary Protection Directive, art. 4(1).

[393](#) UNHCR, 'Note on International Protection' ([n 389](#)) para. 50.

[394](#) Fitzpatrick, J., 'Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations' (2004) 35 *VirgJIL* 13, 68 (fn omitted).

[395](#) See further the second edition of this work, [Ch. 5](#).

[396](#) In effect, temporary refuge for Indo-Chinese refugees was bought and paid for by (mostly) western countries, on terms that kept the majority of asylum seekers away from their frontiers while leaving them able also to choose among candidates for permanent

settlement. Taylor and Boyd argue while Australia was promoting the concept of temporary refuge during the Indo-Chinese crisis, ‘European countries were confident that they would never be at the receiving end of a mass influx situation [and thus] resisted the institutionalisation of a concept that they perceived as having the potential to undermine the principle of non-refoulement and/or to place pressure on them to share the burden of mass influx faced by countries in other regions. However, in the 1990s, when the same European countries were faced with a mass influx of their own, they embraced the concept of temporary refuge, albeit under another name’: Taylor & Boyd ([n 389](#)) 280.

[397](#) For an overview, see Fitzpatrick ([n 375](#)); Eggli ([n 334](#)) 139–43; Kerber, K., ‘Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States’ (1997) 9 *IJRL* 453; Marx, R., ‘Temporary Protection—Refugees from Former Yugoslavia: International Protection or Solution Orientated Approach?’ (ECRE, Jun. 1994); Kjaerum, M., ‘Temporary Protection in Europe in the 1990s’ (1994) 6 *IJRL* 444; Luca, D., ‘Questioning Temporary Protection, together with a Selected Bibliography on Temporary Refuge/Temporary Protection’ (1994) 6 *IJRL* 535; Thorburn ([n 341](#)).

[398](#) Durieux & Hurwitz ([n 334](#)) 138; see also Kälin ([n 376](#)). For a detailed analysis, see the third edition of this work, [Ch. 6](#), s. 6.2.

[399](#) See the Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof’, COM(2000) 303 final (24 May 2000) OJ 2000 C311, para. 1.4, which clarifies that temporary protection is not a third form of protection (in addition to subsidiary protection and Convention-based protection), but ‘[a] component of the system, and more specifically a tool enabling the system to operate smoothly and not collapse under a mass influx. It is accordingly a tool in the service of a common European asylum system and of the full operation of the Geneva Convention.’

[400](#) Temporary Protection Directive, art. 17(1).

[401](#) Ibid., art. 17(2).

[402](#) It was considered briefly in response to large numbers of asylum seekers arriving from Iraq and Afghanistan in the early 2000s, but was rejected as potentially creating a ‘pull factor’: Klug, A., ‘Regional Developments: Europe’, in Zimmermann ([n 3](#)) 133. See also Gluns, D. & Wessels, J., ‘Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis”’ (2017) 36(2) *RSQ* 57; Genç, H. Deniz, & Şirin Öner, N. Aslı, ‘[Why Not Activated? The Temporary Protection Directive and the Mystery of Temporary Protection in the European Union](#)’ (2019) 7 *International Journal of Political Science & Urban Studies* 1.

[403](#) See Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* ([n 360](#)). For an analysis of the non-implementation of the Directive between 2001 and 2014, as well as an overview of its history, see Beirens, H. and others, *Study on the Temporary Protection Directive: Final Report* (European

Commission, Brussels, 2016).

⁴⁰⁴ UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’ (Feb. 2014) para. 1.

⁴⁰⁵ Durieux ([n 389](#)) 249–50; Kagan, M., ‘UNHCR Issues New Guidelines on Temporary Protection. They Need a Rewrite’ (*RSDWatch* 20 Mar. 2014).

⁴⁰⁶ See also Fitzpatrick ([n 375](#)) 287.

⁴⁰⁷ For instance, Kagan ([n 405](#)) queries why asylum seekers who arrive by boat are singled out, since these may not form part of a mass influx that overwhelms individual RSD procedures, and there is nothing in international law that conditions reception and standards of treatment on mode of arrival. Durieux ([n 389](#)) 249–50 additionally queries the introduction of ‘temporary stay arrangements’. This latter point may be responding to developments in the context of protection from disasters (on which, see [Ch. 12](#)), but as Durieux and Kagan’s critiques make clear, this conceptual blurriness can create problems.

⁴⁰⁸ Although there are four criteria concerning when temporary protection ends, none provides an indication of how long or short ‘temporary’ protection is. See also [Ch. 12](#).

⁴⁰⁹ Durieux ([n 389](#)) 250. See also [Ch. 12](#): in the context of disasters, temporary protection may serve a purpose if return is possible after a period. That is, perhaps, implicit in Durieux’s critique: different concepts are being collapsed into each other, creating conceptual confusion and potentially undermining the application of the Convention regime in circumstances where it could (and thus should) apply.

⁴¹⁰ Durieux & McAdam ([n 334](#)); Durieux ([n 389](#)) 251; cf. Edwards ([n 375](#)).

⁴¹¹ Art. 31(3), 1969 Vienna Convention on the Law of Treaties. UNGA res. 73/202, ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’ (20 Dec. 2018) Annex, Conclusion 3 characterizes subsequent agreements and subsequent practice as ‘being objective evidence of the understanding of the parties’ and as ‘authentic means of interpretation’. See also the ILC’s Commentary on Conclusion 10, ‘Agreement of the parties regarding the interpretation of a treaty’: *ILC Report* 2018, Ch. IV, ‘Subsequent agreements and subsequent practice’, 75.

⁴¹² Perluss, D. & Hartman, J. F., ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 *VirgJIL* 551, 554, examples at 571 ff. See also Goodwin-Gill, G. S., ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26 *VirgJIL* 897, 902, noting that while customary international law had incorporated the core meaning of art. 33, it had also ‘extend[ed] the principle of *non-refoulement* to include displaced persons who do not enjoy the protection of the government of their country of origin’; Fitzpatrick ([n 375](#)) 282–7. For a different view, but on somewhat different issues, see: Hailbronner, K., ‘*Non-Refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 *VirgJIL* 857.

⁴¹³ This is how Durieux ([n 389](#)) 225 characterizes their approach.

⁴¹⁴ Report of UNHCR to ECOSOC: UN doc. E/1985/62 (1985) para. 22 (emphasis added).

⁴¹⁵ See the second edition of this work, 136.

⁴¹⁶ Fitzpatrick, J., ‘Human Rights and Forced Displacement: Converging Standards’, in Bayefsky, A. F. & Fitzpatrick, J., eds., *Human Rights and Forced Displacement* (2000) 8. ‘Temporary protection’ in this context should be distinguished from specific temporary protection regimes in domestic contexts: see n 375.

⁴¹⁷ He defined this as ‘refuge which lasts for a limited time, or which is provided to supply a passing need’, which ‘either comes to an end, when the need has passed, or it transitions to something more lasting, if not quite yet to a durable solution’: Goodwin-Gill, G. S., ‘Non-Refoulement, Temporary Refuge, and the “New” Asylum Seekers’, in Cantor & Durieux (n 56) 441, referring also to Durieux & McAdam (n 330).

⁴¹⁸ For further analysis, see Goodwin-Gill (n 417), especially on the customary international law aspect; Lambert, H., ‘Customary Refugee Law’, in Costello, Foster, & McAdam (n 1) 249–52; Mendelson, M., ‘The Formation of Customary International Law’ (1998) 273 *Hague Recueil* 155; Simma, B. & Alston, P., ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’ (1988–89) 12 *AustYBIL* 82; Roberts, A., ‘Traditional and Modern Approaches to Customary International Law’ (2001) 95 *AJIL* 757.

⁴¹⁹ See also discussion in Ch. 12 of temporary protection from disasters.

⁴²⁰ These principles may find expression not just in offers of resettlement, but also in financial and material assistance, and moral and political support.

⁴²¹ Note, however, that in the debate on international solidarity in 1988, the Sub-Committee left for further discussion in plenary the following proposed operative paragraph, in which the Executive Committee would have underlined, ‘that, while international solidarity is important for the satisfactory resolution of refugee problems, *the absence of solidarity cannot serve as the pretext for failing to respect basic humanitarian principles*’: Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/717 (3 Oct. 1988) para. 35 (emphasis added). As finally adopted, para. 4 of Executive Committee Conclusion No. 52 (1988) merely recalled that, ‘the respect for fundamental humanitarian principles is an obligation for all members of the international community, it being understood that the principle of international solidarity is of utmost importance to the satisfactory implementation of these principles’.

⁴²² Hailbronner attributes refusal to accept a treaty-based asylum obligation to fear of ‘restriction of political decision-making through the concept of an individual right’: Hailbronner (n 412) 347.

⁴²³ Fitzpatrick (n 375) 280.

⁴²⁴ See, for example, ‘Protracted Refugee Situations: Impact and Challenges’, speech by the Assistant High Commissioner for Refugees, Mr Kemal Morjane, Copenhagen (23 Oct. 2002) 1: ‘Camps and idle populations do not simply appear as a natural consequence of forced displacement—they are established in response to political realities and constraints which stem from a lack of political will to resolve conflicts and to find durable solutions for refugees.’

⁴²⁵ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol (n 49)

Preamble, para. 4; UNHCR Advisory Opinion ([n 46](#)) para. 15; UNHCR's *amicus* brief, *CPCF v Minister for Immigration and Border Protection* (15 Sep. 2014) paras. 34–9 http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf; UNHCR, 'Note on International Protection': UN doc. A/AC.96/1110 (4 Jul. 2012) para. 12; UNHCR, 'Note on International Protection': UN doc. A/AC.96/1134 (9 Jul. 2014) para. 18; UNHCR, 'Note on International Protection': UN doc. A/AC.96/1145 (2 Jul. 2015) para. 24; UNHCR, 'The Principle of *Non-Refoulement* as a Norm of Customary International Law' ([n 341](#)) para. 5; Lauterpacht & Bethlehem ([n 33](#)); Kälin, Caroni, & Heim ([n 3](#)) 1345; Kälin, W. & Künzli, J., *The Law of International Human Rights Protection* (2nd edn., 2019) 548; Zimmermann & Wennholz ([n 196](#)) 1411; Costello, C. & Foster, M., 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test', in den Heijer, M. & van der Wilt, H., eds., *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (2016); Lambert ([n 418](#)) 243–9; Mathew, P., 'Non-refoulement', in Costello, Foster, & McAdam ([n 1](#)) 904–05, 915; Messineo, F., 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?', in Juss, S. S., ed., *The Ashgate Research Companion to Migration Law, Theory and Policy* (2013); Wouters, K., *International Legal Standards for the Protection from Refoulement* (2009); Gilbert, G., 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 *EJIL* 963, 966. Hathaway ([n 36](#)) 438–59 is the lone dissenter; his 'analysis' of customary international law has been sufficiently dealt with in 2014 by Goodwin-Gill, G. S., 'Non-Refoulement, Temporary Refuge, and the "New" Asylum Seekers', in Cantor & Durieux ([n 56](#)) 44; see also Hathaway, J. C., 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503; [n 452](#) below.

[426](#) In theory, a State could be exempted from the obligation had it been a persistent objector to the formation of the customary rule, but no State has done so. See, for example, UNGA res. 73/203, 'Identification of customary law' (20 Dec. 2018) Annex, Conclusion 15 (persistent objector); ILA [Statement of Principles applicable to the Formation of General Customary International Law \(2000\)](#). Note that the US objection to its extraterritorial application, upheld domestically in *Sale, Acting Commissioner, INS v Haitian Centers Council*, 509 US 155 (1993), does not, in our view, amount to a persistent objection sufficient to displace the customary rule with respect to the US. During the first 10 years of the Haitian interdiction programme, senior US officials publicly and repeatedly affirmed the principle of *non-refoulement*, not only in the broad general sense, but also in the specific context of Haitian operations. Moreover, the relevant Executive Order (Executive Order 12324, 29 Sep. 1981, s. 3) stated clearly that '[t]he Attorney General shall ... take whatever steps are necessary to ensure ... the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland'. The combination of declarations in the sense of an international obligation with practice confirming that obligation is conclusive evidence of the applicability of the principle of *non-refoulement* to the extraterritorial activities of US agents. From time to time, the US nevertheless continues to pretend otherwise: 'US Observations on UNCHR [sic] Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007)' <https://2001-2009.state.gov/documents/obligations/130377.htm>.

2009.state.gov/s/l/2007/112631.htm.

⁴²⁷ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 Jun. 2008) para. 12 (citing Jordan, Pakistan, and the Syrian Arab Republic). See also the decision by the Court of Final Appeal in Hong Kong SAR, China, which held that even though Hong Kong is not a party to the 1951 Convention or its 1967 Protocol, there is nonetheless a duty of independent inquiry to ensure respect for the principle of *non-refoulement*: *C v Director of Immigration* [2008] HKCU 256; *Prabakar* ([n 323](#)); Loper, K., ‘Human Rights, Non-refoulement and the Protection of Refugees in Hong Kong’ (2010) 22 *IJRL* 404; Kochhar-George, C. S., ‘Recent Developments in Hong Kong’s Torture Screening Process’ (2012) 42 *Hong Kong Law Journal* 385; Jones, O., ‘Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective’ (2009) 58 *ICLQ* 443. The Supreme Court of Bangladesh (a State which is not a party to the Convention/Protocol) has also recognized the principle as part of customary international law: *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh* Judgment (31 May 2017). As at November 2019, only 10 of the 193 UN member States were not parties to a universal treaty containing the obligation (although some were signatories): Bhutan, Brunei Darussalam, Malaysia, Federated States of Micronesia, Myanmar, Oman, Palau, Saint Lucia, Singapore, and Tonga.

⁴²⁸ Preamble, para. 4. See also the High Court of Kenya in *Kenya National Commission on Human Rights* ([n 225](#)) 10.

⁴²⁹ UNGA res. 57/187, para. 4, cited in Kälin, Caroni, & Heim ([n 3](#)) 1344.

⁴³⁰ Kampala Declaration, art. 6.

⁴³¹ See the detailed analysis in Goodwin-Gill ([n 417](#)), drawing on the State practice and *opinio juris* described in Perluss & Hartmann ([n 412](#)), Lauterpacht & Bethlehem ([n 33](#)), as well as his analysis of the formation of customary international law more generally (see also literature in [n 418](#)). See also Costello & Foster ([n 424](#)) 286–91.

⁴³² See, for example, Lauterpacht & Bethlehem ([n 33](#)) para. 253; Kälin, Caroni, & Heim ([n 3](#)) 1346; Costello & Foster ([n 424](#)) 283–6.

⁴³³ Final Act, UN Conference on the Status of Stateless Persons, 360 UNTS 117 (1954).

⁴³⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep. 3, 42.

⁴³⁵ In *N v Secretary of State for the Home Department* [2005] UKHL 31, para. 48, Lord Hope described this as one of the basic principles of the European Court of Human Rights’ jurisprudence on art. 3.

⁴³⁶ See Crawford ([n 152](#)) 23–6.

⁴³⁷ Note also Costello & Foster ([n 424](#)) 286: ‘In our view, the evidence points overwhelmingly to the establishment of *non-refoulement* as a norm of customary international law.’

⁴³⁸ Kälin, Caroni, & Heim ([n 3](#)) 1343–4.

⁴³⁹ This conclusion represents a modification of views set out by Goodwin-Gill in 1978 ([n](#)

[2\) 141.](#) See also Lauterpacht & Bethlehem ([n 33](#)).

[440](#) See *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep. 3, 41 (para. 88), in which the court hinted at the ‘legal difficulties, in internal and international law’ which might have resulted from the United States acceding to Iran’s request for the extradition of the former Shah.

[441](#) The Special Committee on the Rationalization of the Procedures and Organization of the General Assembly concluded that ‘the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations’. The Committee emphasized, however, ‘that the right of every Member State to set forth its views in full must not be prejudiced by this procedure’: *Report of the Special Committee*, GAOR, 26th Sess., Supp. No. 26: UN doc. A/8426 (1971) paras. 28–9; Rules of Procedure of the General Assembly: UN doc. A/520/Rev.12 (1974) Annex V, para. 104. See D’Amato, A., ‘On Consensus’ (1970) 8 *CanYBIL* 104; Buzan, B., ‘Negotiating by Consensus: Developments in Techniques at the United Nations Conference on the Law of the Sea’ (1981) 75 *AJIL* 324.

[442](#) On 16 December 1981, the General Assembly adopted without a vote res. 36/148 on International Co-operation to Avert New Flows of Refugees, on the recommendations of the Special Political Committee: *Report*: UN doc. A/36/790 (1981). In the course of debate in the Committee, a number of delegates made statements in explanation which included substantial reservations regarding the draft resolution; other delegates expressly stated that they would have abstained, had the draft been put to the vote: UN doc. A/SPC/36/SR.45 (1981) paras. 49 ff.

[443](#) UNHCR, ‘The Principle of *Non-Refoulement* as a Norm of Customary International Law’ ([n 341](#)) para. 5. For examples, see s. 2.4.1.

[444](#) For a detailed and cogent account of State practice, see Perluss & Hartman ([n 412](#)). Contemporary criticism of the argument failed to address either the facts or the legal issues; for example, see Martin, D. A., ‘Effects of International Law on Migration Policy and Practice’ (1989) 23 *IMR* 547, who asserted (at 567) that Perluss & Hartmann (and Goodwin-Gill ([n 412](#))) ‘essentially’ propound the idea, ‘hardly credible to the average citizen or to politicians and government officials’, that international law forbids return if there is danger in the homeland. Both Perluss & Hartman, and Goodwin-Gill, in fact are somewhat more subtle. Martin further asserted that Hailbronner ([n 412](#)) ‘offered a detailed examination of the evidence used’, to conclude that practice does not support a norm of customary international law. In fact, Hailbronner scarcely commented at all on the extensive examples offered by Perluss & Hartman, concentrating mostly on *municipal* law, limiting himself to disagreeing with their conclusions while dealing principally with an interesting, but peripheral issue, namely, the extent to which art. 3 ECHR 50 had been (until then) of little use to refugees. See also Hathaway ([n 36](#)) 363 ff.

[445](#) *C v Director of Immigration* [2011] HKCA 159, paras. 66–7 (Yuen JA), para. 1 (Cheung CJHC), para. 103 (Lam J). It is a ‘telling point’ that no State has returned a refugee ‘using the

argument that refoulement is permissible under contemporary international law. Whenever *refoulement* occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied': San Remo Declaration on the Principle of Non-Refoulement (Sep. 2001), 'Explanatory Note on the Principle of Non-Refoulement of Refugees as Customary International Law' https://www.peacepalacelibrary.nl/ebooks/files/IIHL1_en.pdf. See also analysis in Costello & Foster (n 424) 291–302; *Situation en République Démocratique du Congo: Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, ICC-01/04-01/07 (International Criminal Court, 9 Jun. 2011) para. 68, acknowledging that the principle of *non-refoulement* is a norm of customary international law.

⁴⁴⁶ Their methodology and conclusions are supported by Kälin, Caroni, & Heim (n 3).

⁴⁴⁷ Lauterpacht & Bethlehem (n 33) para. 253.

⁴⁴⁸ In addition to being found in CAT 84, art. 3; ICCPR 66, art. 7, and ECHR 50, art. 3, it is also contained in UDHR 48, art. 5; ACHR 69, art. 5(2); EU Charter of Fundamental Rights, art. 4; 1948 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art. 2 (implicit in 'genocide'); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 244, art. 2; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA res. 3452 (XXX) (9 Dec. 1975) arts. 1, 2; African Charter on Human and Peoples' Rights, art. 5; 1985 Inter-American Convention to Prevent and Punish Torture (n 299); 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, as amended; CRC 89, art. 37; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, art. 10; 1992 Declaration on the Protection of All Persons from Enforced Disappearances, UNGA res. 47/133 (18 Dec. 1992) art. 1. See also the 1949 Geneva Conventions and 1977 Additional Protocols: GCI, arts. 3, 50; GCII, art. 51; GCIII, art. 130; GCIV, art. 147; API, art. 75; APII, art. 4; and see further Rome Statute of the International Criminal Court, arts. 8(2)(a)(ii), 55(1)(b); Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), art. 2; Statute of the International Criminal Tribunal for Rwanda, art. 2. The ICTY's pronouncements on the customary international law prohibition on torture are instructive; see, for example, *Furundzija*, ICTY Case No. IT-95-17/1-T, Trial Chamber (10 Dec. 1998). See also Lauterpacht & Bethlehem (n 33) paras. 222–9; sources in n 432 above.

⁴⁴⁹ OAU 69, art. I(2).

⁴⁵⁰ Cartagena Declaration, conclusion III(3).

⁴⁵¹ See Ch. 7, nn 89–111.

⁴⁵² Hathaway, for example, argues that there is insufficient evidence to establish the principle of *non-refoulement* as part of customary international law, however narrowly

defined: Hathaway ([n 36](#)) 435 ff. His focus on the fact that some States have returned refugees to persecution and other serious harm ignores the lengths to which States have gone to characterize such returns as something ‘other’ than *refoulement*. His thesis is also open to question on other grounds, not the least being that it is out of touch with contemporary jurisprudence and scholarship regarding the identification of customary law. Kälin, Caroni, & Heim ([n 3](#)) 1345 point out that to insist on State practice being entirely uniform is to misunderstand the requirements of customary international law, while Zimmermann & Wennholz ([n 196](#)) 1411 describe Hathaway’s approach as reliant on ‘an overly narrow concept of consistent State practice’, which ‘fails to convince’. On sources and customary international law, see also Besson, S., ‘Sources of International Human Rights Law: How General is General International Law’, in d’Aspremont, J. & Besson, S., eds., *The Oxford Handbook of the Sources of International Law* (2017) 837, 857, 859–61; Wuerth, I. B. & Ryngaert, C., ‘Sources of International Law in Domestic Law: Domestic Constitutional Structures and the Sources of International Law’, *ibid.*, 1119, 1129; White, N. D., ‘Lawmaking’, in Cogan, J. K., Hurd, I., & Johnstone, I., eds., *The Oxford Handbook of International Organizations* (2016) 559, 564–5, 573–8; Alvarez, J. E., *The Impact of International Organizations on International Law* (2017) 357–9; also, the third edition of this work, 351 ff.; and, in more detail, Goodwin-Gill ([n 417](#)) 448 ff.

[453](#) Cf. Allain, J., ‘The *Jus Cogens* Nature of *Non-Refoulement*’ (2002) 13 *IJRL* 533; Orakhelashvili, A., *Peremptory Norms in International Law* (2006) 55; Executive Committee Conclusion on International Protection No. 25 (XXXIII) (1982) para. (b) (which ‘[r]eaffirmed the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law’); *Report of the United Nations High Commissioner for Refugees*: UN doc. A/40/12 (13 Sep. 1985) paras. 22–3. In addition, successive Latin American declarations have asserted its peremptory status, as have political and judicial bodies in Switzerland.

[454](#) Interestingly, Costello and Foster’s extensive analysis leads them to conclude only that the principle of *non-refoulement* is ‘ripe for recognition as a norm of *jus cogens*’; they do not definitively assert that it has already achieved that status: Costello & Foster ([n 424](#)) 323.

[455](#) As de Wet confirms, the category was contested at the time and the Vienna Convention gives no hints as to content: de Wet, E., ‘*Jus Cogens* and Obligations *Erga Omnes*’, in Shelton, D., ed., *The Oxford Handbook of International Human Rights Law* (2013) 541, 541–3.

[456](#) Besides the considerable literature, see the *Report* on the work of the International Law Commission of its 70th Session: UN doc. A/73/10 (2018) Ch. VIII, paras. 91–163.

[457](#) To take just one example, see *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3) [1999] UKHL 17, [2000] 1 AC 147.

[458](#) *Furundzija* ([n 448](#)) 56–65, paras. 153–7; *Al Adsani v United Kingdom*, App. No. 35763/97 (21 Nov. 2001) paras. 60–1.

⁴⁵⁹ Inter-American Court of Human Rights, *Advisory Opinion on Rights and Guarantees of Children in the context of Migration and/or in Need of International Protection* (2014) Series A, No. 21, para. 225; see also, de Wet, E., ‘The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law’ (2004) 15 *EJIL* 97, 118. UNHCR adds that the principle ‘includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments’: UNHCR Advisory Opinion ([n 424](#)) para. 21 (and references cited there).

⁴⁶⁰ Orakhelashvili ([n 453](#)) 55.

⁴⁶¹ *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 Admin (Leggatt J): ‘the non-refoulement obligation cannot ... be regarded as having the same fundamental status as the prohibition against torture and inhuman or degrading treatment itself.’ This is because, ‘whereas subjecting a person to torture or other inhuman or degrading treatment is contrary to the criminal laws of civilised societies, the same cannot be said of a breach of the non-refoulement obligation’: paras. 168 and 167, respectively; also, paras. 165, 187–94.

⁴⁶² Ibid., para. 197. But, apart from the issue of complicity in torture, as Leggatt J also points out, the cases show that, ‘[i]n terms of culpability, a breach of the non-refoulement obligation can ... be committed without any mens rea or personal liability on the part of any state official. It is a strict obligation. A breach is established simply by showing the existence of substantial grounds for believing that the individual in question would face a real risk of being subjected to treatment contrary to article 3 if sent to the receiving state. There is no requirement that state officials should have knowledge of the risk’: ibid., para. 166.

⁴⁶³ See, for example, de Wet ([n 459](#)) 114; cf. Costello & Foster ([n 424](#)) 276, 310–19; van der Wilt, H., ‘On the Hierarchy between Extradition and Human Rights’, in de Wet, E. & Vidmar, J., eds., *Hierarchy in International Law: The Place of Human Rights* (2012) 154.

The Principle of *Non-refoulement*—Part 2

1. Time and place, ways and means

The recognition of refugee status under international law is essentially declaratory in nature, but the legal implications of this fact are often misunderstood in the interpretation and application of the 1951 Convention/1967 Protocol.¹ As a general principle, States are obliged to implement their international legal obligations effectively and in good faith. The duty to protect refugees arises as soon as the individual or group concerned satisfies the criteria for refugee status set out in the definition (flight from the State territory for relevant reasons) and comes within the territory or jurisdiction of another State, regardless of whether refugee status has been formally determined. Under general principles of international law, State responsibility may arise directly from the acts and omissions of government officials and agents, or indirectly where domestic legal and administrative systems fail to implement international standards.² The fact that the harm caused by State action may be inflicted outside the territory of the State, or in an area identified by municipal law as an international zone, in no way diminishes the State's responsibility.³

While the principle of *non-refoulement* does not entail a right for refugees to be granted asylum in a particular State,⁴ it does require States to ensure that whatever course of action they adopt, refugees are not sent—either directly or indirectly—to a place where their lives or freedom would be in danger on account of one of the five Convention grounds, or contrary to the principle of *non-refoulement* under human rights law (to the extent that it differs). In order to give effect to those obligations consistently with the general rule above, '[S]tates will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.'⁵

1.1 Extraterritorial application

There is virtual unanimity among States, UNHCR, and academics that responsibility for respecting the principle of *non-refoulement* is engaged wherever States assert jurisdiction,⁶ whether on their own territory or extraterritorially, for example on the high seas.⁷ This is so under both

international refugee law and international human rights law. This responsibility extends not only to those formally recognized as refugees or beneficiaries of complementary protection, but also to asylum seekers who have not yet been through a formal status determination process.⁸ Thus, asylum seekers must not be sent to any place in which they may face a real chance of persecution or other serious harm before their status has been assessed in accordance with the law. As the Inter-American Court of Human Rights has noted '[i]t is widely accepted that the principle of *non-refoulement* applies not only in the territory of a State, but also at the border, in international transit areas and at sea, due to their key role in ensuring access to territorial asylum',⁹ and applies to conduct including *inter alia* 'deportation, expulsion or extradition, but also refusal at the border, non-admission, interception in international waters and informal transfer or "surrender"'.¹⁰

Under international human rights law, it is clear that a State's obligations extend beyond its physical territory and apply anywhere that it asserts jurisdiction.¹¹ Although the text of article 2 ICCPR 66 suggests that a State's obligations under that instrument extend only to individuals 'within its territory *and* subject to its jurisdiction' (emphasis added), the UN Human Rights Committee has stated that it is 'unconscionable' to interpret article 2 as territorially anchored, since this would lead to a double standard whereby a State party could 'perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.¹² This interpretation better accords with the treaty's object and purpose and is consistent with the law of State responsibility more generally, which provides that States are responsible for the actions of their officials or their delegates wherever they act, and whether or not such action is characterized as the exercise of jurisdiction or effective control. The International Court of Justice has likewise held that the ICCPR 66 applies to acts done by a State outside its territory,¹³ as has the Committee against Torture with respect to the *non-refoulement* obligation in article 3 CAT 84.¹⁴ The key issue is the relationship between the individual and the State concerned.¹⁵ Gammeltoft-Hansen argues that this is best characterized as a 'functional approach' to jurisdiction, namely the power or authority assumed by the State in acting extraterritorially in a given situation. Thus, he writes, '[a] strong presumption prevails that any interdiction measure, even if not amounting to effective control over individuals or a geographical area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting state to

respect basic rights under international refugee and human rights law.’¹⁶

This subsequent State practice in human rights law is highly relevant to the principle’s interpretation under the Refugee Convention as well.¹⁷ Although the Refugee Convention does not contain a jurisdictional clause, the treaty’s text and its humanitarian object and purpose (‘to assure refugees the widest possible exercise of ... fundamental rights and freedoms’¹⁸) suggest that it necessarily applies extraterritorially. If it did not, this would effectively negate the very purpose of the Refugee Convention by ‘extinguish[ing] the most basic right enshrined in the treaty—the right of non-return’.¹⁹ State practice²⁰ and academic commentary²¹ on this point are virtually uniform. Likewise, UNHCR ‘is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return an individual to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.’²²

Unlike some other provisions in the Refugee Convention which condition rights on lawful presence or residence in a State, article 33 contains no such limitations. On the contrary, it prohibits the return of refugees ‘*in any manner whatsoever*’ to the frontiers of territories where they may be persecuted, including by way of extradition, expulsion, deportation, or rejection at the frontier. The principle applies regardless of whether the relevant action occurs ‘beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc’.²³ As Kälin, Caroni, and Heim note, ‘in the absence of any clause restricting the applicability of the 1951 Convention to a State’s own territory, one must assume that Art. 33 applies anywhere a State exercises jurisdiction over a refugee’.²⁴ Lauterpacht and Bethlehem similarly state that the principle of *non-refoulement* applies ‘to the conduct of State officials or those acting on behalf of the State *wherever this occurs*’, including extraterritorially.²⁵

There is also nothing in the drafting history of the Refugee Convention to suggest that the principle of *non-refoulement* is territorially confined.²⁶ In fact, at the time of drafting, the term ‘*refoulement*’ encompassed interception and rejection from outside a State’s territory.²⁷ The text of article 33(1) makes clear that States are prohibited from returning an individual ‘to’ the frontier of any territory where he or she is at risk of harm, however that return is carried out. The place *from* which the person is returned is immaterial; what matters is that

the state does not engage in conduct that puts a person at risk of being returned to a place of danger.²⁸

As UNHCR has observed:

an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.²⁹

The only States that reject the otherwise unanimous view that the principle of *non-refoulement* applies extraterritorially are the United States and, more recently, Australia.³⁰ The US Supreme Court has been roundly criticized for upholding this approach in the 1993 *Sale* decision, which examined US obligations in relation to Haitian asylum seekers intercepted at sea.³¹ Described as an 'outlier case ... in which the Court engaged in highly formalist and decontextualized reasoning',³² the decision was based on domestic, not international, law, and must be understood within that context alone. To the extent that the court engaged with international law issues at all, its treatment was superficial and selective.³³ According to Koh, it took 'its place atop a line of recent Supreme Court precedent misconstruing international treaties'³⁴—a view supported by Judge Pinto de Albuquerque in his concurring but separate opinion in *Hirsi* in the European Court of Human Rights: '[t]he United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees and departs from the common rules of treaty interpretation.'³⁵

Although the Supreme Court made passing reference to the *travaux préparatoires* of the 1951 Convention, its essentially *policy* decision to deny a remedy to individuals beyond territorial jurisdiction relied mostly on the language of 'Congressional intent' at the time of a domestic legislative enactment.³⁶ The decision could not and did not alter the international obligations of the United States,³⁷ as was later recognized by the Inter-American

Commission of Human Rights, which found the US in breach of article 33(1) of the Refugee Convention.³⁸ The Commission also held that the practice breached the asylum seekers' rights to life, liberty, and security of the person, and the rights to asylum protected by article XXVII of the American Declaration of the Rights and Duties of Man.³⁹ UNHCR has consistently protested the US interpretation of the Refugee Convention, and no other State has ever voiced objections to UNHCR's position—an important indication of acceptance by other States.⁴⁰

1.1.1 Establishing responsibility

It is trite knowledge that the State is responsible in international law for the conduct of its organs, and that it will be liable for such conduct if it is attributable to the State, and if that conduct violates an international obligation binding on the State.⁴¹ As the above analysis has shown, it is clear that the principle of *non-refoulement* applies extraterritorially. Where the facts disclose an actual or potential violation, then it should fall to the State to show why no liability attaches in the particular case.⁴² The relevant question to be determined in each case is whether the conduct is attributable to the State, and whether it constitutes the breach of an international obligation binding on that State.⁴³ ‘Jurisdiction’, or the exercise of jurisdiction, may be relevant to treaty-based schemes of protection, but ultimately it is the facts, the acts of the State or State organs, which count. In any context, ‘authority’ and ‘control’ may be useful shorthand bases for describing a sufficient factual connection between State and individual, but there is no juridical base for giving them a life of their own, to the extent of interposing an additional evidential obstacle to liability.

Jurisdiction tends to be a term of art in certain human rights protection regimes, where it is commonly a *necessary* condition of liability and/or entitlement to a remedy. State responsibility and jurisdiction are related but distinct legal concepts. ‘Jurisdiction only triggers the *applicability* of human rights law, whereas State responsibility examines whether the State is *liable* for the violation of a specific human right.’⁴⁴

In their detailed analysis of the concept of jurisdiction, Klug and Howe explain that in international law, extraterritorial jurisdiction may be established where a State exercises a high level of *de facto* territorial control;⁴⁵ where it has control over persons;⁴⁶ where there is flag State or consular jurisdiction;⁴⁷ or where there is a personal link, or cause-and-effect, between the State and the affected

individual.⁴⁸ Milanovic argues that in human rights treaties, jurisdiction denotes ‘solely a sort of factual power that a state exercises over persons or territory’, by contrast to the concepts of prescriptive and enforcement jurisdiction in general international law.⁴⁹ In all cases, the rationale is a protective one that essentially ensures that States cannot commit harms outside their territory that would be prohibited within it.⁵⁰

The European Court of Human Rights, which has considered the concept of extraterritorial jurisdiction in a number of cases, has yet to spell out a coherent, systematic approach to establishing when ECHR 50 applies to extraterritorial activities.⁵¹ An analysis of the cases nevertheless shows that it may arise both *de jure* and *de facto*, the latter encompassing *inter alia* situations where individuals are subject to the State’s physical power or control (for example, the interception and boarding of a boat on the high seas, and, in the case of *Medvedyev*, the detention of the crew),⁵² or where States exert governmental authority over individuals. As expressed in *Al-Skeini*, a State has jurisdiction ‘whenever the State through its agents exercises control and authority over an individual’,⁵³ which suggests, subject to what has been said above, ‘that any exercise of authority (and possibly also a refusal to exercise authority) may enliven a “jurisdictional link”’.⁵⁴

In the specific context of interceptions and pushbacks at sea, the court in *Hirsi* held that intercepting migrants in international waters, transferring them to Italian-flagged vessels crewed exclusively by Italian military personnel, and returning the migrants to Libya fell within the jurisdiction of the Italian State—both on the grounds of *de jure* and *de facto* jurisdiction. These actions were not merely incidental to a search and rescue operation, as the Italian government sought to argue.⁵⁵ According to the court, ‘[i]n the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.’⁵⁶ In other words, the nature or purpose of the interdiction was irrelevant.

Whether this reasoning could extend to a situation where State A provided boats and staff for border controls conducted by State B is less clear and remains to be decided.⁵⁷ However, according to the general principles governing the responsibility of States for internationally wrongful acts, the particular factual circumstances may well establish attribution, and thus liability.⁵⁸ If Judge Bonello’s functional approach to jurisdiction in *Al-Skeini* were followed, then the

relevant test would be whether the State has authority and control to see that its positive obligations are respected.⁵⁹

1.1.2 Example: interception on the high seas

States are bound by the principle of *non-refoulement* wherever they assert control⁶⁰—whether in ‘international zones’ of an airport or other places where domestic legal fictions purport to exclude areas from State territory,⁶¹ or on the high seas or the territorial seas/coastal zones of third States.⁶² As Judge Pinto de Albuquerque stated in a concurring opinion in *MA v Lithuania*, ‘the principle of non-refoulement would be purely fictional if the State could prevent the application of the principle by means of push-back policies or non-admission or rejection at the border’.⁶³ Indeed, in the context of operations at sea, or in policing maritime traffic, for example, in the Mediterranean (discussed in more detail below), UNHCR’s Executive Committee has consistently affirmed that:

interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.⁶⁴

This means that States must refrain from any act or omission that could foreseeably expose an asylum seeker to serious harm—whether through return to the country of origin, a transit country, or any country that might itself remove an asylum seeker in violation of the principle of *non-refoulement*.⁶⁵ In *Hirsi*, the European Court of Human Rights explained that the principle of *non-refoulement* requires States to ‘find out about the treatment to which [asylum seekers] would be exposed after their return’, and determine whether protection is available in the place to which their return is contemplated (including a third country).⁶⁶ This is necessary even if the individuals concerned do not specifically request asylum.⁶⁷

Thus, a State that intercepts a boat carrying refugees on the high seas and returns them directly to their country of origin violates the principle. Equally, an intercepting State that disembarks refugees and asylum seekers in a country which it knows or reasonably foresees will *refoule* them, or otherwise violate their fundamental human rights, becomes party to that act.⁶⁸ It aids or assists in

the commission of the prohibited conduct. It is responsible, jointly with the State which actually does the deed, for no State can avoid responsibility by outsourcing or contracting out its obligations. The fact of interception—whether or not it is characterized as the taking of control and custody—establishes the necessary juridical link between the State and the consequence.⁶⁹

Finally, the principle of *non-refoulement* necessarily entails a requirement to provide asylum seekers with access to fair and effective procedures to assess their protection claims on an individual basis.⁷⁰ As the Inter-American Court of Human Rights has repeatedly noted, ‘when an individual alleges before a State that he is in danger if he is returned, the competent authorities of that State must, at least, interview him and make a preliminary assessment in order to determine whether or not that risk exists if he should be expelled’.⁷¹

There must be ‘sufficient guarantees ensuring that the individual circumstances of each of those concerned [are] ... the subject of a detailed examination’.⁷² At a minimum, this includes the right to information about the right to seek asylum and the procedure; the opportunity to set out one’s case, with the assistance of lawyers and interpreters; the reasonable and objective evaluation of the claim by a qualified official; and the possibility for independent review.⁷³ Indeed, this has been the focus of UNHCR’s interventions in relation to interceptions at sea: the *inadequacy* of on-board procedures to identify effectively those who might have a claim to asylum.⁷⁴ States’ duty to provide effective remedies with suspensive effect suggests that the intercepting State should ensure that people are properly processed, which would seemingly rule out on-board processing and/or systematic transfers of asylum seekers to third countries without individual consideration of their claims. Legal experts regard on-board screening as insufficient to meet the relevant procedural and substantive guarantees.⁷⁵ As UNHCR has noted on many occasions, a ‘substantive assessment of the admissibility or merits of an international protection claim, should generally not take place at sea, as there can be no guarantee of reception arrangements and eligibility screening processes in line with international standards’.⁷⁶

Removing an asylum seeker to another State for status determination cannot absolve the removing State of its responsibilities under international law. States thus have an obligation to assess individual asylum claims, and cannot rely on a blanket designation of a State as ‘safe’ for the purposes of transferring asylum seekers elsewhere.⁷⁷ It is, accordingly, impermissible to return people summarily

or to engage in only cursory screening. Without ‘independent and rigorous scrutiny’, there is a real risk that the principle of *non-refoulement* will be breached and ‘irreversible’ damage will result.⁷⁸ Furthermore, an individual need not expressly voice a desire to seek asylum for the principle of *non-refoulement* to be engaged: ‘If the state concerned is aware or ought to be aware of facts about the profile of persons in respect of whom return is contemplated, or circumstances in the country to which return is contemplated, which indicate a risk that such return may itself constitute *refoulement*, these must be taken into account regardless of whether there has been an explicit and articulated request for asylum.’⁷⁹

1.2 ‘International zones’

Whereas State activities beyond territorial jurisdiction are sometimes said to be outside the scope of the *non-refoulement* obligation, in other circumstances international obligations are claimed to have limited effect even within the State. Any argument for the non-application of international obligations in State territory (for example, in transit or international zones, whether in the matter of refugees, asylum seekers, stowaways, or any other subject) faces substantial objections, however. It is a fundamental principle of international law that every State enjoys *prima facie* exclusive authority over its territory and the persons within it, and with that authority or jurisdiction goes responsibility.⁸⁰ Thus, a State could hardly argue that it is not bound by international duties of protection with respect to diplomatic personnel, merely by reason of the fact of their location within an ‘international’ or transit area of an airport.

The European Court of Human Rights stated in *Amuur v France* that ‘[d]espite its name, the international zone does not have extraterritorial status’.⁸¹ At the very least, a failure to examine an asylum request made in an international zone would constitute rejection at the frontier.⁸² This was reinforced in the 2017 case of *Z v Russia*, where four applicants had spent varying amounts of time—between five months and nearly two years—in the transit zone of Sheremetyevo Airport in Moscow.⁸³ Before the initial Chamber, the court emphasized that: ‘Holding aliens in an international zone of an airport involves a restriction on liberty which is not in every respect comparable to that which obtains in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation

of liberty.⁸⁴ In that case, the applicants ‘were in the situation of asylum-seekers whose applications had not yet been considered ... and did not have the option of entering a State other than that which they had left’. As such, they had not consented to their deprivation of liberty and it was unlawful.⁸⁵ Furthermore, the very poor conditions in which they were detained ‘caused them considerable mental suffering, undermined their dignity, and made them feel humiliated and debased’, and constituted inhuman and degrading treatment under article 3 ECHR 50.⁸⁶

The Grand Chamber upheld both these findings. It explained that in determining whether movement was restricted or completely denied in this context, the following factors were relevant:

- (i) the applicants’ individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.⁸⁷

In the instant case, there was deprivation of liberty on account of:

the lack of any domestic legal provisions fixing the maximum duration of the applicants’ stay, the largely irregular character of the applicants’ stay in the Sheremetyevo airport transit zone, the excessive duration of such stay and considerable delays in domestic examination of the applicants’ asylum claims, the characteristics of the area in which the applicants were held and the control to which they were subjected during the relevant period of time and the fact that the applicants had no practical possibility of leaving the zone.⁸⁸

Many States, of course, do choose to accord lesser rights in their municipal law to those awaiting formal admission, than to those who have entered. The United States is a typical example, where *physical* presence is not necessarily synonymous with *legal* presence for the purpose of determining constitutional guarantees. Other States make similar distinctions, for example, in the case of stowaways or illegal entrants, who are often deemed not to have entered the country. The purpose of such provisions is usually to facilitate summary or discretionary treatment, but from the perspective of international law, what counts is not the status or non-status conferred by municipal law, but the treatment in fact accorded. For international law purposes, *presence within State*

territory is a juridically relevant fact sufficient in most cases to establish the necessary link with the authorities whose actions may be imputable to the State in circumstances giving rise to State responsibility. These flow from the fact of control over territory and include, with respect to human rights, the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.⁸⁹ Municipal courts, too, have rarely doubted their authority to extend their jurisdiction and protection into so-called international zones.⁹⁰

In examining the legality and implications of zones that States suggest are beyond their jurisdiction, the point of departure is the State's sovereign and *prima facie* exclusive authority or jurisdiction over all its territory, and the concomitant international legal responsibilities flowing from the fact of control and the activities of its agents. This authority or jurisdiction, with its basis in customary international law, is amply confirmed by international treaties, such as the 1944 Chicago Convention and the 1982 Convention on the Law of the Sea. No State, by treaty or practice, appears to have abandoned the territory comprised by its ports of entry; the extent of national control exercised therein sufficiently contradicts any assertion of their purely *international* character.

While obligations relating to *non-refoulement* and the protection of human rights come into play by reason of the juridically relevant facts of presence within State territory and jurisdiction, the State retains choice of means with regard to implementation. To apply different procedures and standards in such zones will not necessarily result in breach; the underlying practical issue is one of monitoring and compliance, but experience unfortunately confirms that errors of *refoulement* are more likely when procedural shortcuts are taken in zones of restricted guarantees and limited access.⁹¹

Australia has gone to considerable lengths to deny access to protection to asylum seekers who arrive without a visa (predominantly, refugees who arrive by boat). Successive statutes have excised thousands of islands, coastal ports, and ultimately the whole Australian mainland from the migration zone to deny legal presence—and thus the ability to apply for protection—to such people.⁹² This may constitute a breach of Australia's duty to apply its 1951 Convention obligations in good faith (as well as obligations in other human rights instruments and customary international law),⁹³ and its duty not to frustrate or defeat that treaty's object and purpose.⁹⁴

Asylum seekers who arrive without a visa are transferred to offshore

processing centres in countries with which Australia has bilateral memoranda of understanding (Nauru and Papua New Guinea).⁹⁵ Their asylum claims are determined.⁹⁶ Those found to be refugees are never allowed to settle in Australia. Given the limited resettlement prospects for refugees in Nauru and Papua New Guinea, attempts have been made to secure resettlement in third countries. A handful of refugees agreed to be resettled in Cambodia, pursuant to a bilateral arrangement between the governments of Cambodia and Australia; most of them subsequently moved on.⁹⁷ In 2016, the United States agreed to resettle around 1,250 refugees from Nauru and Papua New Guinea, but this became a highly protracted (and politicized) process that was still ongoing five years later.⁹⁸

As examined in detail in Chapter 8, the offshore processing arrangements themselves raise questions about Australia's compliance with international law in a number of respects.⁹⁹ With respect to the principle of *non-refoulement*, when Australia transfers asylum seekers to offshore processing countries, it does not systematically examine whether those countries are safe for each individual, thus raising the prospect that the principle could be breached in individual cases. For instance, there are concerns that homosexual or Muslim asylum seekers may be at risk of persecution in Papua New Guinea on account of their sexuality or religion.¹⁰⁰ In other cases, conditions in the detention centres may amount to inhuman or degrading treatment, especially for particularly vulnerable asylum seekers.¹⁰¹

A domestic legal regime cannot oust a State's international legal obligations, and indeed Australia has not sought to mount such an argument. Nevertheless, Australia's Migration Act was amended in 2014 to provide that, with respect to the removal of 'unlawful non-citizens', 'it is irrelevant whether Australia has non-refoulement obligations', and '[a]n officer's duty to remove as soon as reasonably practicable an unlawful non-citizen ... arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen'.¹⁰² The deliberate absence of procedural or substantive safeguards means that the possibility of Australia violating the principle of *non-refoulement* is high.

1.2.1 'Frontiers of territories' and diplomatic asylum

Individuals must not be removed to 'the frontiers of territories' in which they face a risk of persecution or other serious harm.¹⁰³ As Lauterpacht and Bethlehem rightly point out, the term 'territories' implies that return is prohibited

to *any* territory in which the risk is material, irrespective of whether that territory is the individual's country of origin.¹⁰⁴ They argue further that the use of 'territories', rather than 'States' or 'countries', suggests that the legal status of the place is immaterial.¹⁰⁵ Accordingly, in their view, if an individual has taken refuge in a diplomatic mission within his or her own country, or is protected there by the armed forces of another State, then the protecting State is subject to the prohibition on *refoulement* and cannot release the individual back into the jurisdiction of the country of origin.¹⁰⁶ Whether this can be reconciled with the requirement in article 1A(2) that a refugee is a person *outside* his or her country of origin is doubtful, since it requires interpreting 'outside' in a legal, jurisdictional sense, rather than a physical, territorial sense, an interpretation which is supported neither by State practice nor *opinio juris*.¹⁰⁷ While embassies and consulates are inviolable, they remain part of the sovereign territory of the host State; thus, the asylum seeker is not 'outside' the country of origin (unless he or she is a foreign national in a third State). Nonetheless, principles of international human rights law that prevent States from exposing individuals within their territory or jurisdiction to particular forms of serious harm may prevent a diplomatic mission from removing the individual.¹⁰⁸

However, while diplomatic premises are legally inviolable, general international law does not recognize a right of diplomatic asylum per se,¹⁰⁹ even if, as Fitzmaurice suggested, the ICJ in the *Asylum Cases* prepared the ground for a general right, capable of being universalized.¹¹⁰ By contrast, diplomatic asylum has long enjoyed a special place in the law and practice of Latin American States.¹¹¹ It encompasses the 'right of the State in whose embassy refuge has been taken ... to grant asylum on a temporary basis as a matter of humanitarian protection'.¹¹² It can also be seen with some regularity in other regions,¹¹³ although whereas Latin American States have frequently sought to translate the practice into a treaty-based system of protection, States elsewhere have tended to deny its legal character, all the while admitting nonetheless that refuge may well be accorded in egregious cases.¹¹⁴ For instance, the United States, Canada, and the United Kingdom, while of the view that there is no right to diplomatic asylum, have granted refuge in their missions to individuals seeking protection from the local authorities.¹¹⁵

The UK does not accept the principle of diplomatic asylum. It is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplomatic asylum by a foreign embassy in this country. Moreover, it is well established that, even for those countries which do recognise diplomatic asylum, it should not be used for the purposes of escaping the regular processes of the courts.¹¹⁶

As expounded in *B's Case*, the UK accepts the practice only in humanitarian cases of urgent peril.¹¹⁷ There, two Afghan boys had escaped from mandatory detention in Australia and made their way to the British consulate in Melbourne where they claimed asylum. They submitted that consular officials would breach articles 3 and 5 ECHR 50 if they returned them to the Australian authorities, since they would be subjected to a real risk of inhuman and degrading treatment, and arbitrary and indefinite immigration detention. Since the boys had escaped custody, the British High Court characterized them as fugitives from justice,¹¹⁸ stating:

The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction; see Article 55 of the 1963 Vienna Convention. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum.¹¹⁹

The judgment went on to suggest that the treatment to which the individual may be exposed need not reach the severity of a crime against humanity, but that protection against inhuman or degrading treatment or punishment will only be forthcoming if ‘the perceived threat to the *physical safety* of the applicants … [is] so immediate and severe’ that to return them would violate the host State’s duties under international law.¹²⁰ The threshold was not met in the instant case. While refusal to hand over the children on the grounds of diplomatic asylum ‘would have been an abuse of the inviolability of premises and would have infringed the obligations of the United Kingdom under international law’,¹²¹ it shows the

tension between that concept and protection broadly conceived. Arguably, it imposes too high a threshold when considered through the lens of human rights law. Indeed, there is no evidence in the practice of States generally, nor in the provisions of regional treaties, that limits the practice of diplomatic asylum to circumstances in which the person to be protected is at risk of a ‘crime against humanity’ or of the ‘immediate likelihood of experiencing serious injury’.

Where diplomatic asylum is granted, the problem of what to do next can be very real.¹²² As Lauterpacht observed, a person might be ‘exposed for a prolonged period to a condition of uncertainty and suspense in a manner incompatible with human dignity’.¹²³ Of course, similar issues can arise in territorial asylum as well: countless refugees may have the ‘protection’ of territorial asylum, but their situation remains precarious, characterized by extreme hardship, and in need of solutions which the law cannot yet supply. Individuals accused of a crime of international concern may be liable to extradition and also find themselves in limbo, although here, the possibility of local prosecution can help to avoid return to persecution while maintaining the integrity of the international justice system.¹²⁴ Diplomatic asylum nevertheless adds a sharper edge to an ongoing legal relationship,¹²⁵ and the sheltering State’s non-exclusive competence raises near insurmountable obstacles to a solution in purely legal terms. Ironically, it was only in its third judgment in the *Asylum Cases* that the ICJ appears to have recognized the normative quality of regional practice, and to have accepted that, while the 1928 Havana Convention provided for the surrender of common criminals, its silence on what to do with political offenders ‘cannot be interpreted as imposing an obligation to surrender the refugee’, even where asylum had been granted inconsistently with that treaty, for this would be contrary to the spirit of Latin American tradition which only an express provision could achieve.¹²⁶ It is hardly surprising, therefore, that the ICJ turned to regional practices and traditions of good neighbourliness when it urged the parties to find the solution it could not provide itself. The ICJ’s recognition of the principle of *non-refoulement*, however, remains critically important to this day.

As noted in Chapter 5, while the concept of extraterritoriality has at times been relied upon in support of diplomatic asylum,¹²⁷ regional treaty appears to be its more solid foundations; in 2018, the Inter-American Court of Human Rights found that there was insufficient *opinio juris* to substantiate the argument that diplomatic asylum was regional custom in the Americas.¹²⁸

Significantly, the ICJ distanced its reasoning from the extraterritoriality argument,¹²⁹ instead emphasizing asylum as a ‘state of protection’:

The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or a legation. Any grant of asylum results in, and in consequence logically implies, a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection.¹³⁰

The court stressed that the ‘essential justification’ for asylum is the ‘imminence or persistence of a danger for the person of the refugee’,¹³¹ and while asylum cannot be opposed to the operation of justice, it does protect where ‘arbitrary action is substituted for the rule of law’, and ‘against any measures of a manifestly extra-legal character’.¹³² Later developments generally in the field of human rights, building on these dicta, can now provide and strengthen an alternative rationale for asylum, which resides in the various duties of the State to provide protection to those at risk of relevant serious harm.¹³³ In its 2018 Advisory Opinion on asylum, the Inter-American Court of Human Rights described diplomatic asylum as ‘a humanitarian practice for the purpose of protecting fundamental human rights … which has been granted for the purpose of saving lives or preventing damage to rights in the face of an imminent threat’.¹³⁴

1.3 Joint and several State responsibility

As a matter of State responsibility, liability for breaches of international law can be both joint and several. Any State that aids or assists, directs or controls, or coerces another State to commit an internationally wrongful act is also responsible if it knows the circumstances of the wrongful act, and the act would be wrongful if that State committed it itself.¹³⁵ Furthermore, an internationally wrongful act is attributable to a State if it is committed by a legislative, judicial, or executive organ of government, or a person or entity which, although not a government organ, has nonetheless been delegated certain aspects of governmental authority (even if that person or entity exceeds the actual authority they have been given or goes against instructions).¹³⁶ In other words, States cannot ‘contract out’ their international responsibilities.

It is well established that the principle of *non-refoulement* includes protection

from return to territories where the individual, although not directly at risk of persecution or other ill-treatment, faces a danger of being sent to other territories where such a risk exists. How, then, is an act of removal by one State, which leads to an individual's *refoulement* by another, to be characterized as a matter of international law? Although this is commonly referred to as 'indirect' or 'chain' *refoulement*, such terminology is essentially descriptive and confuses the legal basis for liability, since the first State's act is not one of *refoulement* per se. While a State that *actually* returns a refugee to persecution or other serious harm remains primarily responsible for that act, the first State, through its act of expulsion, may be also jointly liable for it.¹³⁷ Phrases such as 'indirect' or 'chain' *refoulement* are therefore misleading, since they divert attention from the basis of liability and the nature of the act attributable to the first State.¹³⁸ Removal by the first State may also breach other applicable human rights provisions where the process of refusal and return amounts to cruel, inhuman, or degrading treatment.¹³⁹

2. *Non-refoulement* and flight by sea

The core meaning of *non-refoulement* requires States not to remove refugees in any manner whatsoever to territories in which they face the possibility of persecution or other serious harm. But States may deny admission in ways not obviously amounting to a breach of the principle. For example, stowaways and refugees rescued at sea may be refused entry; refugee boats may be towed back out to sea and advised to sail on; and asylum applicants may be sent back to transit or 'safe third' countries. State authorities may also induce expulsion through various forms of threat and coercion.¹⁴⁰ Whereas Chapter 8 examines interception and deterrence policies in the context of the right to seek asylum, the present chapter focuses on their relationship with the principle of *non-refoulement*.

2.1 Stowaways

Without breaching the principle of *non-refoulement*, the State where a stowaway asylum seeker arrives may require the ship's master to keep the stowaway on board and travel on to the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unacceptable; or it may allow temporary disembarkation pending resettlement elsewhere. In the absence of

rules regulating the appropriate State to consider the asylum claim, the situation is comparable to that of refugees in orbit, while practical solutions are made more difficult to obtain by the tendency of States' immigration laws to deal summarily with stowaways.¹⁴¹

On several occasions during the Indo-China exodus, port of call States sought to make stowaways' disembarkation conditional on guarantees of resettlement from flag States, by analogy with the then developing practice for rescue-at-sea cases in South-East Asia.¹⁴²

The issue of stowaway asylum seekers was first briefly examined by an Executive Committee working group during a rescue-at-sea meeting in Geneva in July 1982. While it was agreed that the principle of *non-refoulement* should be maintained, there were widely diverging views on how problems should be solved, and the recommendations on stowaways were not adopted.¹⁴³ Although there was more success in 1988, the debate was not all plain sailing. Executive Committee Conclusion No. 53 (1988) emphasized that like other asylum seekers, stowaway asylum seekers 'must be protected against forcible return to their country of origin'. Without prejudice to any flag State responsibilities, it also recommended that they 'should, whenever possible, be allowed to disembark at the first port of call', with the opportunity to have their refugee claim determined, 'provided that this does not necessarily imply a durable solution in the country of the port of disembarkation'.¹⁴⁴

State practice has not so far given rise to a rule on the treatment of stowaway asylum seekers, although attempts have been made to promote shared responsibilities for stowaways generally.¹⁴⁵ Guidelines promulgated by the International Maritime Organization (IMO) and reflected in the Convention on the Facilitation of Maritime Traffic, probably encapsulate the prevailing view of States, which recognizes that '[s]towaways arriving at or entering a State without the required documents are, in general, illegal entrants', and '[d]ecisions on dealing with such situations are the prerogative of the countries where such arrival or entry occurs'.¹⁴⁶ Nevertheless, the Guidelines also recommend that stowaways be treated 'in accordance with international protection principles', such as those set out in the 1951 Convention/1967 Protocol,' adding that the authorities may also wish to consider Executive Committee Conclusion No. 53 (1988).¹⁴⁷ In reality, however, the discretion of the coastal State may be limited by the particular facts of the case. If the flag State refuses to accept any responsibility for resettlement and if the ship's next port of call is in a country in

which the stowaway asylum seeker's life or freedom may be threatened, then the practical effect of refusing disembarkation is *refoulement*. The nominal authority of the flag State to require diversion to a safe port, which would in any case be controversial where a charter party was involved, can hardly be considered a practical alternative, or 'last opportunity', to avoid *refoulement*. The paramount consideration remains the refugee status of those on board.

2.2 Asylum seekers at sea

The phenomenon of asylum seeking by boat puts at issue not only the interpretation of the principle of *non-refoulement*, but also the extent of freedom of navigation and of coastal States' right of police and control.¹⁴⁸ The international search and rescue regime places obligations on all coastal and seafaring States in their own waters, in those of other States, and on the high seas. These include respect for fundamental principles of international refugee and human rights law, including *non-refoulement*, the right to family unity, the best interests of the child, and the prohibition of cruel, inhuman, or degrading treatment.¹⁴⁹

The simple denial of entry of ships to territorial waters cannot automatically be equated with a breach of the principle of *non-refoulement*, which requires that State action have the effect or result of returning refugees to territories where their lives or freedom would be threatened.¹⁵⁰ Denial of entry to internal or territorial waters must therefore be distinguished from programmes of interdiction of boats that are accompanied by the actual, physical return of passengers to their country of origin or to third countries in which their protection needs cannot be guaranteed. Even then, the principle of *non-refoulement* comes into play only in the presence of certain objective conditions indicating the possibility of danger befalling those returned.¹⁵¹ However, it does not follow that States enjoy complete freedom of action over arriving boats, even if they come in substantial numbers and without nationality. The range of permissible measures is limited by obligations relating to rescue at sea and arising from elementary considerations of humanity, while action that would directly effect the return of refugees is prohibited by the principle of *non-refoulement*. Whether on the high seas or in waters subject to the jurisdiction of any State, refugees may also be protected by UNHCR in the exercise of its functional protection role.¹⁵²

In South-East Asia during the Indo-China exodus of the 1970–80s, States

several times prevented boats from landing, and towed back to the high seas many which had penetrated the territorial sea and internal waters. Today, the United States and Australia actively pursue interception policies, using coast guard or navy ships forcibly to prevent the arrival of boats carrying asylum seekers and migrants. As noted above, in 1981 the United States announced a policy of ‘interdiction’ on the high seas of boats which were believed to be bringing illegal aliens to that country. In September 2001, Australia established a naval interception programme and began excising territory from its domestic ‘migration zone’ in order juridically to deny the fact of ‘entry’ to asylum seekers arriving by boat. Since that time (with a brief hiatus between 2008–12), boats have been routinely intercepted, detained, and ‘turned back’ to Indonesia (a so-called transit State), as well as directly to Vietnam and Sri Lanka (with those States’ collaboration).¹⁵³ None of those States are parties to the Refugee Convention or its Protocol. Asylum seekers have threatened or engaged in acts of self-harm in the process and some have drowned.¹⁵⁴ A number of pushbacks (or ‘turnbacks’) have involved violations of Indonesia’s territorial waters, in breach of international law.¹⁵⁵

Meanwhile, interception activities by EU Member States in the Mediterranean and elsewhere raise similar issues,¹⁵⁶ including about joint and several liability.¹⁵⁷ Some States have entered into bilateral partnerships to try to stop asylum seekers and migrants departing regions of origin in the first place, and to intercept them en route (for example, Italy and Libya, Spain and Morocco, Senegal, Mauritania, and Cape Verde).¹⁵⁸ The objectives of such operations have included the identification of passengers, returning them to ports of departure, deterring passage through interceptions in territorial waters and the contiguous zone, and cooperation with coastal State authorities to prevent departures. Such agreements must satisfy minimum formal and substantive requirements. They must be published, and, ideally, subject to Parliamentary scrutiny. They must make provision for protection, including the determination of refugee status; access to asylum or other solutions; and treatment in accordance with international law. They must be subject to international supervision in their application, ideally by UNHCR in the exercise of its protection responsibilities. In the absence of effective and verifiable procedures and protection in countries of proposed return, the responsibility to ensure protection remains that of the EU agency or Member State.

Spain and the EU border agency Frontex have carried out interception

operations off the West African coast, and Italy has done so in the Mediterranean—in a manner found to be unlawful by the European Court of Human Rights.¹⁵⁹ Certain coastal States have refused to allow boats from North Africa to disembark, while others have been returned without allowing the asylum seekers on board to have a substantive hearing of their claims.¹⁶⁰ Europe has also explored the establishment of ‘regional disembarkation platforms’ to safely disembark rescued persons third countries (where they would be processed to identify those with protection needs).¹⁶¹ Neither domestic legislation,¹⁶² regional instruments, nor bilateral agreements¹⁶³ can preclude States’ treaty obligations under international law, but UNHCR has expressed concern at the ‘[w]orrisome practices of “pushbacks”, “towbacks” and other forms of maritime interdiction’ in the Mediterranean, the Asia-Pacific region, and the Caribbean, which are ‘testing the principle of *non-refoulement*’.¹⁶⁴

In the context of returns or pushbacks at sea involving more than one State, neither the presence on board of a third State official, nor the use of joint patrols in which actual interception is undertaken by a third State, disengages the primary actor from responsibility for setting the scene that allows the result, if nothing more. In each case, the EU agency or Member State exercises a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless.

Responsibility in these circumstances is underlined by principles clearly laid down by the International Court of Justice over 70 years ago in the *Corfu Channel Case*.¹⁶⁵ There, in addition to reminding States of what may flow from elementary considerations of humanity, the court placed considerable weight on the presumed knowledge of the presence of mines that could be attributed to the coastal State, and on that State’s singular failure to warn of the danger—‘grave omissions’, in the words of the court, which engaged its international responsibility. In the present situation, presumed knowledge lies with the intercepting EU organs and individual Member States. It concerns danger, not in international waters this time, but in the coastal State itself—the risk of ill-treatment contrary to international law and the danger of *refoulement*.

Assessing the legality of States’ actions with respect to asylum seekers and refugees at sea requires analysis of additional treaty obligations under the United Nations Convention on the Law of the Sea (UNCLOS 82), the International Convention on Maritime Search and Rescue (SAR Convention), the International Convention on the Safety of Life at the Sea (SOLAS), and the Migrant

Smuggling Protocol (which supplements the United Nations Convention against Transnational Organized Crime).¹⁶⁶

Under the law of the sea, a State's entitlement to intercept vessels depends upon where this occurs. For the purposes of the following discussion, these can be broadly defined as internal waters and territorial waters (extending from the baseline up to 12 nautical miles), which come under the sovereignty of the coastal State;¹⁶⁷ the contiguous zone (12–24 nautical miles from the baseline, in which certain actions are permissible to prevent or punish infringement of customs, fiscal, immigration, or sanitary laws);¹⁶⁸ and the high seas, which are not subject to the exercise of sovereignty by any State.¹⁶⁹ These zones form a spectrum in which the rights of the coastal state are gradually reduced in relation to their distance from that State.¹⁷⁰

Finally, it should be noted that States sometimes seek to circumvent refugee and human rights law by claiming that border control measures, such as interception, are rescue measures. This is not justified as a matter of international law and goes far beyond what is authorized under the law of the sea.¹⁷¹

2.2.1 High seas

The high seas¹⁷² are ‘open to all States’ for peaceful purposes.¹⁷³ Vessels are liable to the exclusive jurisdiction of the flag State, which means that any interference with them without that State’s permission is prohibited, save in exceptional cases provided for by treaty or under general international law.¹⁷⁴ In all cases, obligations under refugee and human rights law must be respected.

The freedom of the high seas, however, is generally expressed as a freedom common to *States*,¹⁷⁵ the boats of asylum seekers, like their passengers, will most usually be denied flag State protection. Similarly, the right of innocent passage for the purpose of traversing the territorial sea or entering internal waters is framed with normal circumstances in mind. A coastal State might argue that boats of asylum seekers are to be assimilated to ships without nationality¹⁷⁶ and thus subject to boarding and other measures on the high seas.¹⁷⁷ The better view is that ‘the right to visit such vessels does not *ipso facto* entail the full extension of the jurisdictional powers of the boarding States’,¹⁷⁸ and does not extend to a right to tow a boat to another part of the sea.¹⁷⁹ Additionally, the coastal State might argue that existing exceptions to the principle of freedom of navigation, applying within the territorial sea and the contiguous zone,¹⁸⁰ justify such preventive measures as the coastal State deems necessary to avoid landings on its

shores.

Under general international law, a ship on the high seas may be boarded without consent in very limited circumstances, namely, where it is in need of rescue;¹⁸¹ where it is suspected of migrant smuggling, piracy, or slave trading; where it has no nationality or has the same nationality as the warship purporting to exercise authority; or where the ship is engaged in unauthorized broadcasting.¹⁸²

As ‘small, unmarked vessels carrying no registration papers’,¹⁸³ asylum seeker boats may most closely approximate a vessel without nationality. However, even if such boats are without the effective protection of their country of origin, it is doubtful whether they can be assimilated to ships without nationality. No boat is ever entirely without the protection of the law. Obligations with regard to the rescue of those in distress at sea will circumscribe a State’s freedom of action in certain cases.¹⁸⁴ As Guilfoyle and Papastavridis note, the first problem is that a further connection between the acts of the vessel and the interests of the intercepting State is needed to justify seizure or arrest,¹⁸⁵ while the second is that small vessels may not require registration papers to enjoy a nationality.¹⁸⁶ Additionally, elementary considerations of humanity¹⁸⁷ require that account be taken of the rights to life, liberty, and security of the person, and to freedom from torture, and cruel, inhuman, or degrading treatment or punishment; with respect to many such rights no derogation is permitted, even in time of public emergency threatening the life of the nation. The Migrant Smuggling Protocol expressly requires any State party involved in ‘the return of a person who has been the object of [smuggling] … [to] take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person’.¹⁸⁸ All actions must be consistent with the principle of *non-refoulement*, human rights obligations, and the law of the sea, including the law relating to the safety of life at sea.¹⁸⁹

Somewhat different considerations arise where, under a bilateral agreement, a flag State agrees to permit the authorities of another State to intercept its vessels. Precedents have existed for many years in regard to smuggling, slaving, and fisheries conservation. Under the Haitian interdiction programme, the US Coast Guard was instructed to stop and board specified vessels, including those of US nationality, or no nationality, or possessing the nationality of a State which had agreed to such measures. Those on board were to be examined and returned to their country of origin, ‘when there is reason to believe that an offence is being

committed against the United States immigration laws'.¹⁹⁰ Australian legislation permits the authorities to chase and board a foreign ship, including by force if necessary.¹⁹¹ In Latin America, the Regional Conference on Migration has discussed programmes for returning boats intercepted on the high seas to their countries of origin with the assistance of the IMO.¹⁹²

In the absence of an armed attack, the use of force against asylum seekers cannot be justified on the ground of self-defence.¹⁹³ Notions of necessity¹⁹⁴ or self-preservation,¹⁹⁵ as well as exceptions relating to the 'peace, good order or security' of the coastal State,¹⁹⁶ are subject to the limitations set out above. While a State necessarily enjoys a margin of appreciation in determining whether an influx of asylum seekers constitutes a threat, the lawfulness of measures taken to meet it will depend on there being some relationship of proportionality between the means and the end. International procedures for assistance and for finding solutions to refugee problems exist, and it is highly doubtful whether the use of such force as is reasonably likely to result in injury or death can ever be justified.¹⁹⁷

2.2.2 The contiguous zone

In the law of the sea, the term 'contiguous zone' describes the area of seas between 12 and 24 miles from the baselines employed to delimit the boundaries of the territorial sea.¹⁹⁸ In this zone, or equivalent areas, international law has long limited the range of permissible enforcement measures.¹⁹⁹ Even before the crystallization of State competence in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, it was widely recognized that jurisdiction might be exercised beyond the 'exact boundaries' of a State's territory, for law enforcement purposes, or in order to preserve national safety.²⁰⁰ The question is, whether 'the interest sought to be protected warrants the authority asserted for the time projected in the area specified'.²⁰¹

In the contiguous zone, the coastal State 'may exercise the control necessary' to prevent or punish infringement of its customs, fiscal, immigration, or sanitary laws within its territory or territorial sea,²⁰² which requires proportionality in each case.²⁰³ O'Connell argues, however, that 'necessary power to control' entails only a right to approach, inspect, and warn a boat, and,

does not include the right to arrest, because at this stage (i.e. that of a ship coming into the contiguous zone) the ship cannot have committed an offence. Enforced direction into port may not be arrest, in a technical sense, but it is tantamount to it and therefore is in principle excluded. The necessary examination should take place at sea, while the ship to be examined is in the zone.²⁰⁴

He further suggests that ‘additional powers of seizure for the purpose of punishment’ would come into operation where illegal immigrants have been landed, but this would be because the infringement of protected interests has already occurred in national territory.

By comparison with those which run in the territorial sea, the special jurisdictional rights that a State can exercise in the adjacent area of the contiguous zone do not clearly include the interception of vessels believed to be carrying asylum seekers.²⁰⁵ One authority argues that ‘such force and only such force may be used as will prevent the attempted incursion of illegal immigrants from becoming a danger to the preservation of the State’.²⁰⁶ Although the basic principle of control is undisputed, this proposition begs the question, what is permissible in less extreme cases? The degree of force which might be used would need to be determined in light of all the circumstances, in the same way that the initial exercise of discretion would need to take into account the safety of passengers, the status of those on board, and the likely consequences of interdiction.²⁰⁷ Further, the requirement of ‘necessity’ (in article 33 UNCLOS 82) means that any response must be proportionate. It is not obvious that powers of detention, escort to port, and forcible return are encompassed, for instance (contrary to practices carried out by some States).²⁰⁸ A State’s obligations under refugee and human rights law must therefore be taken into account when evaluating measures to prevent the infringement of immigration law.²⁰⁹

If there are reasonable and probable grounds to believe that a vessel’s intended purpose is to enter the territorial sea in breach of the immigration law, the coastal State may have the right to stop and board the vessel.²¹⁰ However, action taken under those powers, including inspection and redirection, might be objected to by flag States.²¹¹ In the absence of the flag State and in circumstances suggesting a refugee dimension, the Office of the United Nations High Commissioner for Refugees might be expected to make representations in the exercise of its responsibilities to provide international protection.²¹²

Finally, action to prevent the infringement of immigration law does not automatically extend beyond the contiguous zone by virtue of the right of hot

pursuit unless the coastal State has ‘good reason to believe that the ship *has violated* [its] laws and regulations’ (not that it may do so).²¹³ Boats carrying asylum seekers will not infringe a State’s immigration laws unless and until they enter territorial waters, and article 31 of the 1951 Convention requires that asylum seekers not be penalized for any such infringement.

In summary, the exercise and enforcement of jurisdiction over ships in the contiguous zone may violate international law where it is inconsistent with the purposes for which the contiguous zone exists and the limited authority allowed to coastal States; or because the exercise of enforcement powers (surveillance, identification, interception, and arrest) exceed what is permissible under that law.²¹⁴ Furthermore, if forcing a ship from the contiguous zone to the high seas would leave refugees with no option but to return to their country of origin, or to a third State that would return them, this constitutes *refoulement*.

2.2.3 Internal waters and the territorial sea

Internal waters, lying behind the baselines used to delimit territorial waters, are completely within the jurisdiction of the State. The territorial sea also is an area over which the coastal State exercises full sovereignty and in which, subject to the requirements of innocent passage, all the laws of the coastal State may be made applicable. The sovereignty here exercised is no different in kind from that over State territory.

Under international law, States are entitled to regulate innocent passage through the territorial sea (12 nautical miles from the baselines),²¹⁵ for example, to prevent the infringement of immigration provisions. Non-compliance with such regulations may make passage non-innocent. Articles 19(2)(g) and 25 of UNCLOS 82 are probably declaratory of customary international law. Article 19(2)(g) provides:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

...

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

It is important to note that passage must be ‘prejudicial to’, not merely create a disturbance, and the relevant prejudicial activities listed in article 19(2)(g) are

exhaustive.²¹⁶ Article 25 of UNCLOS 82, and article 16 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone before it, provides expressly that: ‘The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.’ This does not necessarily authorize States to remove a vessel engaged in non-innocent passage from the territorial sea, since States are only permitted to take such steps as are *necessary* to prevent that passage.²¹⁷

Although the territorial limits of a State run to the boundaries of its territorial sea, it does not follow that entry within the latter constitutes entry within the State, where ‘entry’ is the juridical fact necessary and sufficient to trigger the application of a particular system of international rules, such as those relating to landings in distress or immunity for illegal entry.²¹⁸ States generally apply their immigration laws not within territorial waters, but within internal waters, even though it may be argued that ‘entry’ occurs at the moment when the outer limit of the territorial sea is crossed. Under article 31 of the 1951 Convention, refugees who cross into territorial waters and who otherwise satisfy the requirements of that provision could be said to have entered ‘illegally’ and to be entitled to exemption from penalties. Entry within territorial waters may be an ‘entry’ for certain purposes,²¹⁹ but it is incorrect to generalize from these particulars.

A vessel in distress may enter the territorial waters of another State and avoid sanctions for violation of domestic immigration or customs laws.²²⁰ ‘Distress’ is not defined,²²¹ but may be linked to the preservation of human life,²²² or may result from ‘the weather or from other causes affecting the management of the vessel’.²²³ This notion of distress, or *force majeure*, reflects not so much a right of entry, as a limited immunity for having so entered in fairly well-defined circumstances.²²⁴

Similarly, article 31 of the 1951 Convention, within its restricted area of application, operates as a defence to prosecution and penalty, but neither *force majeure* nor article 31 comes into operation unless and until a measure of enforcement action is taken. The coastal State may elect to exercise jurisdiction, and prosecute and punish, or simply prohibit and prevent the passage in question.²²⁵ The fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage, even though the status of the passengers may entitle them to claim immunity from penalties under article 31 of the 1951 Convention.²²⁶ Even if the refugee character of those on board were

compatible with innocent passage, this would not alone entail a right of entry into any port, although other rules of international law might affect or control the discretionary decision as to what is to be done with respect to any particular vessel. International law allows States to take all reasonable measures in the territorial sea to prevent the entry into port of a vessel carrying illegal immigrants and, in principle, to require such vessel to leave the territorial sea. In practice, however, responses will need to factor in and be consistent with a range of other potentially applicable rules and principles governing, for example, the safety of life at sea, international human rights and humanitarian law, and the rights and interests of other States.

States engaging in interception measures and pushbacks may themselves unlawfully interfere with the rights of coastal States.²²⁷ For example, as noted above, Australia's pushbacks of boats of asylum seekers to Indonesia resulted in a number of violations of Indonesia's territorial waters.²²⁸ In that context, it was argued that pushing back boats to the edge of Indonesia's territorial waters (without entering them) was likely to be unlawful because it was questionable whether towing or escorting boats through Indonesia's exclusive economic zone amounted to an exercise of the freedom of navigation.²²⁹

2.3 Rescue-at-sea

Asylum seekers have been escaping by sea for years.²³⁰ Historically, international law was unclear about State responsibility for persons who, having been rescued at sea, were unable or unwilling to return to their country of origin. There were several options open to the State where those rescued arrived: it could refuse disembarkation absolutely and require ships' masters to remove them from the jurisdiction, or it could make disembarkation conditional upon satisfactory guarantees as to resettlement, care, and maintenance, to be provided by flag or other States, or by international organizations. Amendments in 2004 to key international maritime treaties for the first time imposed obligations on States to cooperate and coordinate the disembarkation of those rescued at sea,²³¹ irrespective of the nationality or status of those rescued,²³² although practical and operational challenges remain, especially concerning processing and durable solutions.²³³ Since asylum seekers' protection claims can only be finally determined after disembarkation,²³⁴ it is important that they are taken to a place of safety without delay.²³⁵ While a categorical refusal of disembarkation cannot be automatically equated with breach of the principle of *non-refoulement* (even

though it may result in serious consequences for asylum seekers), a refusal to take account of their claims, either on the specious basis that they have not ‘entered’ State territory or on the (disputed) ground that they are the responsibility of the flag or any other State, will not suffice to avoid liability for breach of the principle.²³⁶

The duty to rescue those in distress at sea is firmly established in both treaty²³⁷ and general international law,²³⁸ and applies in all maritime zones.²³⁹ Article 98(1) of UNCLOS 82, for example, requires ship captains to ‘render assistance to any person found at sea in danger of being lost’, and ‘to proceed with all possible speed to the rescue of persons in distress’, insofar as this is reasonable and will not seriously endanger the ship, its crew or its passengers.²⁴⁰ Similarly, the SOLAS Convention provides that the ‘master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance’.²⁴¹ The importance of this duty is reflected in the municipal law of a number of States, which imposes criminal liability on ship masters who fail to render assistance to persons in distress at sea.²⁴²

A number of international treaties require States to maintain effective search and rescue facilities,²⁴³ to provide assistance ‘regardless of the nationality or status of such a person’,²⁴⁴ and to deliver those rescued to ‘a place of safety’ (a duty that falls primarily on the State responsible for the SAR region in which people are rescued). While this is commonly regarded as the nearest port of call,²⁴⁵ in the asylum context it must necessarily be interpreted in light of the principle of *non-refoulement*.²⁴⁶

The non-binding Guidelines on the Treatment of Persons Rescued at Sea, which were developed to assist governments and shipmasters in implementing the 2004 amendments, add that a ‘place of safety’ is somewhere ‘where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met ... [and] a place from which transportation arrangements can be made for the survivors’ next or final destination’.²⁴⁷ A vessel may be an interim, but not a final, place of safety.²⁴⁸ The Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea provide further guidance, and note relevantly that: ‘If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each

Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support'.²⁴⁹ However, there is no clear consensus in international or regional law that such a duty exists, which is a major gap in the treaty regime.²⁵⁰

UNHCR regards the 'coastal State in the immediate vicinity of the rescue' as the State that will generally be responsible in the first instance for admitting the rescued asylum seekers and providing access to asylum determination procedures,²⁵¹ in the absence of established mechanisms for responsibility-sharing.²⁵² However, it has 'long recognized that the disembarking State need not be solely responsible for providing protection and solutions'.²⁵³ This is an unsettled area, where the law of the sea and international refugee and human rights law intersect; it will likely continue to be contested until such time as States are able to agree on the modalities for sharing responsibility.²⁵⁴

UNHCR's Executive Committee first acknowledged the problem in 1976, when it stressed the obligations of ships' masters and States, and called for the grant of first asylum.²⁵⁵ Over the next 10 or so years, many thousands of Indo-Chinese refugees were successfully rescued and disembarked under schemes directly linked to resettlement offers.²⁵⁶ In the meantime, debate continued over the principles that could, or ought, to govern, and neither flag State nor first port of call nor residual responsibility ever established itself in the practice of States. Solutions continued to be found within a political process that remained committed to resettlement until, with the adoption of the Comprehensive Plan of Action in 1989, the groundwork was laid for bringing this particular crisis to an end.²⁵⁷ The urgent need for disembarkation faded from the international agenda, as did the idea that all members of the group were entitled to resettlement. The absence of agreement on principles and modalities for solutions emerged once again, however, but now within a more complex world of rescue, safety of life at sea, and disembarkation in a place of safety.

2.3.1 International cooperation and the case of the Mediterranean

With increasing numbers of refugees, asylum seekers, and migrants taking the often risky maritime route to Europe,²⁵⁸ the Mediterranean became something of a proving ground during the first two decades of the 21st century; a few States questioned the applicability of certain protective principles in the context of extra territorial maritime operations, for example, but the European Court of Human Rights quickly confirmed that liability for human rights violations can and does

follow the flag.²⁵⁹ What remains under-examined, however, is the question of collective responsibility in this shared and much exploited space of some 2.5 million square kilometres, where 23 States have littoral responsibilities and 12 or 13 of them oversee search and rescue regions.

In this space, through the operations of individual Member States, but particularly through Frontex, the European Border and Coastguard Agency,²⁶⁰ the EU has staked a claim to control and ‘manage’ large areas of the Mediterranean with a view to curbing irregular migration.²⁶¹ Frontex is thus also the practical manifestation of the movable frontier, pushing EU borders beyond territory, and out into common spaces, such as the high seas, and even into the maritime zones of third States. If a measure of collective responsibility is to attach to its operations and to those of individual States, then a starting point is the legal framework that already encompasses international obligations owed with regard to victims of smuggling and trafficking, to those over whom States may exercise authority and control, or who may be rescued when found in distress at sea.²⁶²

The key elements of responsibility in such situations can be inferred from established doctrine.²⁶³ First, there is *knowledge of risk*, of danger to life at sea, as a result of smuggling and trafficking; secondly, there is *awareness of obligations*—to set up search and rescue regions in the area, to provide and/or to coordinate search and rescue services, to combat smuggling and trafficking, including by taking preventive measures against non-State actors whose conduct violates human rights, and to protect human rights—and thirdly, there is *the capacity and the means* to respond through surveillance and rescue, both individually and collectively.

The Mediterranean engages many potential actors—States, State organs, and institutions created by States—few of which will necessarily have a direct juridical relationship with the individuals at risk. Nevertheless, the circumstances and the known facts clearly raise the question of the individual and collective responsibility of identifiable States and entities to save lives at risk and to ensure, respect, and protect human rights. This is a positive protection obligation, not immediately absolute in the sense of the prohibition of torture, for example, but a positive ‘due diligence’ obligation to save lives;²⁶⁴ and thereafter to treat those rescued or otherwise brought within the jurisdiction, authority, or control, in accordance with settled law.

Clearly, the EU and its Member States know of the risks being run in the

Mediterranean. they are also aware of their international obligations, and they have the capacity to save lives. In fact, the EU acknowledges a considerable body of applicable international law, both in the Schengen Borders Code,²⁶⁵ and in the rules for Frontex search, rescue, and interception operations at sea contained in the 2014 Regulation on rules for the surveillance of the external sea borders.²⁶⁶ This Regulation emphasizes the need for ‘full compliance with relevant Union law, including the Charter of Fundamental Rights … and relevant international law’.²⁶⁷ Measures taken are to be ‘proportionate’, ‘non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of *non-refoulement*’.²⁶⁸ In addition, the operative provisions of the Regulation underscore the obligation of Member States to render assistance to any vessel or person in distress at sea, and prohibit the disembarkation of intercepted or rescued persons in a country where they would risk serious harm.²⁶⁹

At the same time, however, there is an apparent obligation deficit which needs to be made good, particularly with regard to disembarkation.²⁷⁰ There may be no clear rule that obliges any particular State to accept disembarkation, but rescue or interception by public ships (that is, a State’s naval or equivalent vessels), engages State responsibility directly.²⁷¹ It may also engage the institutional responsibility of organizations involved in the coordination of interception operations, or more generally in policing and the pursuit of common or community goals. States committed to search and rescue in the Mediterranean fulfil a community responsibility, and a formula for equitable sharing is called for which, while securing prompt disembarkation, then leads on to land-based assistance, processing, and solutions.²⁷² A different approach is still required for merchant vessels and for private vessels engaged in humanitarian search and rescue operations; what is needed, as the Indo-China experience demonstrated, is an internationally or regionally agreed and administered scheme or pool of disembarkation guarantees, coupled with assistance in interim care and maintenance, and linked to resettlement or onward processing.²⁷³

If those intercepted or rescued at sea are not disembarked in European space, then additional measures of protection will also be required: effective, open, and internationally supervised agreements will be essential to ensure their landing and accommodation in a place of safety, their treatment and protection in accordance with applicable international and European standards, and a solution appropriate to individual circumstances, such as asylum, resettlement, facilitated

third country migration, or return in safety and dignity to countries of origin. Given the extraterritorial reach of Europe's obligations, whether under EU law, the EU Charter, or ECHR 50, indefinite detention of refugees, asylum seekers, and migrants in sub-optimal conditions may well entail liability across a broad spectrum of actors.²⁷⁴

As of the time of writing, the EU and Member States continued to deal in an ad hoc and inconsistent fashion with the challenges of rescue, disembarkation, and relations with countries of origin and transit, particularly in Africa, and with an unstable Libya, from which many of the journeys in search of Europe begin.²⁷⁵ Essential reforms of the Common European Asylum System also remained on hold, and the possibility of greater equity in the allocation of responsibilities was still a distant prospect.

Ironically, more has been achieved in providing places of refuge for *ships* in need of assistance, than for people. One of the best ways to deal with a ship at risk, for example, after a fire or explosion on board, is to transfer cargo and bunkers in a place of refuge near to land. That may endanger the coastal State, but the IMO has developed guidelines which provide a non-exhaustive list of objective and relevant criteria which that State ought to consider, 'in a balanced manner and give shelter whenever reasonably possible'; and it has recommended that States set up appropriate institutional mechanisms, so that emergencies can be dealt with promptly and efficiently.²⁷⁶ The EU has its own version, the 'VTM Directive', as a result of which EU Member States may not issue an outright refusal of a place of refuge, but are instead obliged to carry out an initial assessment on the basis of certain parameters before making a decision on accommodating a ship in distress.²⁷⁷ The EU VTM Directive states that the safety of human life and the environment are the overriding concern, and issues of financial security, while important, are secondary.

In recent years, the rescue and protection of refugees at sea has been a core focus for UNHCR, including a two-year 'Global Initiative on Protection at Sea' (2014–16) which sought to catalyse action to create protection-sensitive responses and prevent further loss of life at sea through a series of regional consultations and other expert meetings.²⁷⁸ 'Protection at Sea' was also the theme of the 2014 High Commissioner's Dialogue on Protection Challenges. In 2011, an Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea in Djibouti proposed a model framework agreement for responsibility-sharing,²⁷⁹ which suggested that arrangements should address the allocation of

responsibility for coordination; search-and-rescue activities; identification of a safe and appropriate disembarkation country; reception arrangements, first assistance, and protection from *refoulement*; identification of those seeking asylum or with particular needs or vulnerabilities, and referral to appropriate processes, procedures and services; determination of international protection needs; outcomes for rescued persons (including local settlement and integration, or resettlement, for those determined to be refugees; regularization, migration options, or return for those without international protection needs; and responses for non-refugees with specific needs such as people with disabilities, unaccompanied or separated children, or victims of trafficking); and arrangements for capacity-building support to disembarking countries.²⁸⁰

In all cases, the international protection regime, comprising refugee law, human rights law, and more generally applicable rules informed by the principle of good faith, provides a normative and institutional framework for solutions.²⁸¹ Its very conception is premised on States acting cooperatively, rather than in their own self-interest.²⁸²

¹ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued with Guidelines, 2019) para. 28.

² Brownlie, I., *System of the Law of Nations: State Responsibility, Part I* (1983) 150–1. In relation to conduct that may be attributed to a State, see arts. 4–11 of the Articles on the Responsibility of States for Internationally Wrongful Acts: *Yearbook of the International Law Commission* (2001) vol. II (Part Two); UNGA res. 56/83 (12 Dec. 2001), as corrected by UN doc. A/56/49 (Vol. I) Corr. 4.

³ Brownlie (ⁿ 2) 135–7, 159–66.

⁴ See further Ch. 8.

⁵ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (Jan. 2007) para. 8, referring to UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’: EC/GC/01/12 (31 May 2001) paras. 4–5; Executive Committee Conclusion No. 81 (XLVIII) ‘General’ (1997) para. (h); Conclusion No. 82 (XLVIII) ‘Safeguarding Asylum’ (1997) para. (d)(iii); Conclusion No. 85 (XLIX) ‘International Protection’ (1998) para. (q); Conclusion No. 99 (LV) ‘General Conclusion on International Protection’ (2004) para. (l).

⁶ On extraterritorial processing, see Ch. 8, s. 6.7.

⁷ As explained in Ch. 5, the principle has crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of people to countries where they may face persecution or other serious harm. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction. The US objection to the principle's extraterritorial application, which was upheld in *Sale, Acting Commissioner, INS v Haitian Centers Council*, 509 US 155 (1993) does not amount to a persistent objection sufficient to displace the customary rule with respect to the US. Throughout the first decade of the Haitian interdiction programme, senior US officials repeatedly affirmed the principle of *non-refoulement*, not only in a general sense, but also in the specific context of the Haitian operations. Further, the relevant Executive Order (Executive Order 12324 (29 Sep. 1981) s. 3) stated that '[t]he Attorney General shall ... take whatever steps are necessary to ensure ... the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland'. This combination of declarations in the sense of an international obligation with practice confirming that obligation is conclusive evidence of the applicability of the principle of *non-refoulement* to US agents' extraterritorial activities. See the third edition of this work: 246–50.

⁸ See, for example, Executive Committee Conclusion No. 6 (XXVIII) 'Non-refoulement' (1977) para. (c), which reaffirms 'the fundamental importance of the principle of *non-refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees': UNHCR Advisory Opinion ([n 5](#)) para. 6.

⁹ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-25/18 of 30 May 2018 requested by the Republic of Ecuador: The Institution of Asylum and Its Recognition as a Human Rights in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7, and 22.8 in relation to Article 1(a) of the American Convention on Human Rights) para. 187 (fns omitted).

¹⁰ *Ibid.*, para. 190 (fn omitted). See also *Wong Ho Wing v Peru* (IACtHR, 30 Jun. 2015) para. 130.

¹¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 2 (ICCPR 66) read in conjunction with Human Rights Committee, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant': UN doc. CCPR/C/21/Rev.1/Add.13 (2004) para. 10; Committee against Torture, 'Conclusions and Recommendations of the Committee Against Torture: United States of America': UN doc. CAT/C/USA/CO/2 (2006) para. 15; Committee against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties': UN doc. CAT/C/GC/2 (2007) para. 16; Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep. 136, paras. 109, 111, 113. See further Goodwin-Gill, G. S., 'The Extra-Territorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction', in

Boisson de Chazournes, L. & Kohen, M., eds., *International Law and the Quest for its Implementation* (2010); Milanovic, M., *Extraterritorial Application of Human Rights Treaties: Laws, Principles, and Policy* (2011); den Heijer, M., *Europe and Extraterritorial Asylum* (2012). On the committees' relatively expansive approach to extraterritorial jurisdiction, see Çali, B., Costello, C., & Cunningham, S., 'Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies' (2020) 21 *German Law Journal* 355, 363–5.

¹² *Lopez Burgos v Uruguay*, Comm. No. R.12/52, UN doc. A/36/40 (1981) para. 12.3; *Celiberti de Casariego v Uruguay*, Comm. No. R.13/56, UN doc. A/36/40 (1981) para. 10.3.

¹³ *Legal Consequences of the Construction of a Wall* (n 11) para. 109. The court relied in part on jurisprudence of the Human Rights Committee, noting that the *travaux préparatoires* of ICCPR 66 confirm this interpretation.

¹⁴ See, for example, Committee against Torture, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture: United States of America': UN doc. CAT/C/USA/CO/2 (25 Jul. 2006) para. 20.

¹⁵ *Al-Skeini v United Kingdom*, App. No. 55721/07 (Grand Chamber, 7 July 2011); *Al-Saadoon v United Kingdom*, App. No. 61498/08 (2 March 2010); *Lopez Burgos v Uruguay* (n 12) para. 12; *de Casariego v Uruguay* (n 12) para. 10. See also Human Rights Committee (n 11) para. 10; Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel': UN doc. CCPR/C/79/Add.93 (18 Aug. 1998) para. 10; 'Concluding Observations of the Human Rights Committee: United States of America': UN doc. CCPR/C/79/Add.50 (6 Apr. 1995) para. 284; Inter-American Human Rights Commission, *Coard v United States*, Case No. 10.951, Rep. No. 109/99 (29 Sep. 1999) para. 37; Inter-American Human Rights Commission, *Haitian Refugee Cases*, Case No. 10.675, Inter-AmCHR. 334, OEA/Ser.L/V/II.85, doc. 9 rev. (1994)—ruling on the issue of admissibility that US interdiction policies appeared to violate, among others, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

¹⁶ Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (2011) 125. See also Fischer-Lescano, A., Löhr, T., & Tohidipur, T., 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *IJRL* 256, 267–8 (fns omitted): 'the decisive factor cannot be the place where the person concerned and the acting state official are located. Rather, the only point at issue is whether the person concerned is under the control of state institutions or is affected by their actions. There can be no place outside the country of origin of the person concerned where the Refugee Convention's *non-refoulement* principle does not apply—whether this be on a state's own territory, at its borders, beyond national borders, in transit zones or in areas declared as international zones.'

¹⁷ 'In UNHCR's view, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the

prohibition of *refoulement* under international refugee law, given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis’: UNHCR Advisory Opinion ([n 5](#)) para. 42 (fn omitted); see also para. 34. ‘Although the territorial scope of Article 33 of the 1951 Convention is not explicitly defined, the complementarity and mutually reinforcing nature of international human rights law and international refugee law speak strongly in favour of delineating the same territorial scope for all expressions of the *non-refoulement* principle’: Klug, A. & Howe, T., ‘The Concept of State Jurisdiction and the Applicability of the *Non-refoulement* Principle to Extraterritorial Interception Measures’, in Ryan, B. & Mitsilegas, V., eds., *Extraterritorial Immigration Control: Legal Challenges* (2010) 71. In practice, there are few (if any) cases where a breach of the principle under human rights law would not also amount to a breach under the Refugee Convention. Thus, arguments seeking to draw a distinction between the extraterritorial reach of the two may, in effect, be of limited utility.

¹⁸ Refugee Convention Preamble, para. 2; see also Kälin, W., Caroni, M., & Heim, L., ‘Article 33, para. 1’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1361.

¹⁹ UNHCR’s *amicus* brief in *Sale* ([n 7](#)) in (1994) 6 *IJRL* 85, 92. See also UNHCR’s *amicus* submissions in *CPCF v Minister for Immigration and Border Protection* (15 Sep. 2014) paras. 13–19 (relating to *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1).

²⁰ See, for example, UNHCR Advisory Opinion ([n 5](#)) para. 33 (fns omitted): ‘Subsequent State practice is expressed, *inter alia*, through numerous Executive Committee Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned. Subsequent State practice which is relevant to the interpretation of the *non-refoulement* obligation under the 1951 Convention and 1967 Protocol is also evidenced by other international refugee and human rights instruments drawn up since 1951, none of which places territorial restrictions on States’ *non-refoulement* obligations.’

²¹ Hathaway, J. C., *The Rights of Refugees under International Law* (2nd edn, 2021) 384, see generally 379–99; Lauterpacht, E. & Bethlehem, D., ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) paras. 76–86; Kälin, Caroni, & Heim ([n 18](#)) 1361; Wouters, K., *International Legal Standards for the Protection from Refoulement* (2009) 50; Goodwin-Gill, G. S., ‘The Haitian Refoulement Case: A Comment’ (1994) 6 *IJRL* 103, 103; Kälin, W., *Das Prinzip des Non-Refoulement: Das Verbot der Zurückweisung, Ausweisung und Auslieferung von Flüchtlingen in den Verfolgerstaat im Völkerrecht und im schweizerischen Landesrecht* (1982); ‘The Michigan Guidelines on Refugee Freedom of Movement’ (2018) 39 *Michigan Journal of International Law* 5, para. 9; Bank, R., ‘Introduction to Article 11: Refugees at Sea’, in Zimmermann ([n 18](#)) 833–6; ‘Summary Conclusions: The Principle of Non-Refoulement’, in Feller, Türk, & Nicholson ([n 21](#)); Gammeltoft-Hansen & Hathaway ([n 1](#))

247–8; Moreno-Lax, V., *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017) 8; Klug & Howe (n 17); den Heijer, M., ‘Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case’ (2013) 25 *IJRL* 265; Coleman, N., ed., *European Readmission Policy: Third Country Interests and Refugee Rights* (2009) 253. On the extraterritorial applicability of the Convention to any territory ‘under the *de facto* effective control of the State party’, see ‘Conclusions and Recommendations on the United States of America’: UN doc. CAT/C/USA/C/2 (1–19 May 2006) para. 15; *JHA v Spain*, UN doc. CAT/C/41/D/323/2007 (21 Nov 2008); see also, ‘General Comment 2: Implementation of Article 2 by States Parties’ (n 11) para. 6.

²² UNHCR Advisory Opinion (n 5) para. 24 (fn omitted); see also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1053 (30 June 2008) para. 18; Executive Committee Conclusion No. 6 (1977) para. (c); Executive Committee Conclusion No. 15 (1979, paras. (b)–(c); Executive Committee Conclusion No. 22 (1981) para. II.A.2. The Refugee Convention requires the asylum seeker to be outside his country of origin or habitual residence in order for the principle to apply: *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2005] 2 AC 1. However, human rights law may preclude a State from handing over a person to authorities where he or she would be at risk: see, for example, *R (on the Application of ‘B’) v Secretary of State for the Foreign and Commonwealth Office* [2005] QB 643, [2004] EWCA Civ 1344; *Al-Saadoon and Mufdhi v United Kingdom*, App. No. 61498/08 (Fourth Section, 2 Mar. 2010); final (4 Oct. 2010).

²³ Lauterpacht & Bethlehem (n 21) para. 67. They also consider that if an individual has taken refuge in a diplomatic mission within his or her own country, then the protecting State is subject to the prohibition on *refoulement*: para. 114. See also Jennings, R. & Watts, A., eds., *Oppenheim’s International Law*, vol 1 (9th edn., 1996) 1084–5 on State practice relating to ‘urgent and compelling reasons of humanity’ as a basis for asylum; *B’s Case* (n 22); Goodwin-Gill, G. S., ‘Asylum (*Colombia v Peru*) 1949 and Request for Interpretation of the Judgment of 20 November 1950 in the *Asylum Case (Colombia v Peru)* 1950’, in Wojcikiewicz Almeida, P. & Sorel, J.-M., eds., *Latin America and the International Court of Justice: Contributions to International Law* (2017). On collective expulsion, see Ch. 11, s. 1.2.5.

²⁴ Kälin, Caroni, & Heim (n 18) 1361; Gammeltoft-Hansen (n 16) 104 ff. In *Medvedyev v France*, App. No. 3394/03 (Grand Chamber, 29 March 2010) paras. 66–7, the Grand Chamber of the European Court of Human Rights found that such elements as boarding a vessel, keeping crew under guard, rerouting the vessel by towing it under government authority constituted ‘full and exclusive’ control such that the vessel was under France’s jurisdiction.

²⁵ Lauterpacht & Bethlehem (n 21) para. 67.

²⁶ See UNHCR’s *amicus* brief in *Sale* (n 19) 99–102; UNHCR’s *amicus* submissions in *CPCF* (n 19) para. 20.

²⁷ See UNHCR’s *amicus* brief in *Sale* (n 19) 90.

²⁸ See UNHCR’s Advisory Opinion ([n 5](#)) para. 26.

²⁹ *Ibid.*, para. 43.

³⁰ See discussion and sources in Goodwin-Gill ([n 21](#)) 105–9; also, the defendants’ written submissions in *CPCF* (30 Sep. 2014) paras. 20 ff. In *CPCF* ([n 19](#)), the Commonwealth cited one UK and two Australian authorities as supporting the position in *Sale* ([n 7](#)) para. 20. However, neither of the Australian cases was directly on point: UNHCR’s *amicus* submissions in *CPCF* ([n 19](#)) para. 31. In the UK case, *Roma Rights* ([n 22](#)), only Lord Hope (at para. 68) expressly adopted the reasoning in *Sale*, and his remarks were *obiter*. The circumstances in *Roma Rights* were very different from those in *Sale*: the appellants had not yet left their country of origin, and observations about the Refugee Convention’s application must be understood in that context. Lord Bingham accepted that States may have extraterritorial jurisdiction in international law: para. 21. More recently, the UK Supreme Court has noted that art. 33 of the Refugee Convention applies ‘subject to the contracting state’s jurisdiction’, distinguishing it from other provisions of the Convention that apply only when a refugee is physically present in a State’s territory: *R (ST) v Secretary of State for the Home Department* [2012] UKSC 12, [2012] 2 AC 135, para. 21.

³¹ *Sale* ([n 7](#)). For detailed analysis of the case, and US practice, see the third edition of this work, 247 ff. See also Hathaway ([n 21](#)) 380–87, who describes the decision as an ‘outlier’ (380). The objections by the United States to the extraterritorial application of the principle of *non-refoulement* was undermined by its own earlier practice. Executive declarations of intent to abide by art. 33, substantiated by a decade of practice in which all interdicted Haitians were screened, sufficiently confirmed its ‘extraterritorial’ obligations. The option of ‘persistent objector’ is not open to late arrivals, while evidence of ‘subsequent objection’ sufficient to establish a new rule is equally lacking. Cf. Crawford, J., *Brownlie’s Principles of Public International Law* (9th edn., 2019) 26–7; UNGA res. 73/203, ‘Identification of Customary Law’ (20 Dec. 2018) Annex, Conclusion 15 (while a rule is ‘in the process of formation’).

³² Gammeltoft-Hansen & Hathaway ([n 1](#)) 247.

³³ See further Goodwin-Gill ([n 21](#)) 104–5. According to Harold Koh, who litigated the case, ‘the Supreme Court made bad law’; the decision was, however, confined to the legality of the US interdiction policy under domestic law, not international law: Koh, H. H., ‘The “Haiti Paradigm” in United States Human Rights Policy’ (1994) 103 *Yale LJ* 2391, 2402, also 2403. Gammeltoft-Hansen ([n 16](#)) 122 argues that *Sale* ([n 7](#)) ‘provides an excellent example of why national court decisions, even from the highest instance, should not be regarded as final settlements’.

³⁴ Koh ([n 33](#)) 2416. At 2419, he stated: ‘Neither the Justices [on the court at that time, by contrast to some of their predecessors] nor their clerks display command of basic international law precepts’, recalling remarks made by Blackmun J the day after announcing his retirement from the court: see Blackmun, H. A., ‘The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind’ (1995) 88 *Proceedings of the*

ASIL Annual Meeting 383, 388.

³⁵ *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, 67.

³⁶ For further views, see the dissenting judgment of Blackmun J and Goodwin-Gill's 'Comment' (1994) 6 *IJRL* 71, 103.

³⁷ See UNHCR, 'Brief *amicus curiae*' (1994) 6 *IJRL* 85. Nor did it amount to a persistent objection, sufficient to displace the application of customary international law with respect to the US; see n 31. See further Ch. 5, s. 9.

³⁸ *Haitian Center for Human Rights v United States*, Case 10.675, Inter-American Commission on Human Rights (13 Mar. 1997) paras. 156–8. See also Human Rights Committee, 'United States of America' (n 15) para. 284.

³⁹ See, for example, Goodwin-Gill (n 21); Goodwin-Gill, G. S., 'YSL Sale Symposium: The Globalization of High Seas Interdiction—Sale's Legacy and Beyond' *Opinio Juris* (2014) <http://opiniojuris.org/2014/03/16/yale-sale-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/> and <http://opiniojuris.org/2014/03/16/yale-sale-symposium-sales-legacy-beyond-part-ii/>; *Haitian Center for Human Rights* (n 38) paras. 156–8, 163, 171; see also Human Rights Committee, 'United States of America' (n 15) para. 284.

⁴⁰ See, for example, UNHCR's *amicus* submissions in *CPCF* (n 19) paras. 27–33; UNHCR, 'UNHCR Legal Position: Despite Court Ruling on Sri Lankans Detained at Sea, Australia Bound by International Obligations' Press release (4 Feb. 2015) <http://www.unhcr.org/54d1e4ac9.html>. Further, as UNHCR noted in its *amicus* brief to the US Supreme Court in *Sale* (n 19) 92: 'No State has, to UNHCR's knowledge, resorted to the implementation of a formal policy of intercepting refugees on the high seas and repatriating them against their will. This fact itself confirms the international understanding that Article 33 prohibits such conduct.' See also Ch. 5, text to fn 152 (on acquiescence).

⁴¹ Human rights obligations are certainly capable of binding the State in its extraterritorial activities. Whether they do, and what the consequences are, depends first on the nature and content of the primary rule establishing the obligation; secondly, on whether the claimant comes within the scope of that rule; and thirdly, on whether the injury, the act, is attributable to the State impugned. Attribution, in its State responsibility sense, links the acts of State organs to the (legal) responsibility of the State itself.

⁴² The two-step process was set out in reverse (jurisdiction, then merits) in *Hirsi* (n 35). Giuffré writes: 'It is important to emphasize that neither the denial of entry of a vessel into territorial waters, nor the refusal to allow disembarkation, amount per se to a breach of the principle of *non-refoulement*. For such a violation to occur, it is necessary that interdiction results in the physical return of intercepted refugees to territories (either countries of origin or transit) where their life and liberty would be threatened. The evaluation of a third country's safety is, therefore, a *conditio sine qua non* for EU member states to avoid responsibility both under human rights treaties and general international law.' Even if a State is considered 'generally safe because of the presence of adequate asylum procedures and judicial oversight, every individual should be entitled to rebut the presumption of safety of that country for him

or her in their particular case': Giuffré, M., 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *IJRL* 692, 699 (fns omitted). For a general overview of States' extraterritorial human rights obligations and the question of jurisdiction, see Goodwin-Gill (n 11).

⁴³ Articles on the Responsibility of States for International Wrongful Acts (n 2), arts. 1 and 2, in particular.

⁴⁴ Klug & Howe (n 17) 100 (emphasis added, fn omitted). They note that the European Court of Human Rights sometimes unhelpfully blurs the two. See also Giuffré (n 42) 720–3.

⁴⁵ Klug & Howe (n 17) 76–82.

⁴⁶ *Ibid* 82–5.

⁴⁷ *Ibid* 85–7.

⁴⁸ *Ibid* 87–8.

⁴⁹ Milanovic, M., 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *HRLR* 411, 417.

⁵⁰ See, for example, *Issa v Turkey* (2005) 41 EHRR 27 para. 71; *Lopez Burgos* (n 12) para. 12.3, referred to in Klug & Howe (n 17) 88; see also jurisprudence cited in Milanovic (n 11).

⁵¹ As Judge Bonello stated in his concurring opinion in *Al-Skeini* (n 15) the court's case law on the jurisdiction of the Contracting Parties has 'been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies' (para. 4) thus resulting in 'a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best' (para. 5). For an analysis of the evolution of the court's jurisprudence on this subject, and a critique, see Milanovic, M., '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 *EJIL* 121; Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016) 238–49.

⁵² Costello (n 51) 241, referring to the circumstances in *Medvedyev* (n 24).

⁵³ *Al-Skeini* (n 15) para. 137.

⁵⁴ den Heijer (n 21) 274, referring to Milanovic (n 51) 131–3 (in relation to the court's ambivalence on this point).

⁵⁵ *Hirsi* (n 35) para. 79.

⁵⁶ *Ibid.*, para. 81.

⁵⁷ Costello (n 51) 246. For instance, Australia has supplied boats to Sri Lanka for the purpose of turning back asylum seekers attempting to leave. See also Klug & Howe (n 17) 96–7; Giuffré (n 42) 723–32; Giuffré, M., 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy* (2012)' (2012) 61 *ICLQ* 728; den Heijer, M., 'Issues of Shared Responsibility before the European Court of Human Rights' (ACIL Research Paper No. 1012-04, 2012).

⁵⁸ Meron has emphasized the importance of looking at the 'nature and content' of the particular right, or the language of the particular treaty in general, either or both of which

might indicate a territorial limitation: Meron, T., ‘Extraterritoriality of Human Rights Treaties’ (1995) 89 *AJIL* 78. See also den Heijer ([n 57](#)).

[59](#) Judge Bonello, Concurring Opinion in *Al-Skeini* ([n 15](#)) para. 13. ‘Jurisdiction means no less and no more than “authority over” and “control of”. In relation to [European] Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional—in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction’: para. 12. Para. 15 points to the absurdity of drawing finer distinctions in certain circumstances.

[60](#) See also s. 2.2.1, which focuses on permissible operations on the high seas under the international law of the sea, and earlier analysis in the second edition of this work ([Ch. 5](#), s. 4.3). See also [Ch. 8](#), s. 4.

[61](#) See *Amuur v France* (1996) 22 EHRR 533; *ZA and Others v Russia*, App. Nos. 61411/15, 61420/15, 61427/15, and 3028/16 (Grand Chamber, 21 Nov. 2019); Hathaway ([n 21](#)) 397–9. For further analysis, see European Union Agency for Fundamental Rights, *Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law* (2016) 24–6.

[62](#) Goodwin-Gill ([n 21](#)) 105, referring to *Amuur* ([n 61](#)) and *Hirsi* ([n 35](#)); see also Bank ([n 21](#)) 832–41; Frontex Consultative Forum on Fundamental Rights, ‘Response to request for information received from the FRALO’ (24 Feb. 2021) As the European Court of Human Rights explained in *Medvedyev* ([n 24](#)) para. 81, ‘the special nature of the maritime environment … cannot justify an area outside the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees provided by the Convention which the States have undertaken to secure to everyone within their jurisdiction’. See also Gammeltoft-Hansen ([n 16](#)) 120–5. For further analysis, see European Union Agency for Fundamental Rights ([n 61](#)) 27–30, 32–6; for examples, see Ghezelbash, D., *Refuge Lost: Asylum Law in an Interdependent World* (2018) Ch. 4, 169–71.

[63](#) *MA v Lithuania*, App. No. 59793/17 (11 Dec. 2018) concurring opinion, para. 7 (fn omitted).

[64](#) UNHCR Executive Committee, Conclusion No. 97, ‘Protection Safeguards in Interception Measures’ (2003) para. (a)(i). See also Statement by Legal Scholars Regarding the Situation concerning Sri Lankan Asylum Seekers (7 July 2014) <http://www.kaldorcentre.unsw.edu.au/Statement>; Mathew, P., ‘International Association of Refugee Law Judges Conference: Address: Legal Issues concerning Interception’ (2002) 17 *Georgetown Immigration Law Journal* 221.

[65](#) For instance, in *MSS v Belgium and Greece* (2011) 53 EHRR 2, the European Court of Human Rights held that Belgium violated its obligations under human rights law by returning asylum seekers to Greece when it was publicly known that they were ill-treated there and at

risk of *refoulement*. The court noted that asylum seekers were ‘a particularly underprivileged and vulnerable population group in need of special protection’: MSS (n 65) para. 251.

⁶⁶ *Hirsi* (n 35) paras. 133, 147, 157, respectively. See discussion in Trevisanut, S., ‘The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea’ (2014) 27 *Leiden Journal of International Law* 661, 669. Moreno-Lax (n 21) 362 argues that ‘[i]mplicit in the ECHR, there is an individual entitlement of asylum seekers to have their rights guaranteed on consideration of their particular situation, by means of a procedure that permits assessment of their protection needs—even in extraterritorial situations’.

⁶⁷ UNHCR, ‘General Legal Considerations of Relevance to NATO’s Engagement with the Refugee and Migrant Movements in the Aegean Sea’ (8 Mar. 2016) para. 7; *Hirsi* (n 35) para. 133; see also *FG v Sweden*, App. No. 43611/11 (23 Mar. 2016) para. 127.

⁶⁸ Section 22A(1) of Australia’s Maritime Powers Act 2013 (Cth) provides that the authorization of maritime powers is not invalid (under domestic law): ‘(a) because of a failure to consider Australia’s international obligations, or the international obligations or domestic law of any other country; or (b) because of a defective consideration of Australia’s international obligations, or the international obligations or domestic law of any other country; or (c) because the exercise of the power is inconsistent with Australia’s international obligations.’ See also Migration Act 1958 (Cth), s. 197C, with respect to removal of unlawful non-citizens, and text to n 102.

⁶⁹ See further s. 1.3.

⁷⁰ See, for example, UNHCR, ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012); UNHCR’s *amicus* submission in *Hirsi* (n 35); MSS (n 65); UNHCR, ‘Asylum Processes’ (n 5); UNHCR Executive Committee Conclusion No. 8 (1977); UNHCR Executive Committee Conclusion No. 30 (1983) para. (e)(i); Lauterpacht & Bethlehem (n 21) para. 100; Kälin, Caroni, & Heim (n 18) 1369, 1375; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, (2011) 244 CLR 144, para. 125 (Gummow, Hayne, Crennan, & Bell JJ) para. 216 (Kiefel J); *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290; IACtHR (n 9) para. 122; see also n 5. See also Ch. 5, s. 2. Human rights law requires that individuals have a right to an effective remedy if States violate their obligations.

⁷¹ *Wong Ho Wing* (n 10) para. 129; see also IACtHR, Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (2014) Series A, No. 21, para. 232; *Pacheco Tineo Family v Plurinational State of Bolivia* (IACtHR, 25 Nov. 2013) para. 136.

⁷² *Hirsi* (n 35) para. 185.

⁷³ See UNHCR Global Consultations (n 70) para. 50. In *Hirsi* (n 35) para. 185, the court noted that there must be individual interviews carried out by trained personnel, assisted by interpreters and legal advisers.

⁷⁴ For example, in its *amicus curiae* brief in *Haitian Refugee Center, Inc. v Gracey*, UNHCR argued that ‘[g]iven the applicability of the principle of *non-refoulement* to the

broad field of State action or omission, the secondary principle of effectiveness of obligations itself obliges a State to establish procedures adequate and sufficient to ensure fulfilment of the primary duty ... [W]here ... a State of its own volition, elects to intercept asylum-seekers on the high seas and outside their own or any State's territory, particularly high standards must apply and be scrupulously implemented': Motion for Leave to file Brief *Amicus Curiae* and Brief *Amicus Curiae* of the United Nations High Commissioner for Refugees in support of Haitian Refugee Center, Inc., et al (8 Jul. 1985) Section III, 19–24. See also UNHCR's *amicus* submissions in *CPCF* (n 19); UNHCR, 'Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with respect to Extraterritorial Processing' (Nov. 2010) para. 2.

⁷⁵ Kaldor Centre for International Refugee Law, *Where To From Here? Report from the Expert Roundtable on Regional Cooperation and Refugee Protection in the Asia-Pacific* (2016) paras. 60–70 (on the Australian practice of 'enhanced screening' at sea); Dastyari, A. & Ghezelbash, D., 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32 *IJRL* 1; Schloenhardt, A. & Craig, C., '"Turning Back the Boats": Australia's Interdiction of Irregular Migrants at Sea' (2015) 27 *IJRL* 536; Fischer-Lescano, Löhr, & Tohidipur (n 16) 284 ff.; O'Sullivan, M., 'Interdiction and Screening of Asylum Seekers at Sea: Implications for Asylum Justice', in O'Sullivan, M. & Stevens, D., eds., *States, the Law and Access to Refugee Protection* (2017). Dastyari & Ghezelbash (*ibid.*, 24) note that the publicly available data suggests that less than one per cent of those processed at sea by the US and Australia were found to have protection needs.

⁷⁶ UNHCR (n 67) para. 9; see also UNHCR, 'High Commissioner's Dialogue on Protection Challenges: Protection at Sea', Background Paper (11 Nov. 2014) paras. 18, 29; UNHCR, 'Maritime Interception Operations' (n 74) paras. 55–9.

⁷⁷ Australian domestic law was altered after the decision in *Plaintiff M70* (n 70), such that international law considerations do not have to be taken into account in determining whether another country is 'safe' for the purposes of establishing transfer agreements: see Migration Act 1958 (Cth), s. 198AB(2): 'The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country.' While this could potentially result in violations of international law, there is very limited scope for domestic legal challenges because of the text of the legislation, and the absence of a bill of rights and/or relevant constitutional safeguards.

⁷⁸ MSS (n 65) para. 293.

⁷⁹ UNHCR (n 67) para. 7; *Hirsi* (n 35) para. 133; *FG* (n 67) para. 127. As the European Court of Human Rights stated in a different context in *MA v Lithuania* (n 63) para. 105 (emphasis added), 'the central question to be answered is not whether the applicants faced a real risk of ill-treatment in Chechnya, but whether the Lithuanian authorities *carried out an adequate assessment of the applicants' claim* that they would be at such a risk before returning them'.

⁸⁰ See *Amuur* (n 61), in which France was held to have violated art. 5 ECHR 50 when detaining asylum seekers in the transit zone of Paris-Orly airport.

⁸¹ Ibid., para. 52.

⁸² UNHCR, ‘The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’ (31 Jan. 1994) para. 33. On transit zones and excision of territory for migration purposes, see Gammeltoft-Hansen (n 16) 115–20.

⁸³ ZA (n 61) para. 148.

⁸⁴ Ibid., para. 86.

⁸⁵ Ibid., paras. 89–90. Compare with *Ilias and Ahmed v Hungary*, App. No. 47287/15 (Grand Chamber, 21 Nov. 2019) concerning a land border transit zone.

⁸⁶ ZA (n 61) paras. 109–10. The Grand Chamber noted (at para. 191) that this included having to ‘sleep for months at a stretch on the floor in a constantly lit, crowded and noisy airport transit zone without unimpeded access to shower or cooking facilities and without outdoor exercise’, and without access to medical or social assistance.

⁸⁷ Ibid., para. 138.

⁸⁸ Ibid., para. 156. The conditions in which they were held were also found to violate art. 3 ECHR 50: para. 197.

⁸⁹ See art. 2(1) ICCPR 66; art. 1 ECHR 50; art. 1 ACHR 69. Although ICCPR 66 employs the phrase, ‘and subject to its jurisdiction’, the Human Rights Committee has interpreted it to mean, ‘or’; see n 12 and text. The judgment of the Supreme Court of Canada in *Singh* is premised on the fact that those seeking Charter protection were physically present, and ‘by virtue of that presence, amenable to Canadian law’: *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177. Cf. habeas corpus jurisprudence: *Re Harding* (1929) 63 OLR 518 (Ontario Appeal Division); *Barnard v Ford* [1892] AC 326; Cf. Habeas Corpus Act 1679, s. 10; Habeas Corpus Act 1816, s. 5; Habeas Corpus Act 1862; *The Sitka* (1855) 7 *Opinions of the Attorney General*, 122; *Calvin’s Case* (1609) 7 Co. Rep. 1, cited by Farbey, J., Sharpe, R. J., & Atrill, S., *The Law of Habeas Corpus* (3rd edn., 2011) Ch. 9. See also *Ramirez v Weinberger* 745 F. 2d 1500 (DC Cir., 1984) where the court considered that US Constitutional guarantees of due process could be invoked by citizens whose property overseas is affected by US governmental action: ‘Where ... the court ... has personal jurisdiction over the defendants, the extraterritorial nature of the property involved in the litigation is no bar to equitable relief.’ So far as the power to expel and deport implicitly authorizes such extra-territorial constraint as is necessary to effect execution: *Attorney-General for Canada v Cain* [1906] AC 542, 546–7, then the legality of such constraint remains reviewable so long as it continues: Cf. *R v Secretary of State, ex parte Greenberg* [1947] 2 All ER 550. Note also UK Consular Relations Act 1968, s. 6 which provides that a crew member on board a ship flying the flag of a designated State who is detained for a disciplinary offence shall not be deemed to be unlawfully detained unless: ‘(a) his detention

is unlawful under the laws of that State or the conditions of detention are inhumane or unjustifiably severe; or (b) there is reasonable cause to believe that his life or liberty will be endangered for reasons of race, nationality, political opinion or religion, in any country to which the ship is likely to go.' The British Court of Appeal held that acts of British consular and diplomatic officials in Australia fell 'within the jurisdiction' of the United Kingdom, and that the Human Rights Act 1998 was thus applicable to their actions in that country: *B's Case* (n 22) para. 79.

⁹⁰ See Hamerslag, R. J., 'The Schiphol Refugee Centre Case' (1989) 1 *IJRL* 395; decisions of the French Constitutional Council (25 Feb. 1992) and Paris Tribunal de Grande (25 Mar. 1992) discussed in *Amuur* (n 61) paras. 21–2. Earlier cases dealt, for example, with habeas corpus and false imprisonment. See *Küchenmeister v Home Office* [1958] 1 QB 496, in which a non-citizen in transit at London Airport succeeded in an action for false imprisonment, when immigration officers prevented him from joining his connecting flight after he had been refused permission to enter.

⁹¹ See, for example, Foster, M. & Pobjoy, J., 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23 *IJRL* 583.

⁹² Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (Cth); see also Migration Act 1958 (Cth), s. 5, definitions of 'excised offshore place' and 'excision time'. For a detailed explanation of the history and operation of the Pacific Solution, see Gleeson, M., *Offshore: Behind the Wire on Manus and Nauru* (2016); Foster & Pobjoy (n 91); see also the third edition of this work for its operation between 2001–07. On transit zones and excision of territory for migration purposes, see Gammeltoft-Hansen (n 16) 115–20. On access to asylum procedures, see Giuffré, M., 'Access to Asylum at Sea? Non-Refoulement and a Comprehensive Approach to Extraterritorial Human Rights Obligations', in Moreno-Lax, V. & Papastavridis, E., eds., 'Boat Refugees' and Migrants at Sea: A Comprehensive Approach: Integrating Maritime Security with Human Rights' (2017).

⁹³ See Lukashuk, I. I., 'The Principle *pacta sunt servanda* and the Nature of Obligation under International Law' (1989) 83 *AJIL* 513, 515. See also the drafting records of the Vienna Convention on the Law of Treaties: *Yearbook of the International Law Commission* (1964) vol. I (Summary Records of the 16th Session) 727th Meeting (20 May 1964) 52 ff.; *Yearbook of the International Law Commission* (1964) vol. II (Documents of the 16th Session) 7; *Yearbook of the International Law Commission* (1965) vol. II (Documents of the First Part of the 17th Session) 788th Meeting (21 May 1965) 87, 88.

⁹⁴ 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts. 26, 31.

⁹⁵ Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, signed and entered into force 6 August 2013; Regional Resettlement Arrangement between

Australia and Papua New Guinea, signed and entered into force 19 July 2013; Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, signed and entered into force 8 September 2012; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, signed and entered into force 3 August 2013; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, signed and entered into force 29 August 2012: <https://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing>. Although the policy remains in place, the last transfers occurred in 2014. As at March 2021, nearly half of the ca. 3,000 people subjected to offshore processing were still waiting for a durable solution: Senate Estimates, Legal and Constitutional Affairs Legislation Committee, *Hansard* (22 March 2021) 93.

⁹⁶ Section 198AB of the Migration Act provides that the only condition for designating a country as a ‘regional processing country’ is that the Minister personally ‘thinks that it is in the national interest’, and in considering the ‘national interest’, the Minister must have regard to any assurances that country has given that it will not send someone to ‘another country 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’, and will enable an assessment to be made whether anyone transferred there is a refugee, in accordance with article 1A of the Refugee Convention, but such assurances ‘need not be legally binding’. This replaced a previous provision whereby the Minister could declare that a specified country provided: (a) access to effective asylum procedures; (b) protection for asylum seekers pending the determination of their refugee claim; and (c) protection for refugees pending voluntary repatriation or resettlement elsewhere; and that such protection accorded with relevant human rights standards: former s. 198A(3); see analysis of this provision in *Plaintiff M70* ([n 70](#)) in relation to Australia’s proposal to transfer asylum seekers to Malaysia.

⁹⁷ Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia relating to the Settlement of Refugees (26 Sep. 2014); Operational Guidelines for the Implementation of the Memorandum of Understanding on Settlement of Refugees in Cambodia (26 Sep. 2014). See further Gleeson, M., ‘The Australia–Cambodia Refugee Deal’ (Kaldor Centre for International Refugee Law, Research Brief, last updated Oct. 2019)

https://www.kaldorcentre.unsw.edu.au/sites/default/files/Research%20Brief_Cambodia_Oct2019.pdf

⁹⁸ See generally McAdam, J. & Chong, F., *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (2019) 145–7.

⁹⁹ See generally *ibid*, Ch. 5; UNHCR, ‘Monitoring Visit to the Republic of Nauru: 7–9 October 2013’ (26 Nov. 2013); UNHCR, ‘Monitoring Visit to Manus Island, Papua New Guinea: 23–25 October 2013’ (26 Nov. 2013); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) Ch. 12;

Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report* (2nd edn, 2017) 32–40. Australia provides vast financial contributions to Nauru and Papua New Guinea. Australia’s 2017–18 federal budget included funding for offshore processing and refugee settlement arrangements at an estimated cost of \$713,641 million (down from over \$1 billion in 2016–17): *Budget 2017–18: Portfolio Budget Statements 2017–18: Budget Related Paper No. 1.11: Immigration and Border Protection Portfolio* (Commonwealth of Australia, 2017) 25. Expenditure for offshore processing in 2022–24 is projected at \$300 million annually (for 110 people in Nauru and 130 in Papua New Guinea): Higgins, C., ‘With billions more allocated to immigration detention, it’s another bleak year for refugees’ The Conversation (13 May 2021).

¹⁰⁰ UNHCR ‘Monitoring Visit to Manus Island’ ([n 99](#)) paras. 123–4; Amnesty International, *This Is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2013) Ch. 8.

¹⁰¹ **McAdam & Chong** ([n 99](#)) 135–6, 138–9. For details, see Gleeson, M., ‘Australia’s Responsibility for Offshore Processing on Nauru and Manus Island’ (Kaldor Centre for International Refugee Law, Research Brief, last updated Aug. 2018).

¹⁰² Migration Act 1958 (Cth) (Australia), s. 197C. Following two cases, *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 and *AJL20 v Commonwealth of Australia* [2020] FCA 1305, an Act was passed in May 2021 ‘to clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach *non-refoulement* obligations’: Explanatory Memorandum to the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, 2.

¹⁰³ See also [Ch. 5](#), s. 1.

¹⁰⁴ Lauterpacht & Bethlehem ([n 21](#)). Art. 15(b) of the EU Qualification Directive only requires subsidiary protection to be granted when an individual fears removal to torture or inhuman or degrading treatment or punishment *in his or her country of origin*. However, Member States still remain bound by their international law obligations not to remove individuals to *any* territory where there is a risk of such harm.

¹⁰⁵ See also Wouters ([n 21](#)) 134. The original text read ‘to the frontiers of their country of origin, or to territories’. Presumably, because the term ‘territories’ also encompassed the ‘country of origin’, the UK delegation proposed the simpler formulation ‘to the frontiers of territories’, noting that ‘the amendment would not alter the purport’ of the paragraph: Ad hoc Committee on Statelessness and Related Problems (1st Session) ‘Summary Record of the 20th Meeting’ (1 Feb. 1950): UN doc. E/AC.32/SR.20 (Sir Leslie Brass, United Kingdom) para. 7.

¹⁰⁶ Lauterpacht & Bethlehem ([n 21](#)) para. 114. The Inter-American Court of Human Rights ([n 9](#)) paras. 109–10 (fn omitted) has stated that: ‘[T]he nature of its diplomatic functions and the fact that the legation is located in the territory of the receiving State makes a significant difference to territorial asylum, since diplomatic asylum cannot be conceived exclusively in terms of its legal dimension, but has other implications, since there is an interaction between

the principle of State sovereignty, diplomatic and international relations and the protection of human rights. Similarly, while refugee status, territorial asylum and diplomatic asylum are all forms of protection for individuals who are persecuted, each operates in different circumstances and with different legal connotations in international and national law and are therefore not interchangeable. This means that the respective conventions and/or domestic legislation govern each legal situation and establish a catalogue of rights and duties of persons living in asylum under its various modalities.'

¹⁰⁷ *Roma Rights* (n 22). That diplomatic asylum has a legal basis in the notion of extraterritoriality—a predominant view in the 19th century—has more recently been discredited and described as a ‘fiction’: see discussion in *Question of Diplomatic Asylum: Report of the Secretary-General*: UN doc. A/10150 (Sep. 1975) paras. 301–2; Goodwin-Gill (n 23). The Inter-American Court of Human Rights (n 70) para. 149 has clarified that ‘both from the literal interpretation of Article 22.7 of the [American] Convention [on Human Rights] and from the interpretation of its context, in particular the conditions established in the Latin American conventions that clearly define the meaning of the terms “in foreign territory”, it is clear that the purpose of the configuration of the right to seek and receive asylum is the protection in foreign territory of persons who have been forced to flee for certain reasons, which translates into the protection of territorial asylum. This is because it is not possible to assimilate legations to foreign territory’.

¹⁰⁸ See Noll, G., ‘Seeking Asylum at Embassies: A Right to Entry under International Law’ (2005) 17 *IJRL* 542; Ogg, K., ‘Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates’ (2014) 33(4) *RSQ* 81. In our view, the shortcoming of the 1951 Convention is not the term ‘*refoulement*’, as Noll suggests at 555, but the requirement that the individual be outside his or her country of origin. Human rights forms of *non-refoulement* remain relevant (see Ch. 7), but need to be reconciled with traditional perceptions, such as that expressed by the ICJ in the *Asylum Case*: ‘In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of the State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.’ *Asylum Case* [1950] ICJ Rep. 266, 274; cf. *B’s Case* (n 22). For a thorough discussion of so-called extraterritorial diplomatic asylum, see Sinha, S. P., *Asylum and International Law* (1971) 207–9. Note, too, the view of the Inter-American Court of Human Rights (n 70) para. 192 (fns omitted) that ‘the principle of *non-refoulement* is enforceable by any foreign person, including those seeking international protection, over whom the State in question is exercising authority or who is under its effective control, whether on the State’s land, river, sea or air territory. This provision includes acts performed by immigration and border authorities, as well as acts performed by diplomatic officials.’ In *MN v Belgium*, the Grand Chamber of the European Court of Human Rights held that ECHR 50 was not engaged by a Syrian family who unsuccessfully applied for humanitarian visas at

the Belgian consulate in Beirut, Lebanon because they were not within Belgium's territorial jurisdiction: App. No. 3599/18 (5 May 2020) paras. 112–3.

¹⁰⁹ See Jennings & Watts (n 23) 1082–5; *Question of Diplomatic Asylum* (n 107) para. 311, cf. paras. 312–21; cf. Chisholm, J. T., 'Chen Guangcheng and Julian Assange: The Normative Impact of International Incidents on Diplomatic Asylum Law' (2014) 82 *George Washington Law Review* 528.

¹¹⁰ Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law' (1950) 27 *BYIL* 1, 34–5, referring to *Asylum Case* (n 108); *Haya de la Torre Case* [1951] ICJ Rep. 71. For a brief history of the practice, see Denza, E., 'Diplomatic Asylum', in Zimmermann (n 18) 1427–8; Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 2 (1972) 45–56; Goodwin-Gill (n 23).

¹¹¹ In Latin America, a regional custom (codified in treaties) has developed whereby States do not interfere with grants of diplomatic asylum and those granted it are given safe passage out of the country to the State granting it: den Heijer (n 11) 108; Grahl-Madsen (n 110) 57–68, 77. Such asylum is only to be granted in urgent situations to those sought for political reasons (not ordinary crimes) is to be limited to the time needed to ensure safety, and the territorial State may request the person's removal at any time: see 1928 Havana Convention, art. 2; 1939 Montevideo Convention, art. 6; 1954 Caracas Convention, art. XI; *Asylum Case*, Judgment, (n 108) 282. In dissent, Judge Read observed that he could find no occasion on which a political offender had ever been surrendered at the request of the territorial State, and no evidence to show that diplomatic asylum was limited to occasions of pursuit by angry mobs; on the contrary, asylum was freely granted during unsettled, post-revolutionary conditions: *Asylum Case* (n 108) 321.

¹¹² Denza (n 110) 1426.

¹¹³ See generally, Ronning, C. N., *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (1965).

¹¹⁴ The Vienna Convention on Diplomatic Relations makes no provision for diplomatic asylum, apart from an oblique reference to 'special agreements' in article 41: Crawford (n 31) 388–9. Jennings & Watts accepted that there is a 'legal right' to grant asylum, on grounds of humanity, in the case of violence or disorder, but that otherwise diplomatic asylum must be based on treaty: Jennings & Watts (n 23) 1084–5 (see also Oppenheim, 8th edn., 797); Ronning (n 113) 21–3, 66–96, 122–4.

¹¹⁵ See Lee, L. T. & Quigley, J., *Consular Law and Practice* (3rd edn., 2008) 363–5; Green, L. C., 'Trends in the Law concerning Diplomats' (1981) 19 *CanYBIL* 132; Denza (n 110) 1430–1. Outside Latin America, a State may not grant diplomatic asylum if the territorial State objects: see Grahl-Madsen (n 110) 46; for limited exceptions, see den Heijer (n 11) 110. By contrast, it is generally accepted that States may provide 'temporary refuge' in diplomatic premises to people fleeing unrest or pursued by violent mobs, etc: Grahl-Madsen (n 110) 6, 46. Porcino, P., 'Toward Codification of Diplomatic Asylum' (1976) 8 *New York University Journal of International Law and Politics* 435, 438 states that '[t]he allowance of safe

passage is extremely important in that it transforms a temporary refuge into permanent asylum. The latter affords the refugee full protection, while the former may result in the refugee's eventual return to a hostile environment.' See also den Heijer, M., 'Diplomatic Asylum and the Assange Case' (2013) 26 *Leiden Journal of International Law* 399. Note, too, the recognition given after the 1973 coup in Chile to UNHCR 'safe havens', that is, refuge for foreign refugees granted asylum under the Allende government; see UN doc. A/AC.96/ 508 (1974) 5. Cited also by the Chilean representative to the UNHCR Executive Committee in 1992: UN doc. A/AC.96/SR.477, para. 51.

¹¹⁶ United Kingdom Foreign Secretary Statement on Ecuadorian Government's Decision to Offer Political Asylum to Julian Assange (16 Aug. 2012). Ronning ([n 113](#)) 22 (fn omitted) concludes that State practice is based not on any legally recognized *right* of asylum in international law, but rather is 'a *de facto* result of the fact that international law accords to the various accredited diplomatic officers certain well-recognized immunities from local jurisdiction ... Humanitarian, political or other motives may lead to the original grant of asylum but once the refugee is inside the legation the territorial state is faced with an insoluble dilemma. Assuming the state of refuge will not surrender the refugee, the territorial state can apprehend him only by violating the immunity of the diplomatic premises or, possibly, by breaking diplomatic relations. The fact is that such extreme measures are considered too high a price to pay for apprehension of the refugee.' This is exemplified by the Assange case: the Australian WikiLeaks founder entered the Ecuadorian Embassy in London on 19 June 2012 and claimed diplomatic asylum, which was granted on 16 August 2012 and continued until 11 April 2019.

¹¹⁷ *B's Case* ([n 22](#)).

¹¹⁸ 'Fugitive' implies a criminal, and yet the Australian High Court has stated that immigration detention is not 'punitive' but 'administrative': *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562. During the drafting of the Vienna Convention on Consular Relations, the UK had proposed adding: 'Consular premises shall not be used to afford asylum to fugitives from justice': UN doc. A/CONF.25/C.2/L.29 (1963) para. 2, cited in Denza ([n 110](#)) 1437.

¹¹⁹ *B's Case* ([n 22](#)) para. 495.

¹²⁰ Ibid., para. 93 (emphasis added). See also Denza ([n 110](#)) 1433–4, including analysis of this case.

¹²¹ Denza ([n 110](#)) 1434.

¹²² The *Haya de la Torre Case* ([n 110](#)) and, more recently, that of Julian Assange, clearly demonstrate the practical problems. One example is that since there is no right of diplomatic asylum, there is no duty on the host State to guarantee safe passage out of the country at the request of the embassy State; if the embassy State were to use diplomatic transport to do so, this would arguably be an abuse of diplomatic 'functions' under article 3 of the Vienna Convention on Diplomatic Relations.

¹²³ Lauterpacht, H., *The Development of International Law by the International Court*

(1958; republished 1982) 147. As Jully puts it, ‘Voilà un asile qui ressemble fort à une prison!’: Jully, L., ‘L’asile diplomatique devant la Cour internationale de Justice’ (1951–53) 51 *Die Friedens-Warte* 20, 58, n 102. In 2018, the Inter-American Court of Human Rights ([n 9](#)) para. 94 stated that: ‘The principle of *non-refoulement* not only requires that the person not be returned, but also imposes positive obligations on States’ (para. 200) including ‘individualized risk assessment and appropriate protective measures, including measures against arbitrary detention’.

[124](#) Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’, in Goodwin-Gill G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 199. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep. 422, on possible limits to the right of the State to grant asylum to individuals accused of serious human rights violations.

[125](#) O’Connell, D. P., *International Law*, vol. II (2nd edn., 1970) 736.

[126](#) *Haya de la Torre Case* ([n 110](#)) 81–2; see also *Asylum Case* ([n 108](#)) Judge Alvarez dissenting, 293–4, Judge Read dissenting, 322; Goodwin-Gill ([n 23](#)) 178–81.

[127](#) See, for example, *B’s Case* ([n 22](#)): actions of consular officials abroad may be subject to ECHR 50 (though extraterritoriality is not expressly mentioned). On seeking asylum in diplomatic premises, see: Cole, C. V., ‘Is There Safe Refuge in Canadian Missions Abroad?’ (1997) 9 *IJRL* 654; Noll ([n 108](#)); Ogg ([n 108](#)) (who suggests that jurisprudence since [Noll’s 2005](#) article provides grounds to argue that diplomatic missions must in certain circumstances consider asylum claims and, if the requirements are met, grant protection. She bases her thesis largely on the extraterritorial application of certain human rights treaties, but does not cite any case law or State practice that directly supports her contention). During the drafting of the Universal Declaration of Human Rights, the Pakistani representative regarded the concept of extraterritoriality as having ‘dangerous implications’: UN doc. A/C.3/SR.121 (3 Nov. 1948) 337 (Mr Shahi, Pakistan). See also debate in the International Law Commission in 1949: *Yearbook of the International Law Commission*, paras. 49, 87–8; debate on the draft Declaration on the Right of Asylum in 1966: UN doc. A/6570, (1966) para. 11; Moore, J. B., *Digest of International Law*, vol. 2 (1906) 755 ff.; Hackworth, G. H., *Digest of International Law*, vol. 2 (1941) 623 ff.; Whiteman, M. M., *Digest of International Law*, vol. 6 (1968) 445 ff.; McNair, A., ‘Extradition and Extraterritorial Asylum’ (1951) 28 *BYIL* 172.

[128](#) IACtHR ([n 9](#)) paras. 157–62. Many States do not accept the institution of diplomatic asylum, or do so only in very limited cases. Despite some support, a Uruguayan proposal to extend the right of asylum in the Universal Declaration of Human Rights to diplomatic asylum in embassies and legations, based on State practice in Latin America, was rejected: UN doc. A/C.3/268, reproduced in UN doc. A/C.3/285/Rev.1 in UNGAOR [Part 1](#) (3rd Session, 1948) Annexes, 25. In 1974, on an Australian initiative, the General Assembly requested the Secretary-General to prepare and circulate a report on the practice of diplomatic asylum and invited member States to make known their views: UNGA res. 3321

(XXIX) (14 Dec. 1974). The report (UN doc. A/10139) confirmed the regional nature of the practice; of 25 States that made known their views, only seven favoured drawing up an international convention on the matter. Further consideration of the subject was postponed indefinitely: UNGA res. 3497(XXX) (15 Dec. 1975). Cf. Riveles, S., ‘Diplomatic Asylum as a Human Right: The Case of the Durban Six’ (1989) 11 *HRQ* 139; Noll (n 108).

¹²⁹ The status of the premises in which asylum is granted nevertheless remains a relevant consideration overall, and clearly constrains the options open to the territorial State.

¹³⁰ *Asylum Case* (n 108) 281. Cf. ‘*non-refoulement* through time’, as described in Ch. 5, ss. 2, 8. Interestingly, the court’s approach from principle considerably ante-dates the arrival of *jus cogens*, on which, see Goodwin-Gill (n 23) 178–9.

¹³¹ *Asylum Case* (n 108) 282.

¹³² Ibid., 284.

¹³³ Cf. *B’s Case* (n 22).

¹³⁴ IACtHR (n 70) para. 155.

¹³⁵ See Crawford, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002) arts. 16–18, respectively. See generally Hurwitz, A., *The Collective Responsibility of States to Protect Refugees* (2009); Nollkaemper, A., & Jacobs, D., ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *Michigan Journal of International Law* 359; Giuffré (n 42).

¹³⁶ See *Articles on State Responsibility* (n 135) arts. 5–9.

¹³⁷ UNGA res. 56/83, ‘Responsibility of States for Internationally Wrongful Acts’ (12 Dec. 2001) Annex, art. 47; *TI v UK* [2000] INLR 211; *Prince Hans-Adam II of Liechtenstein v Germany*, App. No. 42527/98 (12 Jul. 2001) para. 48; *Banković v Belgium* (2001) 11 BHRC 435; Gammeltoft-Hansen & Hathaway (n 1) 257 ff. See also art. 16 of the *Articles on State Responsibility* (n 135), discussed in Legomsky, S. H., ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *IJRL* 567, 620–1, 642 ff. (the ‘complacency principle’).

¹³⁸ Crawford, J. & Hyndman, P., ‘Three Heresies in the Application of the Refugee Convention’ (1989) 1 *IJRL* 155, 171: ‘It is ... clear that more than one State may share joint responsibility for decisions which result in the *refoulement* of a refugee ... It follows that a State may not rely on the obligation of another State party to the Convention, even where there are good grounds for saying that the latter State is indeed under a particular obligation with respect to the refugee, if that reliance is likely to result in a violation of Article 33.’ For an analysis of contemporary examples, see Hathaway (n 21) 390–9.

¹³⁹ On the earlier practice of ‘shuttlecocking’ migrants, see Goodwin-Gill, G.S., *International Law and the Movement of Persons between States* (1978) 287–8.

¹⁴⁰ In *Orantes-Hernandez v Meese*, 685 F. Supp. 1488 (CD. Cal. 1988) aff ’d sub nom. *Orantes—Hernandez v Thornburgh*, 919 F.3d 549 (9th Cir., 1990), the court found that substantial numbers of Salvadoran asylum seekers were signing ‘voluntary departure’ forms under coercion, including threats of detention, deportation, relocation to a remote place, and

communication of personal details to their government.

¹⁴¹ See, for example, the United States Immigration and Nationality Act 1952, 18 USC s. 2199.

¹⁴² As a port of call State, Australia had only limited success in arguing for this proviso with respect to flag States Greece, Italy, and Denmark. Most stowaways in the period 1979–82 were ultimately allowed to disembark and to lodge claims for refugee status; a few were resettled with relatives in third States. None of the States involved had ratified the 1957 International Convention relating to Stowaways, which still awaits entry into force. Art. 5(2) provides that in considering application of the treaty, ‘the Master and the appropriate authorities of the port of disembarkation will take into account the reasons which may be put forward by the stowaway for not being disembarked at or returned to’ various ports or States. Art. 5(3) declares that: ‘The provisions of [the] Convention shall not in any way affect the power or obligation [sic] of a Contracting State to grant political asylum.’ Art. 3 provides that where a stowaway is otherwise unreturnable to any other State, he may be returned to ‘the Contracting State whose flag was flown by the ship in which he was found’, unless subject to ‘a previous individual order of deportation or prohibition from entry’. For text, see *Conférence diplomatique de droit maritime, 10ème session, Bruxelles*, 491–503 (1958). Both the United Kingdom and the Netherlands opposed these aspects of the treaty on the ground that they made too many inroads on national immigration control: *ibid.*, 200, 436–7, 441–3, 632–3.

¹⁴³ Report of the Working Group on problems related to the rescue of asylum-seekers in distress at sea: EC/SCP/21 (1982) paras. 22 ff.

¹⁴⁴ Report of the 39th Session: UN doc. A/AC.96/721 (13 Oct. 1988) para. 25. Greece proposed deletion of the words ‘whenever possible’, and the phrase beginning, ‘provided that this does not necessarily imply’: *ibid.*, para. 36.2. See also UNHCR, ‘Note on Stowaway Asylum-Seekers’: EC/SCP/51 (22 Jul. 1988); Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/717 (3 Oct. 1988) paras. 36–42; Venezuela: UN doc. A/AC.96/ SR.431 (1988) para. 7; Australia: *ibid.*, para. 9.

¹⁴⁵ Given that the 1957 Convention has not yet entered into force, the main instrument on the treatment of stowaways is the International Maritime Organization (IMO) ‘Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases’, Res. FAL.13(42) (8 Jun. 2018). The IMO compiles State reports of stowaway incidents, for example, IMO, ‘Consideration and analysis of reports and information on persons rescued at sea and stowaways’, FAL 43/13 (1 Feb. 2019).

¹⁴⁶ IMO Guidelines (ⁿ 145) para. 3.6.

¹⁴⁷ *Ibid.*, para. 3.7.

¹⁴⁸ For an overview of refugee movements by sea, see generally, Mann, I., *Humanity at Sea: Maritime Migration and the Foundations of International Law* (2016); Moreno-Lax (ⁿ 21); chapters in Moreno-Lax & Papastavridis (ⁿ 92); in the European context, see also

UNHCR, ‘The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees’ (1 July 2015); in the Asia-Pacific context, see Kaldor Centre for International Refugee Law ([n 75](#)); for a comparative analysis, Ghezelbash, D. and others, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Australia’ (2018) 67 *ICLQ* 315. See also s. 1.1.2.

[149](#) UNHCR ([n 67](#)) 1.

[150](#) In its comments in 1950 on the draft convention, the *Ad hoc* Committee observed: ‘the obligation not to return a refugee to a country where he was persecuted did not imply an obligation to admit him to the country where he seeks refuge. The return of a refugee-ship, for example, to the high seas could not be construed as a violation of this obligation’: UN doc. E/AC.32/L.32/Add.1 (10 Feb. 1950) comment on draft art. 28 (expulsion to country of persecution).

[151](#) Goodwin-Gill, G. S., ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26 *VirgJIL* 897, 902.

[152](#) *Ibid.* On interception and non-arrival policies, see [Ch. 8](#). In the absence of protest by States, the entitlement to invoke the responsibility of a State acting in violation of its obligations under the 1951 Convention falls to UNHCR, which States parties acknowledge as having the duty to supervise its application (see art. 35). See also UNHCR, IMO, & International Chamber of Shipping, ‘Rescue at Sea: A Guide to Principles and Practice as applied to Migrants and Refugees’ (Jan. 2015); UNHCR, ‘Routes towards the Mediterranean: Reducing Risks and Strengthening Protection’ (Jun. 2019).

[153](#) ‘Turning Back Boats’ (Kaldor Centre for International Refugee Law, Research Brief, last updated Aug. 2018). For interviews with passengers about their treatment, see Amnesty International, *By Hook or by Crook: Australia’s Abuse of Asylum-Seekers at Sea* (2015).

[154](#) See, for example, Schloenhardt & Craig ([n 75](#)); Senate Select Committee for an Inquiry into a Certain Maritime Incident, *Report* (Commonwealth of Australia, 2002); Border Protection Command Report, referred to in Stewart, C., ‘Law of the Sea versus the Dictates of Canberra’ *The Australian* (10 Mar. 2012) <http://www.theaustralian.com.au/national-affairs/immigration/law-of-the-sea-versus-the-dictates-of-canberra/news-story/c12f51854dc33536bc4d194e5483eb1a>.

[155](#) Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Breaches of Indonesian Territorial Waters* (Commonwealth of Australia, 2014). See further [McAdam & Chong](#) ([n 99](#)) [Ch. 6](#); Schloenhardt & Craig ([n 75](#)); Chia, J., McAdam, J., & Purcell, K., ‘Asylum in Australia: “Operation Sovereign Borders” and International Law’ (2014) 34 *AustYBIL* 33; Kaldor Centre for International Refugee Law ([n 75](#)) para. 45 ff. (note also the discussion of ‘take-backs’, the transfer of people from one sovereign authority to another).

[156](#) For a discussion of the unlawfulness of Italy’s pushback operations, see den Heijer ([n 21](#)) esp. 270–1; Giuffré ([n 42](#)); Moreno-Lax, V., ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011)

23 *IJRL* 174; Moreno-Lax, V., *The Interdiction of Asylum Seekers at Sea: Law and (Mal)Practice in Europe and Australia* (Kaldor Centre for International Refugee Law, Policy Brief 4, May 2017); Papastavridis, E., *The Interception of Vessels on the High Seas* (2013) Ch. 8.

¹⁵⁷ See, for example, Goodwin-Gill, G. S., ‘The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*’ (2011) 23 *IJRL* 443; Moreno-Lax, ‘Seeking Asylum’ ([n 156](#)); Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* ([n 156](#)); Giuffré ([n 42](#)) (on joint naval patrols to interdict and deflect people at sea). Operation Triton (under Italian control) ran from 1 Nov. 2014 until 1 Feb. 2018 when it was replaced by Operation Themis, which had a law enforcement focus while continuing search and rescue. Operation Sophia was established in 2015 as an EU military operation to neutralize smuggling routes in the Mediterranean. It was succeeded in 2020 by Operation Irini.

¹⁵⁸ Advisory Committee on Migration Affairs (Netherlands) *External Processing: Conditions applying to the Processing of Asylum Applications outside the European Union*, Advisory Report No. 32 (2010) 18. See also EU Mobility Partnerships with Morocco (2013), Tunisia (2014), Moldova and Cape Verde (2008), Georgia (2009), Armenia (2011), and Azerbaijan (2013).

¹⁵⁹ *Hirsi* ([n 35](#)).

¹⁶⁰ UNHCR, ‘Desperate Journeys: June–September 2019’ (Oct. 2019). For an overview of recent practices, see Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* ([n 156](#)).

¹⁶¹ See European Council Note from General Secretariat to Delegations on ‘European Council Meeting (28 June 2018): Conclusions’, EU CO 9/18; Fantinato, M., ‘EU Regional Disembarkation Arrangements in the Mediterranean: Between the Outsourcing of Search and Rescue Services and the Externalisation of Sea Border Management’ (2019) 28 *Italian YBIL* 63.

¹⁶² See, for example, amendments to the *Maritime Powers Act* 2013 (Cth) by virtue of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) and the Migration and Maritime Powers Amendment Bill (No. 1) 2015 (Cth).

¹⁶³ See, for example, the Italy/Libya 2008 Treaty of Friendship, Partnership and Cooperation and the 2009 Additional Technical-Operational Protocol. See also, ‘Italy to Renew Anti-Migration Deal with Libya’, *The Guardian* (31 Oct. 2019); Palm, A., ‘The Italy–Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?’ (2017) <https://eumigrationlawblog.eu>.

¹⁶⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1134 (9 Jul. 2014) para. 25. For an overview of comparative practices in Europe and Australia, see Moreno-Lax, *The Interdiction of Asylum Seekers* ([n 156](#)).

¹⁶⁵ *Corfu Channel Case* [1949] ICJ Rep. 4.

¹⁶⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1836 UNTS 42 (UNCLOS 82); International Convention on

Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 971 (SAR Convention); International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2 (SOLAS); Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime (adopted 15 November 2000, entry into force 28 January 2004) 2241 UNTS 407. Cf. Barnes, who notes that the primary purpose of UNCLOS 82 is to allocate coastal and flag State authority over ocean space: Barnes, R., ‘The International Law of the Sea and Migration Control’, in Ryan & Mitsilegas ([n 17](#)) 108.

¹⁶⁷ UNCLOS 82, arts. 3, 4, 8.

¹⁶⁸ Ibid., art. 33.

¹⁶⁹ Ibid, art. 86; 1958 Geneva Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, art. 1.

¹⁷⁰ See further Chia, McAdam, & Purcell ([n 155](#)) 51; Fischer-Lescano, Löhr, & Tohidipur ([n 16](#)); Barnes ([n 166](#)).

¹⁷¹ See Fischer-Lescano, Löhr, & Tohidipur ([n 16](#)) 291; Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* ([n 156](#)) 9.

¹⁷² See also s. 1.1.2, which examines the operation of the principle of *non-refoulement* on the high seas.

¹⁷³ UNCLOS 82, arts. 87, 88.

¹⁷⁴ For example, to counter slave-trading, piracy, unauthorized broadcasting, where the ship is suspected to be without nationality, or in a situation of hot pursuit: see UNCLOS 82, arts. 99, 100, 109, 110, 111. See further, Papastavridis ([n 156](#)).

¹⁷⁵ 1958 Geneva Convention on the High Seas, art. 2; UNCLOS 82, art. 87.

¹⁷⁶ 1958 Geneva Convention on the High Seas, art. 6; UNCLOS 82, arts. 91, 92. Barnes ([n 166](#)) 115 notes that most asylum boats ‘are usually unnamed, unregistered and lacking other documentation or identifying features. Indeed, many such boats lack a crew or master. This makes the application of ordinary maritime rules more difficult in practice, such rules being designed for vessels that willingly comply with the requirements of order at sea by retaining a formal link with one flag State or another.’

¹⁷⁷ Under article 8 of the Migrant Smuggling Protocol, States may board vessels without a flag, but remain bound by their other international legal obligations, including *non-refoulement*.

¹⁷⁸ Papastavridis ([n 156](#)) 265 (fn omitted).

¹⁷⁹ Contrast the views of Churchill, R. & Lowe, A. V., *The Law of the Sea* (3rd edn., 1999) 214 with McDougal, M. S. & Burke, W. T., *The Public Order of the Oceans* (1962) 1084–5. See also Guilfoyle, D., *Shipping Interdiction and the Law of the Sea* (2009) 341–2.

¹⁸⁰ See 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, arts. 14–20, 24; UNCLOS 82, arts. 17–26, 33.

¹⁸¹ UNCLOS 82, art. 98; SOLAS, Ch. V, reg. 33; SAR Convention. The SAR Convention aims to establish ‘an international maritime search and rescue plan responsible to the needs of maritime traffic for the rescue of persons in distress at sea’ and ‘promote co-operation among search and rescue organizations around the world and among those participating in search and rescue operations at sea’: Preamble. The importance of the principle of *non-refoulement* in the rescue context is expressly recognized in the IMO Maritime Safety Committee, ‘Guidelines on the Treatment of Persons Rescued at Sea’, Res MSC.167(78) (adopted 20 May 2004) Annex 34, Appendix, para. 7.

¹⁸² 1958 Geneva Convention on the High Seas, art. 22; UNCLOS 82, art. 110; Migrant Smuggling Protocol, art. 8(7). Because of doubts as to the obligation, if any, to submit to visit and search, O’Connell suggests that ‘the only safe course to assume is that a right of boarding exists only under the law of the flag’: O’Connell, D. P., *The International Law of the Sea*, vol. II (Shearer, I., ed., 1984) 801–2. Cf. *Molvan v Attorney-General for Palestine* [1948] AC 351, which is some authority for the view that even the ‘freedom of the open sea’ may be qualified by place or circumstance. In that case, the Privy Council found that no breach of international law resulted when a ship carrying illegal immigrants bound for Palestine was intercepted on the high seas by a British destroyer, and escorted into port where the vessel was forfeited. The Board nevertheless considered relevant the fact that the ship in question flew no flag, and could not therefore claim the protection of any State. The power to arrest on the high seas is only clear in the cases of piracy and unauthorized broadcasting: UNCLOS 82, arts. 105, 109.

¹⁸³ Guilfoyle, D. & Papastavridis, E., ‘Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea’ (Background paper for UNHCR subregional meeting on ‘Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea’, Bangkok (3–4 Mar. 2014) 16. See also Papastavridis ([n 156](#)) Ch. 8.

¹⁸⁴ See, for example, AS, *DI, OI and GD v Italy*, UN doc. CCPR/C/130/D/3042/2017 (4 Nov. 2020).

¹⁸⁵ Guilfoyle & Papastavridis ([n 183](#)) 16, referring to Churchill & Lowe ([n 179](#)) 214 and Papastavridis ([n 156](#)) 265–7.

¹⁸⁶ UNCLOS 82, art. 91(1); see exceptions cited in Guilfoyle & Papastavridis ([n 183](#)) 16 fn 71.

¹⁸⁷ *Corfu Channel Case* ([n 165](#)) 22; Crawford ([n 31](#)) 43; Goodwin-Gill, G. S., ‘The Mediterranean Papers’ (2016) 28 *IJRL* 276; Goodwin-Gill, G. S., ‘Setting the Scene: Refugees, Asylum Seekers, and Migrants at Sea—The Need for a Long-Term, Protection-Centred Vision’, in Moreno-Lax & Papastavridis ([n 92](#)); Zagor, M., ‘Elementary Considerations of Humanity’, in Bannier, K., Kristakis, T., & Heathcote, S., eds., *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012).

¹⁸⁸ Migrant Smuggling Protocol, art. 18.

¹⁸⁹ Ibid., arts. 9, 19. For analysis of the application of such law in the Australian context, see Chia, McAdam, & Purcell (n 155); Schloenhardt & Craig (n 75).

¹⁹⁰ Executive Order No. 12324, *Interdiction of Illegal Aliens*, s. 2(c)(3) which continued: '[o]r appropriate laws of a foreign country [with which an agreement exists]; provided, however, that no person who is a refugee will be returned without his consent'.

¹⁹¹ Section 54(3) of the Maritime Powers Act 2013 (Cth) provides that, in cases where 'the person in charge of a vessel does not comply with a requirement to stop or facilitate boarding', a 'maritime officer' may chase the vessel; use any reasonable means to obstruct its passage or to halt or slow its passage, 'including by fouling the propellers of the vessel'; and, after firing a warning shot, 'fire at or into the vessel to disable it or compel it to be brought to for boarding'.

¹⁹² Executive Committee Standing Committee, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach': EC/50/SC/CRP.17 (9 June 2000) para. 7.

¹⁹³ Brownlie, I., *International Law and the Use of Force by States* (1963) 264 ff., 278–9; Schwarzenberger, G. & Brown, L., *A Manual of International Law* (6th edn., 1976) 150. On the distinction between self-defence and self-help, see Bowett, D., *Self-Defence in International Law* (1958) 11–12, but see Maritime Powers Act 2013 (Cth) ss. 37, 54.

¹⁹⁴ Crawford (n 31) 549–50.

¹⁹⁵ Cf. Johnson, D. H. N. 'Refugees, Departees and Illegal Migrants' (1980) 9 *SydLR* 11, 30–1; Bowett (n 193) 22.

¹⁹⁶ See 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, arts. 14, 19, 24; UNCLOS 82, arts. 17–20, 27, 33. As Crawford (n 31) 250–4 points out, coastal States' powers are essentially powers of police and control. It is doubtful that the smuggling of asylum seekers could constitute a threat to the national security of a State that interdicts a boat engaged in that practice. Chia, McAdam, & Purcell (n 155) 56 observe that although a 2008 report by the UN Secretary-General lists the 'smuggling and trafficking of persons by sea' among 'specific threats to maritime security', this broad notion of 'maritime security' remains distinct from the notion of 'national security' which might justify protective jurisdiction: see UN Secretary-General, *Oceans and the Law of the Sea: Report of the Secretary-General*: UN doc. A/63/63 (10 Mar. 2008) paras. 89–97.

¹⁹⁷ Cf. text to n 206.

¹⁹⁸ 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 24, now extended by UNCLOS 82, art. 33.

¹⁹⁹ In *Croft v Dunphy* [1933] AC 156, 164–5, for example, the Privy Council, upholding Canadian Customs Act provisions on 'hovering', took account of the fact that they did not apply to foreign vessels in the area of extended jurisdiction.

²⁰⁰ See McNair, A., *International Law Opinions*, vol. 2 (1956) 186 (enforcement of revenue laws in respect to vessels not yet within maritime jurisdiction); Jessup, P., *The Law of Territorial Waters and Maritime Jurisdiction* (1927) 75–6, 242 ff. O'Connell (n 182)

1045–7, identifies Canada as the first State in modern times to assert a revenue jurisdiction independent of the territorial sea.

²⁰¹ McDougal & Burke (n 179) 584, 585 ff. See also O’Connell (n 182) 1057–61, noting the ‘anticipatory’ nature of contiguous zone powers.

²⁰² UNCLOS 82, art. 33; 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 24.

²⁰³ *Guyana v Suriname, Award*, ICGJ 370 (PCA 2007) para. 445 (fn omitted): ‘The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary’.

²⁰⁴ O’Connell (n 218) 1058. See also Shearer, I., ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) 35 *ICLQ* 320, 330. Cf. the minority view of Dupuy, R. J. & Vignes, D., eds., *A Handbook on the New Law of the Sea*, vol. 1 (1991) 857.

²⁰⁵ The powers allowed in the contiguous zone are only those permitted by international law: O’Connell (n 218) 1058–9; also Morin, J.-Y., ‘La zone de pêche exclusive du Canada’ (1964) 2 *CanYBIL* 77, 86: ‘la notion de zone contigüe ... est très stricte et ne comporte aucune extension de la compétence de l’Etat côtier sur les eaux situées au delà de sa mer territoriale.’ He identifies the contiguous zone as forming part of the high seas, and as defined, ‘[p]récisement par l’absence de toute souveraineté étatique. Il n’est pas douteux que, dans la pratique, certains Etats voient dans la zone contigüe le prolongement de leur mer territoriale et prétendent y exercer les mêmes compétences douanières ou fiscales, mais nous convenons ... que ces Etats sont en opposition avec le droit international tel qu’établi par les conventions sur le droit de la mer.’

²⁰⁶ Johnson (n 195) 11, 32.

²⁰⁷ Some attention would always need to be given to a vessel’s next likely port of call, if all information available indicated that refugees, rather than migrants, were on board.

²⁰⁸ See Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* (n 156) 5, referring to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth); Maritime Powers Act 2013 (Cth); EU Maritime Surveillance Regulation, art. 8. Enforced direction into port may not be arrest in a technical sense, but has been considered to be tantamount to it and thus is equally excluded: 190–1, referring to *Medvedyev* (n 24) paras. 74–5. See also *Camouco (Panama v France)* [2000] ITLOS Rep. 10, 125 ILR 164, para. 71; *Monte Confurco (Seychelles v France)* [2000] ITLOS Rep. 86, 125 ILR 220, para. 90; and *Hoshimaru (Japan v Russia)* [2005–2007] ITLOS Rep. 18, para. 12.

²⁰⁹ ‘Given that the compelling circumstances of flight effectively excuse entry that would otherwise be unlawful, it would appear that only very limited state action in this context would qualify as “necessary” to prevent the infringement of immigration laws’: Chia, McAdam, & Purcell (n 155) 55. The Migrant Smuggling Protocol distinguishes between smugglers, who are liable to prosecution, and the victims of smuggling, who are not: arts. 5 and 6. See also Executive Committee Conclusion No. 97 (2003) para. (a)(vi).

²¹⁰ Under Australian law, if a person in charge of a vessel ‘does not comply with a requirement to stop or facilitate boarding of the vessel’, a ‘maritime officer’ may take certain steps including, after firing a warning shot, firing ‘at or into the vessel to disable it or compel it to be brought to for boarding’: Maritime Powers Act 2013 (Cth) s. 54(3)(d). An ‘authorisation’ is required before powers can be exercised in relation to a vessel, except where maritime powers are exercised to ‘ensure the safety of a maritime officer or any other person’: see ss. 7, 15(b), 16, 29.

²¹¹ Obviously, all will turn on whether the flag State, if any, decides to object. The US interdiction programme was based upon the Haitian government’s agreement thereto. The US–Great Britain Treaty of 1924 (concluded in the context of prohibition) included express agreement by the British to raise no objections to the boarding of private vessels flying the British flag and outside US territorial waters. Enquiries might be undertaken to determine whether the vessel was endeavouring to violate US laws, and vessels might be seized on reasonable cause: Jessup ([n 200](#)) 289–93.

²¹² Such representations were indeed made when the use of force (such as towing out to sea at high speed) resulted in sinking and loss of life of asylum seekers arriving directly from Vietnam in Singapore and Malaysia in 1979.

²¹³ UNCLOS 82, art. 111(1); Lowe, A. V., ‘The Development of the Contiguous Zone’ (1981) 52 *BYIL* 109, 166–7. As Chia, McAdam, & Purcell ([n 155](#)) 58 fn 144 note: ‘Some confusion about the relationship between article 111 of UNCLOS and the coastal state’s right to exercise preventative control in the contiguous zone is apparent in the literature. Mathew, for example, suggests that violations of “the right of *preventing* violations of immigration laws in the territorial sea” (emphasis added) may warrant the hot pursuit of a vessel from the contiguous zone ... This interpretation is not supported by the text or drafting history of articles 33 and 111 UNCLOS. Apart from the difficulty of seeing how a right to *prevent* infringements of certain laws and regulations in the coastal state’s territory or territorial sea would be *violated* by the vessel threatening such infringement leaving the contiguous zone, the contiguous zone was not established to protect a right to exercise preventative control—rather, the right to exercise preventative control was provided to protect the coastal state’s rights with respect to customs, immigration and fiscal and sanitary matters within its territory and territorial sea. Hot pursuit from the contiguous zone will only be justified where an infringement of these laws and regulations within the coastal state’s territory or territorial sea has in fact occurred.’

²¹⁴ See O’Connell ([n 182](#)) 1064, n 25, on practical intervention and enforcement problems, which flow from international law restrictions on the use of force, and on the overall requirements of the necessary vessels; see also at 1071 ff. on the degree of force which may be used. See also Klug & Howe ([n 17](#)) 93–4.

²¹⁵ ‘Regulation’ does not necessarily imply the exercise of control; in principle, the law of the flag State governs the internal affairs of a ship, while neither civil nor criminal jurisdiction should be exercised, absent any actions prejudicial to the peace, good order, or

security of the coastal State: 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 16; cf. UNCLOS 82, art. 21. Moreover, the power to suspend innocent passage temporarily in certain areas is qualified by the requirement that this be essential for the protection of security: 1958 Geneva Convention, art. 16(3); UNCLOS 82, art. 25(3) and it is arguably not intended to be used against specific vessels, or for unrelated reasons.

²¹⁶ Pallis, M., ‘Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes’ (2002) 14 *IJRL* 329, 356; cf. Churchill & Lowe (n 179) 85–6; Barnes (n 166) 122–3; Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* (n 156) 4 (who queries whether the provision is exhaustive).

²¹⁷ Pallis (n 216).

²¹⁸ O’Connell, D. P., *The International Law of the Sea*, vol. I (Shearer, I., ed., 1982) 80–1 observes that art. 1 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone ‘allows for the maximum implications that may be drawn from the concept of sovereignty, but it does not impose those implications on the coastal State’.

²¹⁹ *The Ship ‘May’ v R* [1931] SCR 374.

²²⁰ Røsæg, E., ‘Refugees as Rescuees: The Tampa Problem’ [2002] *Scandinavian Institute of Maritime Law Yearbook* 43, 57, citing Churchill & Lowe (n 179) 63; Brown, E. D., *The International Law of the Sea*, vol. 1 (1994) 39; Case C-286/90 *Anklagemyndigheden v Poulsen* [1992] ECR I-6019 (in relation to fishery rules).

²²¹ The SAR Convention defines the ‘distress phase’ of an emergency operation as a ‘situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’ (Annex, para. 1.3.13; see also para. 4.4.3), which may give some indication of the threshold required. For an examination of the meaning of ‘distress’, see Komp, L.-M., ‘The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?’, in Moreno-Lax & Papastavridis (n 92).

²²² Churchill & Lowe (n 179) 63. Some States have adopted narrow definitions, such as protecting from imminent danger of loss of life: Klepp, S., ‘A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea’ (2011) 23 *IJRL* 538, 553–4.

²²³ 1929 *US v Mexico (Kate A. Hoff claim)* (1951) 4 UNRIAA 444, 447.

²²⁴ O’Connell (n 182) 853–8, 856, citing authority for the proposition that if a ship incurs trouble while engaged in an illegal enterprise against the State in whose waters it takes refuge, it cannot claim immunity from the local jurisdiction, even if entry was indeed occasioned by distress. See also UNCLOS 82, art. 18(2) on the meaning of ‘passage’: ‘passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress’.

²²⁵ UNCLOS 82, arts. 19, 25; McDougal & Burke (n 179) 187–92, 272.

²²⁶ Cf. Pallis (n 216) 355–9; and Moreno-Lax, who argues that ‘unless there is actual

“loading” or “unloading” of persons in breach of immigration regulations, article 19(1) of the UNCLOS should not apply. The fact that article 31 of the Refugee Convention explicitly states that refugees must not be penalised for unauthorised entry, and that States are bound to interpret anti-smuggling/anti-trafficking provisions as subject to refugee law ... reinforces this interpretation’: Moreno-Lax, *The Interdiction of Asylum Seekers at Sea* (n 156) 4, referring also to Moreno-Lax, ‘Seeking Asylum’ (n 156) 191–2.

²²⁷ See generally Klug & Howe (n 17) 92–3.

²²⁸ Senate Standing Committee (n 155). See further McAdam & Chong (n 99) Ch. 6; Schloenhardt & Craig (n 75); Chia, McAdam, & Purcell (n 155).

²²⁹ See Rothwell, D., Submission to the Senate Foreign Affairs, Defence and Trade References Committee *Inquiry into the Breach of Indonesian Territorial Waters* (20 Mar. 2014)

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http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence
This was accepted by the Senate Standing Committee (n 155) para. 2.75: ‘The committee commends the evidence it received regarding breaches of international law to policy makers and government. The committee is concerned by the evidence that was provided to it about potential breaches of International Law which are happening as a direct result of the government’s policy.’

²³⁰ See, generally, Barnes (n 166) 134 ff.

²³¹ See amendments to the SOLAS and SAR Conventions, which were adopted in May 2004 and entered into force on 1 July 2006. Even when termed ‘regulations’, these are binding. For discussion of the *Tampa* incident in 2001, which highlighted the need for such amendments, see the third edition of this work, Ch. 5, s. 4.3; IMO Assembly resolution A.920(22) on ‘Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea’ (2001).

²³² Amendments to SOLAS, Ch. 5; see also amendments to SAR, Ch. 2. This obligation pertains to the flag State, as well as nearby States that receive those rescued.

²³³ UNHCR, ‘Refugees and Asylum-Seekers in Distress at Sea: How Best to Respond?’, Background Note for Expert Meeting, Djibouti (8–10 Nov. 2011) 1; UNHCR, ‘Refugees and Asylum-Seekers in Distress at Sea: How Best to Respond?’, Summary Conclusions of Expert Meeting, Djibouti (8–10 Nov. 2011) paras. 9–10. See also OHCHR, UNHCR, IOM, UNODC, & IMO Joint Statement on Protection at Sea in the Twenty-First Century (10 Dec. 2014): ‘Closer cooperation between States of origin, transit and destination, and other relevant actors, is critical to reducing loss of life at sea, addressing the drivers of dangerous sea journeys, as well as ensuring that responses by States upon arrival and disembarkation uphold human rights and dignity, and address specific needs for protection of migrants, asylum-seekers and refugees. Such cooperation is also critical to identifying, prosecuting and punishing the criminal gangs who are responsible for human rights abuses and for arranging sea transportation in breach of all safety regulations.’ For a detailed overview of States’ operational practices and protection-sensitive tools, see UNHCR, ‘Refugee Protection and

²³⁴ See s. 1.1.2.

²³⁵ UNHCR's 2002 Note on International Protection, issued following the *Tampa* incident in Australia, described the refusal by some States to disembark rescued persons or even to come to their rescue in the first place as a 'serious problem', while other States were commended for their commitment to the 'accepted maritime practice of permitting sometimes larger numbers of people, rescued for instance in the Mediterranean, to disembark on their territory': UNHCR, 'Note on International Protection': UN doc. A/AC.96/965 (11 Sep. 2002) para. 20.

²³⁶ Cf. *Yiu Sing Chun v Sava*, 708 F.2d 869 (2nd Cir., 1983), holding that under the 1980 United States Refugee Act, alien stowaways are entitled to an evidentiary hearing on their asylum applications. Such proceeding is now provided in the asylum regulations: 8 CFR §253.1(f). See also Kälin, Caroni, & Heim (n 18) 1371; Bank (n 21) 850–1.

²³⁷ See, for example, 1910 Brussels International Convention with respect to Assistance and Salvage at Sea (adopted 23 September 1910, entered into force 1 March 1913) art. 11: 1 *Bevans* 780 (1968); 1929 International Convention on the Safety of Life at Sea, 136 LNTS 82, art. 45(1); SOLAS, Ch. V, reg. 10a; 1958 Geneva Convention on the High Seas, art. 12; SAR Convention, especially the 2004 amendments (in force 1 July 2006); UNCLOS 82, art. 98. The duty is so fundamental that it applies to rescue of the enemy: Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (adopted 18 October 1907, entered into force 26 January 1910) art. 16. See further Pedozo, R., 'Duty to Render Assistance to Mariners in Distress during Armed Conflict at Sea' (2018) 94 *International Law Studies* 102; Attard, F. G., *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (2020).

²³⁸ See the view of the International Law Commission with respect to its proposed draft of art. 12 of the 1958 Geneva Convention on the High Seas: 'Report of the International Law Commission to the General Assembly' (1956) II *Yearbook of the International Law Commission* 253, 281; see UN doc. A/3159 (1956). On the duty to rescue as customary international law, see Pallis (n 216) 333–4, and generally Røsæg (n 220).

²³⁹ Nandan, S. N. & Rosenne, S., eds., *United Nations Convention on the Law of the Sea, A Commentary*, vol. III (1995) 176–7.

²⁴⁰ Røsæg (n 220) 49–50 notes, however, that this rule is frequently breached by shipmasters.

²⁴¹ SOLAS Ch. V, reg. 33(1).

²⁴² See, for example, Canada Shipping Act (S.C. 2001, c. 26), ss. 131(1), 132; Merchant Shipping Act 1995 (UK, c. 21) s. 93. This is not required under UNCLOS 82: see UNHCR, 'Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea' (18 Mar. 2002) para. 5.

²⁴³ UNCLOS 82, art. 98(2); SOLAS, Ch. V, reg. 7(1); SAR, Annex, para. 2.1.1, as

amended by res. MSC.155(78) (adopted on 20 May 2004).

²⁴⁴ SAR, Annex, para. 2.1.10.

²⁴⁵ SAR, Annex, para. 1.1.3.2; see further below. ‘The absence of a clear-cut definition of a “place of safety” is not per se damaging since it allows for a case-by-case approach, which takes into account the particular circumstances of each rescue situation and the different categories of stowaways’: Giuffre ([n 42](#)) 706, referring to Moreno-Lax ([n 157](#)) 198. See also Barnes ([n 166](#)) 144; Papastavridis ([n 156](#)) 298–300.

²⁴⁶ IMO Maritime Safety Committee ([n 181](#)) Annex, para. 6.17: ‘The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.’ See further Fischer-Lescano, Löhr, & Tohidipur ([n 16](#)) 290; Papastavridis ([n 156](#)) 305; Dastyari & Ghezelbash ([n 75](#)) 8.

²⁴⁷ IMO Maritime Safety Committee ([n 181](#)) Annex, para. 6.12; see also UNHCR Summary Conclusions ([n 233](#)) 3.

²⁴⁸ IMO Maritime Safety Committee ([n 181](#)) Annex, para. 6.14.

²⁴⁹ IMO, ‘Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea’, FAL.3/Circ.194 (22 Jan. 2009) Principle 2.3.

²⁵⁰ See Guilfoyle & Papastavridis ([n 183](#)) 17–18; Turrini, P., ‘Between a “Go Back!” and a Hard (to Find) Place (of Safety): On the Rules and Standards of Disembarkation of People Rescued at Sea’ (2019) 28 *Italian YBIL* 29. See Goodwin-Gill, G. S., ‘Drowning in the Mediterranean: Time to think and act regionally’ *EJIL Talk!* (12 Apr. 2021) (arguing for a customary international law rule requiring rescue and disembarkation).

²⁵¹ UNHCR ([n 242](#)) paras. 25–6, 30–1; UNHCR ‘Protection at Sea’ ([n 76](#)) para. 34. See also Executive Committee Conclusion No. 14 (1979) para. (c); Executive Committee Conclusion No. 15 (1979) para. (c); Executive Committee Conclusion No. 23 (1981) para. 3. However, the flag State conducting the rescue may have responsibility where it is clear that those rescued intended to seek asylum from that State; if the numbers of those rescued are very small and it is reasonable for them to remain on the vessel until it reaches the flag State’s territory; or if the flag State interdicts the asylum seekers: UNHCR ([n 242](#)) paras. 25–6. There is also some practice in support of flagship responsibility for asylum seekers rescued close to their own territory: Schaffer, R. P., ‘The Singular Plight of Sea-Borne Refugees’ (1978–80) 8 *AustYBIL* 213; Pugash, J. Z., ‘The Dilemma of the Sea Refugee: Rescue without Refuge’ (1977) 18 *HarvILJ* 577, cited in Crock, M., ‘In the Wake of the *Tampa*: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 12 *Pacific Rim and Policy Journal* 49, 59.

²⁵² UNHCR ([n 76](#)) para. 19.

²⁵³ Ibid.

²⁵⁴ See, generally, Grant, B., *The Boat People* (1980) 68–72; Grahl-Madsen ([n 110](#)) 271–2; Pugash ([n 251](#)); Pallis ([n 216](#)); Goodwin-Gill, G.S., ‘Refugees and Responsibility in the Twenty-First Century: More Lessons from the South Pacific’ (2003) 12 *Pacific Rim Law &*

Policy Journal 23; Executive Committee Standing Committee, ‘Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach’: EC/50/SC/CRP.17 (9 Jun. 2000). Art. 11 of the 1951 Refugee Convention requires Contracting States to give ‘sympathetic consideration’ to the establishment within their territory of ‘refugees regularly serving as crew members’ on ships flying their flag. At the 1951 Conference, it was stated that this provision was intended to benefit genuine seamen, not those escaping by sea: UN doc. A/CONF.2/SR.12 (1951) 5. Likewise, the 1957 Agreement relating to Refugee Seamen (updated by the 1973 Protocol thereto) offers little solace to the asylum seeker at sea. Art. 1 defines a ‘refugee seaman’ as a refugee within the meaning of the Convention and Protocol, who ‘is serving as a seafarer in any capacity on a mercantile ship, or habitually earns his living as a seafarer on such ship’. The objective is to determine the links which a refugee seaman may have with contracting States, with a view to establishing entitlement to residence and/or the issue of travel documents. The qualifying links are such as generally to exclude the seafaring asylum seeker; for example, 600 days’ service under the flag of a contracting State, previous lawful residence in a contracting State, or travel documents previously issued by a contracting State: arts. 2, 3. ‘Sympathetic consideration’ is to be given to extending the agreement’s benefits to those not otherwise as qualifying: art. 5.

²⁵⁵ Report of the 27th Session: UN doc. A/AC.96/534, para. 87(f), (g), (h) (1976); see also Report of the 26th Session: UN doc. A/AC.96/516/Add.I, para. 92 (1975).

²⁵⁶ On developments generally, including with regard to the resettlement offers schemes, see the second and third editions of this work.

²⁵⁷ See further, UNHCR, ‘International Conference on Indo-Chinese Refugees. Report of the Secretary-General’: UN doc. A/44/523 (22 Sep. 1989); UNGA res. 44/ 138, ‘International Conference on Indo-Chinese Refugees’ (15 Dec. 1989); UNGA res. 43/119, ‘International Conference on Indo-Chinese Refugees’ (8 Dec. 1988).

²⁵⁸ See, for example, UNHCR, ‘Routes towards the Mediterranean: Reducing Risks and Strengthening Protection’ (Jun. 2019).

²⁵⁹ See, for example, *Hirsi* ([n 35](#)).

²⁶⁰ See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC (16 Sep. 2016) OJ L251/1.

²⁶¹ See, for example, https://europa.eu/european-union/about-eu/agencies/frontex_en. See also the approach set out in the proposed New Pact on Migration and Asylum, including the 2021–2025 EU Action Plan against Migrant Smuggling: European Commission, [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum](#), COM(2020) 609 final (23 Sep. 2020).

²⁶² See, for example, Gauci, J.-P. & Mallia, P., ‘The Migrant Smuggling Protocol and the Need for a Multi-Faceted Approach: Inter-Sectionality and Multi-Actor Cooperation’, in Moreno-Lax & Papastavridis ([n 92](#)).

²⁶³ *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) [1980] ICJ Rep. 3, 32–3, para. 68.

²⁶⁴ Cf. French, D. & Stephens, T., International Law Association Study Group on Due Diligence in International Law, First Report (7 Mar. 2014) <http://www.ila-hq.org/index.php/study-groups>; Barnidge, Jr., R. P., ‘[The Due Diligence Principle under International Law](#)’ (2006) 8 *International Community Law Review* 81; *Case concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) [2010] ICJ Rep. 14, 58, para. 197; International Tribunal for the Law of the Sea, Seabed Disputes Chamber, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion (1 Feb. 2011) ITLOS Reports 2011, 10, para. 110; *AS, DI, OI and GD v Italy* ([n 184](#)).

²⁶⁵ See generally, Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105/1 (as amended).

²⁶⁶ Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93.

²⁶⁷ Ibid., recital (9); see also art. 4, ‘Protection of Fundamental Rights and the Principle of Non-refoulement’.

²⁶⁸ Ibid., recital (10).

²⁶⁹ Ibid., art. 9, ‘Search and Rescue Situations’. From an international law perspective, however, the Regulation contains a number of protection gaps. While in principle contingent on *non-refoulement*, disembarkation may take place in a country from which the vessel is ‘assumed’ to have departed: art. 10(1)(b). Member States may still conduct vessels or those on board who are intercepted on the *high seas* to a third country, and they may effectively alter the course of a vessel intercepted in the territorial waters of a Member State to a destination outside the territorial sea: art. 7(2). And while any operational plans for Frontex-coordinated operations must contain procedures to ensure that those with international protection needs, victims of trafficking, unaccompanied minors, and other vulnerable individuals are identified and provided with appropriate assistance, details on the availability of shore-based medical staff, interpreters, legal advisers, and other relevant experts need be included only ‘when necessary’: recital (17); art. 4(3).

²⁷⁰ See the August 2013 case of the *MV Salamis*, a Liberian-registered tanker which was directed by the Maritime Rescue Coordination Centre (MRCC) in Rome to rescue 102 migrants from a boat in distress off the Libyan coast. See Mallia, P., ‘The MV Salamis and

the State of Disembarkation at International Law: The Undefinable Goal’ (2014) 18(11) *ASIL Insights*. The MRCC instructed the ship to return to Khoms in Libya, which it considered the nearest port of safety. However, the ship continued on its planned route towards Malta, where the Maltese authorities denied entry and refused disembarkation. Italy eventually agreed to allow those rescued to disembark in Syracuse. Malta and Italy diverge on their reading of ‘the law’, and indeed, Malta has not accepted the 2004 amendments to the SAR Convention or the IMO’s (non-binding) ‘Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea’ ([n 249](#)). Instead, Malta advocates ‘next port of call’/‘port of call nearest to the point of rescue’. Italy links disembarkation to the SAR, but Malta’s SAR covers some 250,000 square kms. See also Neri, K., ‘The Missing Obligation to Disembark Persons Rescued at Sea’ (2019) 28 *Italian YBIL* 47.

[271](#) The case of the Spanish warship *Admiral Jean de Borbon* during the 2011 Libya operation should therefore be seen as an exception, contrary to the basic principle; flag State responsibility may explain why other NATO ships engaged at the time reportedly failed to initiate rescue operations and gave priority to the pursuit of military objectives. See Klug, A., ‘Strengthening the Protection of Migrants and Refugees in Distress at Sea’ (2014) 26 *IJRL* 48.

[272](#) Here, the principle of solidarity in art. 80 of the Treaty on the Functioning of the European Union must be called in aid if effective results are to be achieved.

[273](#) As with earlier schemes, some provision may also be required for compensating ships’ owners for at least some of the costs incurred when ships’ masters fulfil their international legal duties.

[274](#) For an overview of European Court of Human Rights jurisprudence on extraterritorial liability for disembarkation, and the relevance of maritime rescue and mass migration to the overall assessment of art. 3, ECHR 50, see Billing, F., ‘The ECtHR on Disembarkation of Rescued Refugees and Migrants at Greek Hotspots’ *EJIL Talk!* (25 Oct. 2019). She notes that a series of cases, beginning with *Khlaifia v Italy*, App. No. 16483/12 (15 Dec. 2016), show that ‘[s]ubstandard conditions for refugees and migrants at the initial disembarkation will not always be regarded as inflicted in contravention of Article 3 ECHR in light of the necessity of saving lives at sea and the difficulties experienced by EU coastal states, such as Greece, in addressing a large number of migrant arrivals.’

[275](#) In October 2015, the UN Security Council exceptionally authorized States (including regional organizations) ‘to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya’, and to seize such vessels if confirmed as being used for migrant smuggling or trafficking: UNSC res. 2240 (9 Oct. 2015) para. 8. This was to be done ‘with a view to saving the threatened lives of migrants or of victims of human trafficking’ (para. 7), with the Security Council emphasizing that ‘all migrants, including asylum-seekers, should be treated with humanity and dignity and that their rights should be fully respected, and urg[ing] all States in this regard to comply with their obligations under international law, including international human rights law and international refugee law, as applicable’ (para.

13). This ‘exceptional’ authority was initially intended for only one year, but it has been extended annually since then: see res. 2491 (3 Oct. 2019).

²⁷⁶ See IMO, Resolution A.949(23) ‘Guidelines on Places of Refuge for Ships in Need of Assistance’, adopted by the IMO Assembly on 5 December 2003; Resolution A.950(23) ‘Maritime Assistance Services’; see also, ‘Places of Refuge for Ships in Need of Assistance: A Position Paper by the International Chamber of Shipping’, ECSA, the Asian Shipowners’ Forum, the International Salvage Union, the International Union of Marine Insurance, and the International Group of P&I Clubs (Apr. 2014) <http://www.ics-shipping.org/submissions/other>.

²⁷⁷ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC [2002] OJ L208/10, as amended by Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 Amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system [2009] OJ L131/101.

²⁷⁸ UNHCR, ‘Global Initiative on Protection at Sea’ (Paper for High Commissioner’s Dialogue on Protection Challenges: *Protection at Sea*) (1 May 2014).

²⁷⁹ UNHCR, Summary Conclusions ([n 233](#)) Annex I.

²⁸⁰ UNHCR ‘Protection at Sea’ ([n 76](#)) para. 38.

²⁸¹ In the EU, for instance, there is a substantial body of legislation that insists on compliance with fundamental rights and conformity with Member States’ protection and *non-refoulement* obligations, including: Regulation (EU) 2016/1624 ([n 260](#)) and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC (16 Sep. 2016) OJ L251/1 and Regulation (EC) No. 562/2006 ([n 265](#)); on Frontex, see also <http://frontex.europa.eu/about-frontex/legal-basis/>.

²⁸² For instance, UNHCR repeatedly described the *Tampa* incident in Australia as a break in the ‘time-honoured tradition of rescue at sea’, characterizing it as an aberration in State practice rather than indicative of a new rule (see, for example, Statement by Ms Erika Feller, Director, Dept. of International Protection, UNHCR, to the 24th Meeting of the Standing Committee (25 Jun. 2002)). No other State formally supported the Australian position, and in 2003, the Executive Committee adopted a Conclusion on protection safeguards in interception measures, recalling the duty of States and ships’ masters ‘to ensure the safety of life and to come to the aid of those in distress or in danger of being lost at sea’: Executive Committee Conclusion No. 97 (2003).

Protection under Human Rights and General International Law

1. Introduction

Under general international law, the principle of *non-refoulement* is wider than its expression in article 33 of the 1951 Refugee Convention. While States have always recognized, to varying degrees, the protection needs of people falling outside the refugee definition in article 1A(2) of the Convention, it is only in the last 25 years or so that they have begun to articulate such protection as an international legal obligation, rather than as a matter left to the discretion and humanitarian goodwill of national governments.¹

This chapter explores the development of the principle of *non-refoulement* beyond the Refugee Convention. In broad terms, this can be described as ‘complementary protection’ because the *non-refoulement* obligation derives from sources that are complementary to the Refugee Convention.² However, though not a term of art, ‘complementary protection’ commonly implies the grant of a domestic legal status as well (that is, ‘protection’, which is more than *non-refoulement* alone).³ According to the Inter-American Court of Human Rights, ‘complementary protection constitutes a normative development that is consistent with the principle of *non-refoulement*, by means of which States safeguard the rights of those who do not qualify as refugee[s] ... but who cannot be returned’.⁴

States have protection obligations arising from international legal instruments and custom that complement—or supplement—the 1951 Refugee Convention. Their personal scope is broader because they apply to all individuals, not just refugees. These obligations may be express or implied. Article 3 of the Convention against Torture, for example, expressly prohibits States from removing an individual in any manner whatsoever where there are substantial grounds for believing that doing so would expose him or her to a risk of being subjected to torture.⁵ By contrast, the prohibition on torture or cruel, inhuman, or degrading treatment or punishment contained in article 7 ICCPR 66⁶ (paralleled by article 37(a) CRC 89 and article 3 ECHR 50, with the omission of the word

‘cruel’) has been interpreted as precluding the removal of individuals who face a real risk of being exposed to those forms of harm.⁷ This is because of its absolute nature and fundamental importance in protecting human rights. Article I of the American Declaration of the Rights and Duties of Man protects every person’s ‘right to life, liberty and the security of his person’.⁸ Cantor and Barichello suggest that the Inter-American Commission on Human Rights’ broad interpretation of ‘security of person’ precludes removal to a wider range of harms than under comparable provisions elsewhere, notwithstanding the Commission’s direct reference to jurisprudence from the European Court of Human Rights and the UN Human Rights Committee.⁹ They contend that, by focusing on gaps left by refugee law, the Commission’s jurisprudence is ‘unique ... in promoting a truly integrated legal framework for the protection of refugees and asylum-seekers’.¹⁰

At a minimum, human rights law also precludes removal to situations where individuals face a real risk of being arbitrarily deprived of life, or subjected to the death penalty or enforced disappearance.¹¹ In addition, a general principle of refuge, based on humanitarian law and human rights law, has emerged in State practice to protect those who flee civil war or generalized violence.¹² Many extradition treaties require that the right to a fair trial be guaranteed; the UN Model Treaty on Extradition provides that extradition must be refused if, among others, the minimum guarantees in criminal proceedings (reflected in article 14 ICCPR 66) will not be respected.¹³ The UN Human Rights Committee has noted that a State that allows the death penalty must observe the guarantee of a fair trial,¹⁴ thus suggesting that any State contemplating an individual’s extradition to such a State must pay particular attention to this element.

In all cases, the *non-refoulement* obligation relates to the foreseeability of the risk of harm occurring. Any breach arises at the time of transfer¹⁵ and lies in ‘exposing the individual concerned to a *risk of mistreatment*’,¹⁶ irrespective of whether the ill-treatment actually occurs.¹⁷

Properly applied, complementary protection does not supplant or compete with the Refugee Convention. By its very nature, it is *complementary* to refugee status determination, which means it should only be considered following a comprehensive evaluation of a person’s claim against the Refugee Convention definition and a finding that the applicant is not a refugee.¹⁸ In many domestic refugee status determination procedures, an asylum seeker’s protection claim will first be assessed in light of the Refugee Convention, and then assessed

against complementary protection grounds.¹⁹ This is intended to safeguard the ‘primacy’ of the Refugee Convention and ensure that decision-makers remain mindful of the evolving meaning of ‘persecution’ in refugee law, thus developing refugee jurisprudence accordingly.²⁰ Analysis of decisions shows that complementary protection is most commonly granted where a person has a well-founded fear of persecution that is not linked to one of the five Refugee Convention grounds; is precluded from being granted refugee status owing to a domestic bar; or the treatment feared does not reach the level of severity of ‘persecution’ under the Refugee Convention.²¹

2. The evolution of complementary forms of protection

Although the expression ‘complementary protection’ arose in the 1990s,²² the practice it describes has a long history.²³ Indeed, rudimentary examples of complementary protection can be traced back to the period of the League of Nations,²⁴ when States realized that not all those in need of international protection could be neatly encompassed by formal legal ‘refugee’ definitions (which at that time were based on national categories).²⁵ France, for example, extended the legal status set out in the 1933 Convention relating to the International Status of Refugees (which applied to Russian, Armenian, Assyrian, Assyro-Chaldean, assimilated refugees (of Syrian or Kurdish origin), and Turkish refugees²⁶) to Spanish refugees fleeing the Civil War,²⁷ while the United Kingdom treated as refugees ‘many thousands of persons who still enjoyed the protection of the Reich, and had extended its asylum to them, either for the purpose of enabling them to make a new home in the United Kingdom, or of staying there temporarily till plans for their settlement in some other country had been completed’.²⁸ An important feature of this practice was that the content of the protection granted was identical, regardless of whether the protected individual was a ‘refugee’ in accordance with the international legal definition of the period. The ‘complementary’ aspect of protection was simply the basis on which it was extended.²⁹ According to Jackson, States tended to follow this pattern until the 1980s, when more restrictive policies began to take effect and ‘status’ became a key political tool for differentiating between ‘genuine’ Convention refugees and others.³⁰ It is ironic, although perhaps not coincidental, that just as States were extending UNHCR’s mandate to refugees in large-scale influxes and displaced persons in refugee-like situations,³¹ they started to

contract the protection they were willing to afford under domestic law.³²

As noted in Chapter 2, there is a disjuncture between UNHCR's functional responsibilities and States' obligations under the 1951 Convention.³³ Whereas UNHCR's mandate has been successively extended by UNGA resolutions, the 1951 Convention text has only been amended (in effect) once, by the 1967 Protocol, to remove the temporal and geographical limitations of the refugee definition in article 1A(2). In the regional refugee instruments of Africa³⁴ and Latin America,³⁵ the refugee concept is defined more broadly than its international counterpart, encompassing (respectively) flight from 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [the] country of origin or nationality',³⁶ and 'generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.³⁷

While States have eschewed any expansion of the Convention refugee definition at the international level, State practice over time evinces an understanding that certain individuals, beyond those encompassed by article 1A(2), must not be returned to serious forms of harm.³⁸ State practice has consistently revealed a dominant trend of offering some form of protection to 'persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin'.³⁹ States have also consistently recognized a right of refuge in cases of grave and urgent necessity, even if they have resisted formally classifying such people as 'refugees'.⁴⁰ Crucially, no State has formally denied the existence of such a right,⁴¹ even if protection has at times been provided in highly varied, *ad hoc* responses at the national level, premised largely on executive discretion.⁴²

As early as 1961, the European Commission on Human Rights had recognized that article 3 ECHR 50, which prohibits torture and inhuman or degrading treatment or punishment, could encompass the principle of *non-refoulement*.⁴³ This was reflected in a Council of Europe Parliamentary Assembly recommendation in 1965, which stated that: 'by prohibiting inhuman treatment, [article 3] binds contracting parties not to return refugees to a country where their life or freedom would be threatened'.⁴⁴ From the mid-1970s, the Council of Europe sought to unify European State practice relating to '*de facto* refugees'—'persons not recognised as refugees within the meaning of Article 1 of the [Refugee] Convention' and who were 'unable or unwilling for political,

racial, religious or other valid reasons to return to their countries of origin'⁴⁵—through a series of non-binding recommendations.⁴⁶ Although States were encouraged not to expel de facto refugees or restrict their political activities,⁴⁷ the instruments did not specify what legal status they should be granted. This, according to Weis, was their main disability.⁴⁸ He favoured the extension of article 1A(2) to encompass additional categories of protected persons, although he realized that, politically, this was unlikely.⁴⁹

Internationally, progress was even slower. Complementary protection, as an issue requiring deliberate and principled consideration, did not emerge on the international agenda until the late 1980s, and tended for a long time to be raised in the context of mass influx.⁵⁰ The UNHCR-convened San Remo Round Table of 1989 was the first international forum to consider the protection of refugees in non-international armed conflicts as a legal responsibility, rather than just a moral obligation. It noted the importance of ‘supplementing the traditional principles of law and doctrine with complementary new principles’,⁵¹ focusing in particular on human rights law as a primary source for refugee protection at all stages of the refugee process.⁵² In particular, the Round Table articulated the importance of conferring a legal status on beneficiaries of a wider protection practice, noting that it was unjust ‘to deprive a human being of a community for many years, especially where the person lived under a continuing threat of expulsion’.⁵³ Two years later, a Working Group, convened at the behest of the Executive Committee,⁵⁴ identified seven categories of people with an international protection need, based on States’ responsibilities under relevant international instruments, and UNHCR’s mandate (as extended by various UNGA resolutions).⁵⁵ It was considered ‘illogical’ that people might be protected in certain regions of the world—namely, in Africa and Latin America where extended refugee definitions applied—but not in other parts.⁵⁶ The topic was considered

pertinent not only because of the large number of people affected, but also because of the complications that can arise when States must deal with such persons in an ad hoc manner that may not be understood or supported by public opinion. In addition, there is a growing gap between the responsibilities which States have been prepared to assume and those which they have asked UNHCR to perform.⁵⁷

Of concern was not only who should benefit from protection beyond the Refugee Convention, but also what the content of that protection should be.⁵⁸ In this

respect, the Working Group considered the OAU Convention and Cartagena Declaration to be appropriate models, synthesizing institutional and State mandates.⁵⁹ The OAU Convention describes itself as a ‘regional complement’ to the international refugee instruments,⁶⁰ while the Cartagena Declaration calls on States in the region to ‘establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights’.⁶¹ The preponderance of academic opinion today supports the view that both instruments envisage Convention refugee status as applying to their beneficiaries, including those recognized under their expanded definitions.⁶²

That extended protection was based on international law, not merely moral or humanitarian principles, was emphasized by UNHCR’s 1991 ‘Note on International Protection’:

Within the framework of this existing body of international law, three sets of principles have tended to develop separately, although in parallel, where they could perhaps have been linked more closely at an earlier stage. These are the law of refugee protection, human rights law generally and humanitarian law. Together, these three domains of law—which, in reality, are closely interrelated and often overlap—should ideally permit an individual to assert a claim, not only against his or her own country or, in certain situations, another country, but on the international community as whole—a claim to its direct involvement on humanitarian grounds. In other words, where Governments fail to recognize individual claims, or where there is no effective Government to which an individual in the first instance might turn, there is a pressing need for that person to be able to assert a claim more broadly. The international community seems already to be moving in this direction as a result of recent events and there might be value in examining how the legal foundations of this development could be strengthened.⁶³

Given that part of the impetus behind these discussions was to narrow the gap between UNHCR’s institutional mandate and States’ protection obligations, a 1992 UNHCR discussion Note identified five categories of people within UNHCR’s mandate: (a) those who fall under the Statute/1951 Convention definition and thus are entitled to benefit from the full range of UNHCR’s functions; (b) those who belong to a broader category but have been recognized by States as being entitled to both the protection and assistance of UNHCR; (c) those to whom the High Commissioner extends his or her ‘good offices’, mainly but not exclusively to facilitate humanitarian assistance; (d) returning refugees,

for whom the High Commissioner may provide reintegration assistance and a certain protection; and (e) non-refugee stateless persons whom UNHCR has a limited mandate to assist.⁶⁴ For the purposes of devising an expanded protection regime, the Note stated that those in category (b) were of most interest, and typically included persons covered by the definitions in the OAU Convention and the Cartagena Declaration. However, this Note marked a shift in thinking about the resultant status for such people. Whereas the regional instruments are complementary to the 1951 Convention, and people in the broader refugee class are entitled to the same legal status as Convention refugees,⁶⁵ this Note for the first time acquiesced in the idea that protection extended on a complementary basis might be temporary in nature, observing that '[f]or the very large majority of persons of concern in the present context, return at some point will be the only available solution'.⁶⁶ The Note itself does not reveal the background discussions on this point. It may simply have been a pragmatic response designed to deal with large influxes of people, or based on the assumption that return would be possible at the end of a civil war. However, the acceptance of this point seems to have occurred without any comprehensive analysis of whether it was legally justifiable or necessary.⁶⁷ Furthermore, for the first time, and again without explanation, a separate complementary protection status, different from Convention status, was contemplated. It was based primarily on the standards set out in the 1981 Executive Committee Conclusion No. 22 on Protection of Asylum-Seekers in Situations of Large-Scale Influx.⁶⁸ Yet, at the same time, the Note concluded that:

There is nothing in the Convention definition which would exclude its application to persons caught up in civil war or other situations of generalized violence. Refugees are refugees when they flee or remain outside a country for reasons pertinent to refugee status, whether these reasons arise in civil war type situations, in international armed conflict or in peace time. Possibilities for identifying these persons should, therefore, not be precluded, but rather specifically provided for.⁶⁹

By this time, there was a general consensus that a uniform international response to people not covered by article 1A(2) but in need of international protection was required in order to avoid differential treatment, uncertainty, and unequal burden-sharing.⁷⁰ However, agreement as to how this should be done was more tenuous. The possibility of drafting a Protocol to the Convention was discouraged on the basis that it would open up 'fundamental principles and precepts in the

Convention itself' for renegotiation.⁷¹ Instead, it was suggested that States should first bring their national laws into line with international and regional standards, and a universal international regime could be developed subsequently. A 1994 Note canvassed four options: a new Convention; a declaration of guiding principles; regional harmonization; or concerted approaches in specific situations. UNHCR considered that a new international instrument—‘an OAU refugee Convention writ large’⁷²—would be the most attractive option, but conceded that States did not seem disposed to incur further legal obligations in relation to asylum.⁷³ For this reason, it was suggested that a set of guiding principles would be the most realistic means of obtaining a formal commitment by States to protect refugees from armed conflict (for which there was broad international consensus),⁷⁴ with harmonized regional approaches cited as ‘perhaps the most promising option for strengthening protection’.⁷⁵

Even though the European Court on Human Rights had confirmed in 1989 that States’ obligations under article 3 ECHR 50 prohibited *refoulement* to torture or inhuman or degrading treatment or punishment⁷⁶—a view echoed by the Human Rights Committee in 1992 with respect to article 7 ICCPR 66,⁷⁷ and the Committee against Torture in 1994 with respect to article 3 CAT 84⁷⁸—it was not until 1994 that the Executive Committee explicitly acknowledged that many States ‘are parties to other international instruments that could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would [be] in jeopardy’.⁷⁹ In the same year, the Parliamentary Assembly of the Council of Europe stated that States’ international protection obligations were ‘based on the 1951 Geneva Convention *and* the Convention for the Protection of Human Rights and Fundamental Freedoms—remembering that *the latter also implies obligations vis-à-vis persons who are not necessarily refugees in the sense of the 1951 Geneva Convention*’.⁸⁰

The identification of specific treaty obligations as extending the principle of *non-refoulement* beyond article 33 of the 1951 Convention marked the turning point in the modern development of complementary protection as a principled response based on international law, rather than a purely *ad hoc* domestic discretion. It was this that also came to differentiate ‘complementary’ and ‘temporary’ protection regimes, with the former operating in relation to identifiable ‘individual’ rights violations, and the latter covering broader humanitarian disturbances (based partly on humanitarian law, but perhaps more

appropriately conceived as the customary law principle of temporary refuge). The logical flaw in the distinction is, of course, that so far as a State's actions may expose an individual to risk of violation of fundamental human rights, its responsibility should be duty-driven, rather than strictly correlative to any individual 'right'.⁸¹ Furthermore, once a protection obligation has been identified, protection should be forthcoming regardless of whether an individual arrives alone or as part of a larger group. Indeed, although the discussion in the early 1990s about protection duties beyond the Refugee Convention seemed to centre on mass influx situations, the records do not reveal any suggestion that this widened responsibility was *only* applicable to flight *en masse*.⁸² For this reason, those earlier deliberations comprise part of the development of the modern notion of complementary protection.

Notwithstanding three decades of discussions at the European and international levels to create a harmonized, legal approach to complementary protection, and the development of an extensive jurisprudence throughout the 1990s by the European Court of Human Rights and UN human rights bodies, it was not until 2004 that a binding supranational legal instrument was adopted by the EU Member States (the Qualification Directive, discussed below),⁸³ and in late 2005 that a non-binding Executive Committee Conclusion was agreed at the international level.

The 2005 Executive Committee Conclusion calls on States to uphold their international obligations under the 1951 Convention, the statelessness treaties, human rights law, and humanitarian law; acknowledges complementary protection as 'a positive way of responding pragmatically to certain international protection needs';⁸⁴ and encourages States to use 'complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol'.⁸⁵ It affirms that complementary protection should be applied 'in a manner that strengthens, rather than undermines, the existing international refugee protection regime',⁸⁶ and emphasizes the importance of applying and developing international protection in a manner that avoids the creation or continuation of protection gaps.⁸⁷ However, a weakness of the Conclusion is its failure to call expressly for the equal treatment of Convention refugees and beneficiaries of complementary protection.⁸⁸

There are now domestic complementary protection regimes in numerous States, including Albania,⁸⁹ Australia,⁹⁰ Bosnia,⁹¹ Canada,⁹² Costa Rica,⁹³ Hong

Kong,⁹⁴ Macedonia,⁹⁵ Mexico,⁹⁶ Montenegro,⁹⁷ New Zealand,⁹⁸ Nicaragua,⁹⁹ Norway,¹⁰⁰ Serbia,¹⁰¹ South Korea,¹⁰² Switzerland,¹⁰³ Turkey,¹⁰⁴ Ukraine,¹⁰⁵ the United Kingdom,¹⁰⁶ the United States,¹⁰⁷ throughout the European Union (EU),¹⁰⁸ and in parts of Africa,¹⁰⁹ in addition to the expanded refugee categories in the regional refugee systems of Africa¹¹⁰ and Latin America.¹¹¹

3. The scope of protection under human rights law

As noted at the outset of this chapter, complementary protection protects people from return to circumstances where they face a real risk of being arbitrarily deprived of life; being subjected to the death penalty, torture, or cruel, inhuman, or degrading treatment or punishment, or enforced disappearance.¹¹² These rights are absolute: they have no exceptions, States cannot enter treaty reservations to them, and they cannot be derogated from during times of public emergency. Their meaning has been the subject of considerable jurisprudence and scholarly analysis, and both the UN Human Rights Committee and the European Court of Human Rights have explained that they cannot be exhaustively defined since their meaning will evolve over time. For this reason, there is no definitive ‘list’ of proscribed treatment. Further, the individual circumstances of each case will have a bearing on whether the particular ill-treatment feared attains the minimum level of severity, which may not be as severe as ‘persecution’.¹¹³ Ill-treatment may result from positive acts, such as the actual infliction of harm, as well as from deprivation, such as the withholding of resources.¹¹⁴

Some human rights are ‘qualified’ rights, in the sense that they are derogable in certain limited circumstances, can be the subject of reservations, or can be balanced against other competing considerations. For example, the right to freedom of expression in article 19 ICCPR 66 can be restricted if this is necessary to protect national security, public order, public health, or morals, or to ensure respect for the rights or reputations of others. In cases concerning qualified rights, applicants may therefore try to show that the harm feared also constitutes ‘inhuman or degrading treatment’, which is clearly recognized as a basis for complementary protection; most jurisprudence on human rights-based *non-refoulement* in fact focuses on that ground.¹¹⁵

An individual at risk of removal who has exhausted all domestic remedies may lodge a complaint with one of the treaty-monitoring bodies, such as the UN

Committee against Torture or the UN Human Rights Committee.¹¹⁶ However, while those bodies may find that a State's *non-refoulement* obligations would be violated if the individual in question were removed, there is no guarantee that the State will follow their views, since they are not legally binding.¹¹⁷ By contrast, decisions of the European Court of Human Rights are binding on the parties to the claim, although the court does not specify what legal status should be granted to the applicant if he or she cannot be removed.¹¹⁸

The following sections describe the nature and scope of the various treaty obligations and how they have been interpreted by the relevant treaty bodies and courts. This gives content to the obligations to which States have subscribed by ratifying particular treaties, and illustrates the criteria that should, at minimum, constitute grounds for complementary protection in national law. Beginning with the case of *Soering v United Kingdom* in 1989, the European Court of Human Rights has been at the forefront of interpreting the principle of *non-refoulement* in human rights law.¹¹⁹ Its reasoning has been applied and extended by international treaty monitoring bodies, other regional courts (such as the Court of Justice of the European Union (CJEU) and the Inter-American Court of Human Rights), and domestic courts and legislatures. For this reason, its jurisprudence is examined in particular detail.

3.1 Absolute nature of *non-refoulement* in human rights law

There are no exceptions to the principle of *non-refoulement* in human rights law, which means that there is no scope for balancing a person's conduct (however abhorrent) against the risk of harm if he or she is returned. This has been affirmed consistently and robustly by the European Court of Human Rights¹²⁰ and the UN treaty-monitoring bodies,¹²¹ notwithstanding arguments by some States that an exception should be made in cases concerning terrorists or other serious criminals.¹²²

In this respect, the principle of *non-refoulement* in human rights law has a broader application than under the 1951 Convention, where the refugee definition contains 'exclusion' clauses and the principle itself permits exceptions. Chetal even argues that 'human rights law has become the ultimate benchmark for determining who is a refugee',¹²³ although the word 'refugee' here is evidently used in a quasi-legal sense. Human rights law may provide protection from *refoulement* to people expressly excluded from refugee status,¹²⁴ but that does not necessarily mean that they will be granted the same domestic legal

status.¹²⁵

3.2 Torture

Return to torture is prohibited by CAT 84,¹²⁶ ICCPR 66,¹²⁷ CRC 89¹²⁸ and a range of regional treaties.¹²⁹ In all cases, the prohibition is absolute: it is non-derogable and applies irrespective of a person's conduct.¹³⁰

CAT 84 is the only treaty that expressly sets out the prohibition on *refoulement* to torture.¹³¹ For the purposes of that treaty, Article 1(1) defines 'torture' as any act,

by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Protection against removal under CAT 84 is thus limited to the risk of torture as defined,¹³² and such limitations do not apply under the other human rights treaties.¹³³ However, the Committee against Torture has recently suggested that the treaty's scope of application is broader, stating that protection should extend to acts by non-State actors,¹³⁴ and that

the infliction of cruel, inhuman or degrading treatments or punishments, whether or not amounting to torture, to which an individual or his/her family were exposed in their State of origin or would be exposed in the State to which he/she is being deported, constitutes an indication that the person is in danger of being subjected to torture if he/she is deported to one of those States. Such indication should be taken into account by States parties as a basic element justifying the application of the principle of 'non refoulement'.¹³⁵

As in refugee law, the prohibition of return 'in any manner whatsoever' applies not only to the immediate State of destination, but also to any State to which the individual in question may subsequently be expelled, returned, or extradited.¹³⁶ A State will not be considered safe simply because it has ratified the relevant human rights treaties, but only in light of actual treatment and conditions.¹³⁷

Conversely, return to a State that is not party to CAT 84 may be presumptively unsafe, since a person returned would then fall ‘outside the protection of the Convention and its remedies of control’.¹³⁸

Widespread violations of human rights may help to substantiate the existence of torture and preclude return,¹³⁹ including acts of cruel, inhuman, or degrading treatment or punishment. However, the existence of such a pattern ‘does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon ... return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.’¹⁴⁰

3.2.1 Lawful sanctions

Pain or suffering arising out of ‘lawful sanctions’ does not amount to ‘torture’ under CAT 84. The convention neither defines ‘lawful sanctions’ nor indicates whether they should be assessed according to an international standard or the domestic laws of each State party. However, State practice and the approach of the UN treaty-monitoring bodies suggest that they are to be evaluated in accordance with international human rights law. For example, ‘imprisonment and the normal conditions of detention’ will not ordinarily amount to torture,¹⁴¹ but may do so if they go beyond the inherent restrictions on liberty that detention entails and involve particularly egregious human rights abuses.¹⁴² Similarly, while the death penalty does not amount to torture per se, particular methods of execution might. For instance, the Committee against Torture has stated that death by stoning is contrary to CAT 84,¹⁴³ and the Human Rights Committee has found that ‘execution by [cyanide] gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant’, even though it was a ‘lawful sanction’ in the country concerned.¹⁴⁴

3.2.2 Intent

Whereas the definition of ‘torture’ in article 1 CAT 84 requires evidence of intent to inflict harm,¹⁴⁵ this is not a formal requirement under the other human rights treaties. Refugee law, for example, does not require that the persecution feared should result from acts committed with intent.¹⁴⁶ However, the intent requirement in CAT 84 has been relied upon by the UN General Assembly and,

in turn, the European Court of Human Rights to distinguish ‘torture’ from other forms of inhuman treatment: it is ‘an aggravated *and deliberate* form of cruel, inhuman or degrading treatment or punishment’.¹⁴⁷ In *Ireland v United Kingdom*, the European Court of Human Rights stated that the distinction between ‘torture’ and ‘inhuman treatment’ was that to torture attaches ‘a special stigma to *deliberate* inhuman treatment causing very serious and cruel suffering’.¹⁴⁸

Intent to cause harm may in some cases bolster a protection claim based on cruel, inhuman, or degrading treatment or punishment, but it is not a formal requirement.¹⁴⁹ As the European Court of Human Rights observed in *Labita v Italy*, ‘[t]he question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account ... *but the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3*'.¹⁵⁰ However, practice is somewhat inconsistent. The CJEU has held that article 15(b) of the Qualification Directive does not apply to an applicant suffering from a serious illness who cannot obtain appropriate treatment in the country of origin, ‘unless such an applicant is intentionally deprived of health care.’¹⁵¹ Australia’s legislative complementary protection scheme requires that torture and cruel, inhuman, or degrading treatment or punishment be intentionally inflicted.¹⁵² The High Court of Australia has held that this requires ‘an actual, subjective, intention on the part of a person to bring about suffering by his or her conduct.’¹⁵³

3.3 Cruel, inhuman, or degrading treatment or punishment

As noted above, removal to a real risk of torture or cruel, inhuman, or degrading treatment or punishment is prohibited by ICCPR 66,¹⁵⁴ CRC 89,¹⁵⁵ and a range of regional human rights treaties.¹⁵⁶ Article 7 ICCPR 66 provides: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. It is an absolute and non-derogable¹⁵⁷ provision, and although it does not specifically proscribe *refoulement* to such ill-treatment, the UN Human Rights Committee has interpreted it as precluding removal where an individual would face a ‘real risk’ of being subjected to such prohibited treatment.¹⁵⁸ This obligation arises out of the combination of articles 7 and 2(1), which requires States to guarantee the ICCPR 66 rights ‘to all persons who may be within their territory and to all persons subject to their jurisdiction’,¹⁵⁹ including asylum seekers and refugees.

The scope of article 7 ICCPR 66, like its regional counterparts, is thus wider

than article 3 CAT 84, encompassing not only torture but also cruel, inhuman, or degrading treatment or punishment (whether inflicted physically or mentally).¹⁶⁰ Unlike under CAT 84, there is no requirement that any of these forms of ill-treatment be carried out by or with the acquiescence of the State.¹⁶¹ Where the risk of harm emanates from a non-State actor, the key question is whether the authorities in the receiving State can obviate it by providing appropriate protection.¹⁶²

Decision-making bodies generally do not draw clear distinctions between treatment that is ‘cruel’, ‘inhuman,’ or ‘degrading’. They commonly regard them either as falling somewhere on a sliding scale of ill-treatment, with torture the most severe manifestation,¹⁶³ or collectively as the ‘compendious expression of a norm’¹⁶⁴ that ‘proscrib[es] any treatment that is incompatible with humanity’.¹⁶⁵ A former UN Special Rapporteur on Torture, Manfred Nowak, suggested that ‘the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted’.¹⁶⁶

The Human Rights Committee has thus considered it unnecessary ‘to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’.¹⁶⁷ For that reason, it commonly fails to determine precisely which aspect of article 7 ICCPR 66 has been violated, and there is accordingly very little jurisprudence about the nature of each type of harm. Both the Human Rights Committee and the European Court of Human Rights have explained that the terms cannot be defined exhaustively, especially since their meaning will evolve over time.¹⁶⁸

Decisions of the European Court of Human Rights on the parallel regional provision, article 3 ECHR 50, provide a little more analysis.¹⁶⁹ The main differentiation has been between ‘torture’ and ‘inhuman or degrading’ treatment, discussed above, although on occasion the court has also provided guidance on the distinction between ‘inhuman’ and ‘degrading’ treatment as well. The court’s more recent approach has been to consider the three types of ill-treatment as a whole, noting that since ECHR 50 ‘is a “living instrument which must be interpreted in the light of present-day conditions” ... certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future.’¹⁷⁰

‘Inhuman treatment’ covers ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’.¹⁷¹ It does not have to encompass actual bodily harm.¹⁷² The European Court of Human Rights has found treatment to be ‘inhuman’, for instance, where it was premeditated, applied for hours at a time, and caused actual bodily injury or intensive physical and mental suffering.¹⁷³ The ill-treatment must qualitatively attain a ‘minimum level of severity’,¹⁷⁴ the assessment of which is relative and ‘depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim’.¹⁷⁵

The Canadian Supreme Court has stated that punishment will be ‘cruel and unusual’ (the domestic equivalent of ‘inhuman or degrading’) if it possesses any one or more of the following characteristics:

- (1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
- (2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
- (3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.¹⁷⁶

Whereas the distinction between torture and inhuman treatment has often been assessed as one of degree, ‘degrading’ treatment generally requires gross humiliation before others or being driven to act against one’s will or conscience. Humiliation, rather than actual pain or suffering, is key.¹⁷⁷ In *Pretty v United Kingdom*, the European Court of Human Rights held that ‘degrading treatment’ occurs ‘[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance’.¹⁷⁸

Degrading treatment can also encompass racial discrimination,¹⁷⁹ which, in the context of complementary protection, would mean treatment less severe than persecution for reasons of race. The denial of basic services necessary for a dignified existence may in some cases amount to degrading treatment (or to

arbitrary deprivation of life or inhuman treatment).¹⁸⁰

In the *non-refoulement* context, decision-makers have refused to allow removal to cruel, inhuman, or degrading treatment including domestic violence; honour killings and other honour-based crimes (for example, blood feuds); extortion attempts; land disputes; revenge attacks; civil war; and certain prison conditions.¹⁸¹ Such types of harm may, in certain circumstances, also amount to persecution, and where they are linked to a Convention reason, recognition of refugee status should follow accordingly.¹⁸²

It is also instructive that the Committee against Torture has detailed a list of non-exhaustive examples of ‘human rights situations which may constitute an indication of a risk of torture’ which should be considered in removal cases.¹⁸³ These include the risk of arbitrary arrest and/or denial of fundamental guarantees while in custody; brutality or excessive use of force by public officials; violence, including sexual or gender-based violence, gender-based persecution, or genital mutilation; an unfair trial; detention or imprisonment in inhumane conditions; exposure to sentences of corporal punishment; removal to a State in which there are credible allegations of genocide, crimes against humanity or war crimes (submitted to the International Criminal Court for consideration), or to a State alleged to have breached certain elements of the Geneva Conventions and their Protocols; denial of the right to life, including by exposure to extrajudicial killings, enforced disappearance, or the death penalty, in some cases; the death row phenomenon and/or an inhuman methods of execution; reprisals (against the person concerned or others, including family members), such as violent or terrorist acts, or the disappearance, torture, or killing of family members; slavery, forced labour, or trafficking; or, if a minor, a violation of fundamental child rights creating irreparable harm, such as recruitment as a combatant or to provide sexual services.¹⁸⁴ Significantly, if such acts can amount to torture (depending on their degree), then they can certainly also constitute cruel, inhuman, or degrading treatment or punishment.

Some domestic complementary protection regimes contain exceptions as to what constitutes torture or cruel, inhuman, or degrading treatment or punishment.¹⁸⁵ In international law, there are two inherent limiting mechanisms: how the treatment is classified in the first place,¹⁸⁶ and whether the individual concerned faces a ‘real risk’ of harm if removed.¹⁸⁷ For example, the European Court of Human Rights has held that forced feeding and forcible medical treatment are not inhuman or degrading if therapeutically necessary, the crucial

factor being whether ‘a medical necessity has been convincingly shown to exist’.¹⁸⁸ Similarly, otherwise ‘degrading’ prison conditions may not reach that threshold if they are necessary to prevent suicide or escape.¹⁸⁹

Various European cases examining whether dire humanitarian conditions or deprivation of socio-economic rights could amount to inhuman or degrading treatment precluding removal are discussed in detail in Chapter 12, in the context of disaster and climate change-related displacement, and in Chapter 8, in the context of Dublin transfers within the EU.

3.4 General risk

In many cases, particularly involving conflict or generalized violence, an individual may flee a risk of harm that is very widespread.¹⁹⁰ The question of how personal this risk needs to be has been extensively examined, particularly in Europe. In relation to article 3 ECHR 50, the European Court of Human Rights has explained that an individual does not have to show ‘further special distinguishing features concerning him personally’¹⁹¹ if, on the basis of their ethnic group or similar status, he or she faces a real risk of torture or inhuman or degrading treatment or punishment if removed. Similarly, in Canada the Federal Court has held that while a claimant must establish a personal and objectively identifiable risk, this ‘does not mean that the risk or risks feared are not shared by other persons who are similarly situated.’¹⁹² This approach is consistent with refugee law, which does not require ‘singling out’.¹⁹³

The EU Qualification Directive contains a specific complementary protection provision to protect civilians at risk of a ‘serious and individual threat to ... life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.¹⁹⁴

During the drafting of the original Qualification Directive, the French delegation expressed somewhat exaggerated fears that if article 15(c) did not require an applicant to demonstrate individual harm, entire populations could flee and obtain subsidiary protection in the EU on the grounds of generalized violence.¹⁹⁵ A clear majority of Member States supported the ‘individual’ requirement on the grounds that this would avoid ‘an undesired opening of the scope of this subparagraph’.¹⁹⁶

Following a series of conflicting approaches by national courts in the EU, the CJEU clarified that an applicant does not have to ‘adduce evidence that he is specifically targeted by reason of factors particular to his personal

circumstances'.¹⁹⁷ Rather, the threshold is met where the indiscriminate violence feared 'is so serious that it cannot fail to represent a likely and serious threat to that person.'¹⁹⁸ In other words,

the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.¹⁹⁹

For a consistent, protection-focused, human rights-oriented approach, the relevant issue is whether an individual faces a real risk of harm, irrespective of whether it is individually targeted.²⁰⁰ Otherwise, there would be an added evidentiary burden above and beyond what is required under the Refugee Convention, which would undermine the Qualification Directive as a *complementary* form of protection.²⁰¹ Such an approach also accords with the logic of the EU's Temporary Protection Directive which extends protection (in situations of mass influx) to 'persons who have fled areas of armed conflict or endemic violence' and 'persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights'.²⁰²

3.5 Standard of proof

In complementary protection claims concerning the right to life, torture, or cruel, inhuman, or degrading treatment or punishment,²⁰³ the relevant standard is that there are substantial grounds for believing that a person would face a 'real risk' of harm if removed.²⁰⁴

The UN Committee against Torture interprets 'substantial grounds' as meaning that there is a 'foreseeable, personal, present and real' risk of torture.²⁰⁵ The threat of torture does not have to be 'highly probable'²⁰⁶ or 'highly likely to occur', but must go 'beyond mere theory or suspicion' or 'a mere possibility of torture'.²⁰⁷ 'Substantial grounds' may be based not only on actions by the individual committed in the country of origin prior to flight, but also on activities undertaken in the receiving country.²⁰⁸ Furthermore, 'it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and

reliable'.²⁰⁹

The UN Human Rights Committee, for its part, will look to see ‘whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.’²¹⁰ In the 2011 case of *Pillai v Canada*, it explained that it had refined this standard over the past decade, bringing it into line with the approach of the Committee against Torture and the European Court of Human Rights, which ‘focus on danger, or risk’ of harm, rather than certainty or probability of harm.²¹¹ This means that attention should be given ‘to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen’.²¹²

Likewise, the European Court of Human Rights has explained that an individual must show that there are substantial grounds for believing that he or she would face a real (‘foreseeable’²¹³) risk of being subjected to torture or inhuman or degrading treatment or punishment if removed.²¹⁴ The risk is to be considered as at the date of the decision-maker’s consideration of the case.²¹⁵ A mere possibility of harm is insufficient, but it is not necessary to show definitively, or even probably, that ill-treatment will occur. Even a small risk can be significant and ‘real’ where the foreseeable consequences are very serious.²¹⁶

This approach accords with that taken in refugee law to determine whether someone has a ‘well-founded fear’ of persecution.²¹⁷ Indeed, in domestic complementary protection cases, courts and tribunals in the UK, New Zealand, Canada, and Australia have interpreted the ‘real risk’ standard as essentially the same as the ‘well-founded fear’ test in the Refugee Convention.²¹⁸

The UK Asylum and Immigration Tribunal has stated that the ‘real risk’ test means the risk ‘must be more than a mere possibility’—a standard which ‘may be a relatively low one’.²¹⁹ Moreover,

[s]ince the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual’s human rights, a difference of approach would be surprising ... Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.²²⁰

The Tribunal noted that to impose a higher standard for complementary

protection claims would also be inconsistent with international human rights jurisprudence and, in practical terms, ‘would produce confusion and be likely to result in inconsistent decisions.’²²¹ The New Zealand Immigration and Protection Tribunal has explained that the test ‘is a threshold analogous to the real chance threshold long-established in refugee law’.²²² While the CJEU has not addressed the standard directly, it likewise appears to regard ‘real risk’ and ‘well-founded fear’ as interchangeable.²²³

By contrast, the US and Canada have adopted a ‘more likely than not’ test.²²⁴ This is inconsistent with international law, partly reflecting factors peculiar to parliamentary intention in those countries but neither explaining nor excusing the inconsistency.²²⁵ A higher test is required for beneficiaries of complementary protection than the ‘well-founded fear’ test for Convention refugee claims, which is interpreted in the United States as meaning a ‘reasonable possibility’ of persecution,²²⁶ and in Canada as a ‘reasonable chance’ or ‘serious possibility’ of persecution.²²⁷ The UN Human Rights Committee has criticized Canada’s approach, stating that its reliance on outdated international jurisprudence and its misunderstanding of the law may have deprived asylum seekers from having their claims properly evaluated under article 7 ICCPR 66.²²⁸ The UN Committee against Torture has noted that the US adopts a much stricter standard than that reflected in the Committee’s jurisprudence and has criticized it in this and other respects for its inconsistency with international law.²²⁹

3.6 Right to life

The right to life is protected in all the key international and regional human rights treaties.²³⁰ The UN Human Rights Committee describes it as the ‘supreme right’,²³¹ which ‘should not be interpreted narrowly’,²³² is non-derogable, and is recognized as entailing a *non-refoulement* obligation.²³³ The same standard of proof applies as in relation to article 7 ICCPR 66 and article 3 CAT 84.

The European Court of Human Rights also recognizes that article 2 ECHR 50 may be relied upon to prevent removal. No case has succeeded solely on this ground,²³⁴ however, because article 2 is generally raised in conjunction with article 3, and if a violation of the latter is found, then the article 2 claim typically falls away.²³⁵ In *Z and T v United Kingdom*, for example, the court stated that the article 3 analysis ‘applies equally to the risk of violations of [Art] 2’.²³⁶ Nevertheless, article 2 may yet have an independent role to play, such as in

States where the right to life is included as a separate ground for complementary protection.²³⁷

Both articles 2 and 3 ECHR 50 impose dual obligations on the State: ‘an obligation ... not to subject anyone within its jurisdiction to torture or other treatment of the kind described; and also a positive obligation to take steps to protect an individual who is exposed to a real and imminent risk of serious harm of which the state authorities are aware’; this, in turn, includes the ‘inherent’ component that a State must not ‘send an individual to another state where there are substantial grounds for believing that the individual would face a real risk of being subjected to torture or other prohibited treatment.’²³⁸

3.6.1 Death penalty

Unlike removal to torture or cruel, inhuman, or degrading treatment or punishment, neither CAT 84 nor ICCPR 66 absolutely prohibits return to the death penalty. However, as noted above, in certain circumstances removal to face the death penalty may be captured by these grounds, such as if a particularly cruel type of execution is to be used or a person is to be held indefinitely on death row.²³⁹

Nevertheless, States parties to the Second Optional Protocol to ICCPR 66 have committed to the abolition of the death penalty in their own territory and, by extension, have undertaken not to expose individuals to it elsewhere.²⁴⁰ The UN Human Rights Committee has also made clear that this obligation applies to States parties to ICCPR 66 that have themselves abolished the death penalty,²⁴¹ as has the Inter-American Court of Human Rights.²⁴² There are comparable provisions in article 37(a) CRC 89, European treaty law,²⁴³ domestic complementary protection regimes,²⁴⁴ and extradition treaties.²⁴⁵ In Europe, practice has evolved in relation to *non-refoulement* to countries where the death penalty is available, and this has now crystallized into a rule of regional customary international law. The rule derives from, and is illustrated by, both consistent State practice and clear statements demonstrating *opinio juris* by all European States. As a matter of policy and practice, no European State returns individuals to any country in which they are at risk of the death penalty.²⁴⁶

Procedural defects may also violate article 6 ICCPR 66. In *Pillai v Canada*, the Human Rights Committee stated that by failing to give the individual concerned the opportunity to appeal under domestic law, the right to life had not been properly considered and thus the removal decision ‘was taken arbitrarily

and in violation of article 6, together with article 2, paragraph 3, of the Covenant.’²⁴⁷

3.7 Right to an effective remedy

Under human rights law, States must ensure that anyone whose rights or freedoms are violated can access an effective remedy.²⁴⁸ The remedy must be effective in both law and practice,²⁴⁹ and a discretionary remedy will be insufficient, given the potential risk of error.²⁵⁰

In the present context, an effective remedy requires that there are both procedural and substantive safeguards in place to prevent a person from being removed in violation of States’ *non-refoulement* obligations.²⁵¹ The European Court of Human Rights has stipulated that, in this context, the right to an effective remedy requires, among other things:

- the suspension of removal arrangements;²⁵²
- giving individuals sufficient time to lodge a claim or appeal, and to have their case for protection thoroughly and rigorously examined;²⁵³
- the remedy to be accessible in practice, not just in theory (which might be curtailed, for example, in a fast-track asylum process).²⁵⁴

4. Other rights

International and regional human rights bodies and courts have emphasized that the list of rights giving rise to complementary protection is not closed. For instance, both the UN Human Rights Committee and the UN Committee on the Rights of the Child have made clear that the *non-refoulement* obligation is ‘by no means limited to’ provisions relating to threats to life or to torture or cruel, inhuman, or degrading treatment or punishment, and applies in *any* case where there are substantial grounds for believing that there is a real risk of ‘irreparable harm’ if a person is removed²⁵⁵—a view endorsed by the Inter-American Court of Human Rights in its 2014 Advisory Opinion on the rights of children in need of international protection.²⁵⁶ While ‘irreparable harm’ has not been defined, both Committees regard arbitrary deprivation of life, torture, and cruel, inhuman, or degrading treatment or punishment as examples of such harm,²⁵⁷ and it is clear from the context that ‘irreparable harm’ is not intended to impose an additional threshold.²⁵⁸ In practice, successful non-removal claims have continued to be

established on the basis of articles 6 or 7 ICCPR 66.

Among international bodies, the most detailed consideration of the scope for other human rights to carry a *non-refoulement* obligation has been undertaken by the European Court of Human Rights. Ever since *Soering* in 1989, it has acknowledged that the same obligation may be implicit in rights other than those in articles 2 and 3 ECHR 50.²⁵⁹ It has expressly recognized this possibility with respect to articles 4 (prohibition of slavery and forced labour),²⁶⁰ 5 (right to liberty and security),²⁶¹ 6 (right to a fair trial),²⁶² 8 (right to respect for private and family life),²⁶³ and 9 (right to freedom of thought, conscience, and religion).²⁶⁴ However, the very high standard demanded in such cases—a ‘flagrant denial’ or a ‘flagrant breach’ of a right—has rarely been met.²⁶⁵ In part, this is because, as the court has noted, it would be difficult to envisage a case where such a violation would not already be encompassed by the prohibition of return to ‘inhuman or degrading treatment’ under article 3 ECHR 50,²⁶⁶ but also because the threshold is very high: a breach ‘which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed’.²⁶⁷ An individual must demonstrate an added ‘measure of persecution, prosecution, deprivation of liberty or ill treatment’ beyond a ‘mere’ violation of the right.²⁶⁸

Costello argues that this higher standard ‘hamper[s] the progressive development of the law’ because it is ‘unduly uncertain and excessively stringent’.²⁶⁹ The rationale, she suggests, is the perception that ECHR 50 is not intended to make contracting States the indirect guarantors of freedoms in the world, and that a higher threshold of harm must be met when rights other than articles 2 and 3 are concerned. Furthermore, when it comes to qualified rights (discussed below), the State may have a ‘legitimate aim’ to restrict them, such that

it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.²⁷⁰

As Foster has observed, this ‘certainly raises a question as to the universality of human rights’.²⁷¹ It also explains why, where a breach can be recharacterized as ‘inhuman or degrading treatment’ under article 3, it may be simpler to pursue it on that basis.²⁷²

Soering was the first case in which the European Court of Human Rights accepted in principle that article 6 ECHR 50 (right to a fair trial) could exceptionally provide protection against removal ‘in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’.²⁷³ It took another two decades before this was substantiated on the facts of a case, *Othman*, where the applicant’s removal was precluded because of the real risk that evidence obtained by torture would be admitted in his criminal trial in Jordan.²⁷⁴ The court emphasized that a ‘stringent test of unfairness’ was required, noting that:

A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.²⁷⁵

In *El-Masri v The Former Yugoslav Republic of Macedonia*, the court found that the State had flagrantly breached article 5 (right to liberty and security) by handing over the applicant for rendition. The court considered that it should have been clear to the Macedonian authorities that the applicant ‘faced a real risk of a flagrant violation of his rights under Article 5’ to be free from arbitrary, incommunicado and indefinite detention if handed over to US authorities.²⁷⁶ The breach was ‘flagrant’ because the detention entailed by the extraordinary rendition was ‘outside the normal legal system’ and ‘by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention.’²⁷⁷

With respect to qualified rights, such as article 8 ECHR 50 which protects the right to respect for private and family life, the interference must be balanced against considerations set out in article 8(2), namely, whether the interference is ‘necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. This involves striking ‘a fair balance between the rights of the individual and the interests of the community’, but ‘[d]ecisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis’.²⁷⁸ For instance, in *Chikwamba v Secretary of State for the Home*

Department, the appellant had been refused asylum in the UK, but her removal to Zimbabwe was suspended because of deteriorating conditions there. In the meantime, she met an old friend (who had been granted asylum), married him, and had a child. The immigration rules required her to apply for entry clearance from outside the UK, but she argued that, given her personal circumstances, to remove her to Zimbabwe would breach her right to respect for private and family life under article 8 ECHR 50. The House of Lords found in her favour, stating that:

No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the appellant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer.²⁷⁹

5. Best interests of the child

Articles 6 (right to life) and 37(a) (prohibition of torture and other cruel, inhuman, or degrading treatment or punishment) of CRC 89 contain an implied *non-refoulement* obligation, paralleling the implied obligation under articles 6 and 7 ICCPR 66. As the UN Committee on the Rights of the Child has observed, States must not remove a child where there are 'substantial grounds for believing that there is a real risk of irreparable harm to the child'—a concept that includes, 'but [is] by no means limited to', the harms reflected in articles 6 and 37 CRC 89.²⁸⁰ For instance, the Committee has noted that the recruitment of children to the military and their involvement in armed conflict 'entails a high risk of irreparable harm'.²⁸¹

Drawing on the Committee's jurisprudence, the Inter-American Court of Human Rights has concluded that States must not remove children if there is a 'reasonable risk' that this would result in the violation of their 'fundamental human rights'.²⁸² Removal is precluded to *any* 'serious violations of the rights guaranteed' by CRC 89, including 'the insufficient provision of food or health services', irrespective of whether they are perpetrated by State or non-State

actors, or whether they are ‘directly intended or are the indirect consequence of action or inaction’.²⁸³ The Inter-American Court has concluded that ‘the determination of the best interest surrounded by the due guarantees [is] a central aspect when adopting any decision that concerns the child and, especially, if the principle of *non-refoulement* is involved’.²⁸⁴

Additionally, article 3 CRC 89 mandates that in any decision concerning a child, the child’s best interests shall be a primary consideration. This means that the child’s best interests should be considered first and only outweighed if some other consideration (either individual or cumulative) is inherently more significant.²⁸⁵ In exceptional cases, such as where a child poses a serious security risk, he or she may be removed ‘after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child’. However, ‘[n]on rights-based arguments such as those relating to general migration control, cannot override best interests considerations.’²⁸⁶ As the European Court of Human Rights has held, a child’s ‘extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant’.²⁸⁷

The Committee on the Rights of the Child has stipulated that for a displaced child, the best interests principle ‘must be respected during all stages of the displacement cycle’.²⁸⁸ A child should not be removed to another country if this would result in ‘a “reasonable risk” that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of *non-refoulement* applies’.²⁸⁹ Relevant considerations include the safety of the child upon return, the availability of care there, how long the child has been absent from that country (and how well integrated the child is in the host country), the child’s own views, the child’s right to preserve his or her identity, and the desirability of continuity in the child’s upbringing.²⁹⁰

The best interests principle is not only a procedural rule,²⁹¹ but also operates as a ‘fundamental, interpretative legal principle’²⁹² and a ‘substantive right’.²⁹³ Wherever children are involved, ‘a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm’.²⁹⁴ Article 3 CRC 89 should be taken into account in all asylum claims concerning children, even where they are not the primary applicants.²⁹⁵ For instance, courts have recognized that it is a relevant (albeit not overriding) consideration in cases where the deportation of a child’s parent is proposed.²⁹⁶

Since the best interests principle demands an age-sensitive approach to a

child's protection needs,²⁹⁷ it affects the very question whether removal is in the child's best interests—quite apart from whether the child meets the refugee definition or complementary protection criteria.²⁹⁸ Indeed, CRC 89 calls for a 'total re-alignment of protection, away from the formalities of 1951-style refugee status towards a complete welfare approach'²⁹⁹ which encompasses the child's broad range of developmental needs, such as freedom from hunger, rehabilitative care for those who have suffered torture and other trauma, access to education, and participation in social and cultural life.

UNHCR notes that best interests determinations 'must take account of the full range of the child's rights',³⁰⁰ and the relevance and weight afforded in each case will depend on the child and his or her situation.³⁰¹ This does not mean that considerations pertinent to refugee status determination are irrelevant; indeed, appreciation of the risks that a child may face if removed is a necessary condition for effective application of the best interests principle.³⁰² UNHCR's 2009 guidelines on child asylum claims emphasize that the best interests principle requires an assessment of harm from the child's perspective, and that '[i]ll-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child.'³⁰³ As well, children are entitled to 'a range of child-specific rights set forth in the CRC which recognize their young age and dependency and are fundamental to their protection, development and survival.'³⁰⁴

However, protection may be triggered by 'degrees of risk falling short of a well-founded fear or serious reasons of anticipated harm', as well as by 'types of risk not generally or directly relevant to refugee or complementary protection, such as deprivation, destitution, denial, exploitation, or absence of care.'³⁰⁵ As such, the best interests principle in article 3 CRC 89 may independently give rise to a non-removal obligation.³⁰⁶

6. The European Union Qualification Directive

Many States have domestic complementary protection regimes in place, and consideration of claims generally occurs as part of a single procedure in which the refugee aspects are examined first, followed by analysis of the complementary protection grounds if the person is found not to be a refugee.³⁰⁷ While it is not possible to examine all domestic schemes, one calls for particular attention. This is the supranational 'subsidiary protection' regime that forms part

of the Common European Asylum System (CEAS) and applies in 26 of the 27 EU Member States.³⁰⁸

The importance of delineating the precise scope and content of complementary protection in the EU was highlighted during the first phase of the CEAS, as EU Member States sought to agree on a harmonized European law for the qualification and status of ‘beneficiaries of subsidiary protection’. Existing national *ad hoc* schemes for ‘*de facto* refugees’ meant that dramatically different levels of protection were available depending on the State where the protection claim was lodged.³⁰⁹ Despite numerous calls from the 1970s onwards for a common European approach,³¹⁰ it was not until 2001 that an EU Directive was formally proposed. The Qualification Directive—the first supranational complementary protection regime—was adopted on 29 April 2004.³¹¹ A recast version of the Directive was adopted in 2011 which did not change the subsidiary protection definitional provisions, but did more closely align the legal status granted to beneficiaries of subsidiary protection with that granted to refugees. The European Commission has proposed a Qualification Regulation, which would replace the Qualification Directive and become directly binding on Member States.³¹² It is discussed where relevant below.

The Qualification Directive was intended to harmonize the ‘best’ elements of Member States’ existing national practices,³¹³ rather than to create new normative standards.³¹⁴ The resulting instrument sets out three grounds on which subsidiary protection is to be granted and, significantly, a codified legal status for beneficiaries of that protection.³¹⁵ However, the Directive does not completely reflect the extent of Member States’ *non-refoulement* obligations under international and regional human rights law. Thus, while some individuals are ineligible for subsidiary protection,³¹⁶ they cannot be removed because of Member States’ *non-refoulement* obligations under human rights law.³¹⁷

The Qualification Directive must therefore be viewed in context: as a pragmatic response to the political realities of the EU and the need for an instrument of compromise. ‘Subsidiary protection’ is, accordingly, a regional manifestation of the broader international legal concept of ‘complementary protection’. While it is based on the Refugee Convention and international human rights law, it has developed as an ‘autonomous system of international protection’.³¹⁸

Article 2(f) (formerly article 2(e)) defines as a ‘person eligible for subsidiary protection’:

a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

‘Serious harm’, which is not a term of art in international law and was devised for the purposes of the Directive, is defined in article 15 as meaning:

- (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.³¹⁹

Paragraph (a) was based on Protocol 6 to ECHR 50, prohibiting the imposition of the death penalty in peace time,³²⁰ and was subsequently strengthened by the entry into force of Protocol 13, which prohibits the death penalty in all circumstances.³²¹ It is also consistent with the jurisprudence of the European Court of Human Rights.³²²

Paragraph (b) implements article 3 ECHR 50, but imposes an additional limitation by requiring that the feared ill-treatment occur ‘in the country of origin’. This caveat was inserted part way through the drafting process, and seems to have been intended to prevent claims based on a lack of resources—in particular, a lack of medical treatment—in the country to which return is contemplated.³²³ Furthermore, it would also obviate a claim by an asylum seeker that he or she would face such ill-treatment in a third country to which return may be contemplated. However, in such cases, the individual may remain protected by Member States’ wider obligations under ECHR 50 and ICCPR 66. Accordingly, while the individual would not be eligible for subsidiary protection status, he or she would be protected from *refoulement*.³²⁴ Significantly, however, such protection would not guarantee a legal status but would simply mean that the person was non-removable.³²⁵ This has rightly been identified as a protection gap.³²⁶

In *MP v Secretary of State for the Home Department*, the CJEU was called

upon to consider whether the UK was prohibited from removing an applicant to Sri Lanka ‘who was tortured by the authorities of his country of origin and who, according to duly substantiated medical evidence, continues, as a result of those acts, to suffer from post-traumatic after-effects that are likely to be significantly and permanently exacerbated, to the point of endangering his life, if he is returned to that country.’³²⁷ While it was clear that his removal was precluded by article 3 ECHR 50,³²⁸ the CJEU had to address the separate question as to whether the UK was required to grant him subsidiary protection status under article 15(b) of the Qualification Directive.³²⁹ The court reiterated its jurisprudence that in order to qualify for protection, the harm feared ‘cannot simply be the result of general shortcomings in the health system’ but must result from an intentional deprivation of health care.³³⁰ That would be the case if, inter alia, the applicant were ‘at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin’ and the authorities were ‘not prepared to provide for his rehabilitation’, or if the authorities applied a discriminatory health care policy, making it more difficult for certain groups of individuals to receive appropriate care.³³¹

Paragraph (c) of article 15 was inserted to reflect the consistent, albeit varied, European State practice of granting some form of complementary protection to those fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to Convention grounds.³³² It replicates in part Member States’ putative obligations under the 2001 EU Temporary Protection Directive³³³ and the Council of Europe’s Recommendation on Subsidiary Protection,³³⁴ as well as EU Member States’ repeated support for UNHCR’s mandate activities for victims of indiscriminate violence (linked to regional agreements such as the OAU Convention and the Cartagena Declaration).

Article 15(c) underwent substantial changes throughout the drafting process. It was first proposed as encompassing anyone fearing ‘a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights’,³³⁵ but was narrowed considerably by requiring applicants to demonstrate that they were at risk of a ‘serious and individual’ threat, and precluding claims based on threats resulting from systematic or generalized human rights violations. Recital (35) (formerly recital (26)) also provided that: ‘[R]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat

which would qualify as serious harm.³³⁶ As noted in section 3.5 above, the CJEU has clarified that a person at risk of indiscriminate violence does not have to show that he or she is specifically targeted by reason of factors particular to his or her personal circumstances.³³⁷ Rather, the degree to which a person will need to demonstrate an individual impact will depend on the nature of the violence itself: ‘the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed’, and vice versa.³³⁸ This has been described as the ‘sliding scale’ concept.³³⁹

In *Diakité*, the CJEU clarified that the meaning of ‘internal armed conflict’ in article 15(c) of the Qualification Directive does not have to meet the threshold in international humanitarian law, but exists ‘if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each other’.³⁴⁰ This was intended to resolve the divergent approaches adopted in European Member States, which meant that protection was forthcoming in some jurisdictions but not others.³⁴¹ A number of scholars, including ourselves, had also expressed concern that to require decision-makers to determine the precise nature of an armed conflict would impose an additional layer of analysis that could divert attention away from the central inquiry, namely, the risk to the applicant and his or her need for protection.³⁴² The proposed Qualification Regulation states that ‘[i]t is not necessary for [an internal armed] conflict to be categorised as an “armed conflict not of an international character” under international humanitarian law’.³⁴³

The CJEU also explained in *Diakité* that it was not necessary to carry out, ‘in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.’³⁴⁴ This is reflected verbatim in recital (35) of the proposed Qualification Regulation.

7. Rights and legal status for beneficiaries of complementary protection

While ‘complementary protection’ is often used as a shorthand term for the widened scope of *non-refoulement* under international law, in a stricter sense it also reflects the idea that a domestic legal status (a form of asylum) should also and necessarily follow from this instance of protection. Indeed, international law requires more than *non-refoulement* alone. Protection is not only about non-

return to a risk of harm; it is also about durable solutions. As the Inter-American Court of Human Rights has stressed, it is insufficient for States to ‘merely abstain from violating this principle [of *non-refoulement*]'; rather it is imperative that they adopt positive measures’ to ensure that human rights are respected.³⁴⁵ Even so, Durieux argues that human rights instruments do ‘not actually deal with asylum, if that concept is construed to mean the sum total of protection afforded by a State to refugees on its territory or under its jurisdiction.’³⁴⁶ Whereas refugee law is framed ‘positively’, in the sense that the 1951 Convention/1967 Protocol sets out a legal status for its beneficiaries, human rights law appears to be framed ‘negatively’, simply limiting who can be removed.³⁴⁷

Although human rights-based sources of *non-refoulement* such as CAT 84 and ICCPR 66 do not provide a resultant status for those who benefit from it (unlike the Refugee Convention), they do set out a body of rights to which all people are entitled, irrespective of their legal status.³⁴⁸ At the bare minimum, they stipulate that no one should be subjected to treatment that is cruel, inhuman, or degrading. The UN Committee on the Rights of the Child has stated that children granted complementary forms of protection ‘are entitled, to the fullest extent, to the enjoyment of all human rights granted to children in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.’³⁴⁹ The Committee against Torture has made clear that a temporary permit for medical treatment is an insufficient status to meet the relevant standards.³⁵⁰ The highest courts of France, Germany, Belgium, the UK, and South Africa have acknowledged that even people without any formal immigration status are entitled to minimum health and other social services, noting that no individual can be denied minimum dignity whatever his or her immigration status.³⁵¹

State practice confirms that beneficiaries of complementary protection should be accorded a domestic legal status (which is generally equivalent to that provided to Convention refugees).³⁵² Whereas the original 2004 EU Qualification Directive provided that a lesser status could be granted to beneficiaries of subsidiary protection,³⁵³ a 2008 survey conducted by the European Council on Refugees and Exiles showed that most Member States were in fact providing an equivalent status for refugees and beneficiaries of subsidiary protection,³⁵⁴ which is why the original proposal for the recast 2011 Directive included equivalent rights.³⁵⁵

To a large extent, this practice has been formalized by the recast Directive,

which sets out a broadly (but not uniformly) harmonized status.³⁵⁶ The title of the recast Directive itself refers to a ‘uniform status’ for both groups, and recital (39) provides that ‘with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility.’

However, the recast Directive still permits some distinctions,³⁵⁷ and a number of EU Member States have reduced the entitlements of beneficiaries of subsidiary protection to the minimum level.³⁵⁸ Article 24 provides that residence permits may be of a lesser duration for beneficiaries of subsidiary protection (one year versus three years, both renewable), and article 29(2) permits social welfare to be limited to core benefits for beneficiaries of subsidiary protection. Furthermore, recital (40) provides that Member States may make access to employment, social welfare, healthcare, and integration facilities contingent on the prior issue of a residence permit (provided this is consistent with international obligations).³⁵⁹ The proposed Qualification Regulation seeks to entrench these inequalities.³⁶⁰

Differential treatment between refugees and beneficiaries of complementary protection is difficult to justify as a matter of law, and State practice generally supports the provision of an identical status.³⁶¹ International law permits distinctions between non-citizens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed. In general, differential treatment will not amount to discrimination where the distinction pursues a legitimate aim, has an objective justification,³⁶² and there is reasonable proportionality between the means used and the aims sought to be realized.³⁶³ To justify the creation of different regimes for different types of non-removable people, States must be able to point to materially different circumstances justifying the distinctions.³⁶⁴ UNHCR has argued that ‘[w]here flight experiences and protection needs are very similar, differentiation may amount to discrimination under EU law and the ECHR’ as well.³⁶⁵

For instance, it might be justifiable to restrict the rights of a person excluded as a refugee by virtue of article 1F of the Refugee Convention, but whom a State cannot remove from its territory on account of the operation of the principle of *non-refoulement* under human rights law. However, when it comes to differentiating between people simply by virtue of the source of the *non-refoulement* obligation, ‘it is doubtful that international law would permit

selective provision of international protection according to category'.³⁶⁶ Indeed, UNHCR has stated that rights and benefits should be based on need, rather than the grounds on which a person has been granted protection. As such, there is no valid reason to treat protected persons differently from Convention refugees.³⁶⁷ The House of Lords Select Committee on the EU stated that to distinguish between Convention refugees and beneficiaries of complementary protection would be 'an apparently unjustified discrimination'.³⁶⁸ This general approach is supported by the jurisprudence of the European Court of Human Rights, which requires any differences in treatment between the holders of different forms of migration status to be objectively and reasonably justified.³⁶⁹

Moreover, both the OAU Convention and the Cartagena Declaration envisage the extension of Convention status to those who come within the wider scope of their 'refugee' definitions.³⁷⁰

7.1 Exclusion from complementary protection

The prohibition on removal to a real risk of torture or cruel, inhuman, or degrading treatment or punishment (among other things) is absolute. Nevertheless, in their domestic complementary protection regimes, it is common for States to exclude persons who, were they refugees, would fall within article 1F or article 33(2).³⁷¹ While they may be denied the legal status granted to other beneficiaries of complementary protection, the absolute prohibition on *non-refoulement* in such cases means they cannot be removed.

The status of the 'domestically excluded' is particularly precarious, in part because international law does not provide a clear remedy. At a minimum, international law requires that no person shall be subjected to treatment in the host State which itself amounts to inhuman or degrading treatment.³⁷² Human rights law obviously applies, but in practice this may not mean much if States do not ensure that the rights subscribed to can actually be claimed.³⁷³ Even where individuals are not expressly barred from the enjoyment of a right, 'they are in practice often deprived of it inasmuch as it is dependent on the fulfilment of certain formalities, such as production of documents, intervention of consular or other authorities, with which ... they are not in a position to comply'.³⁷⁴ While human rights law requires States to respect the rights it sets out in relation to *all* persons within its jurisdiction or territory, the quality of each right may vary depending on the individual's legal position vis-à-vis the State. Thus, while the *standard* of compliance with human rights law is international, the State retains a

degree of discretion in its choice of *implementation*—whether and how to incorporate treaty provisions into domestic law.³⁷⁵ Failing to implement international human rights obligations in domestic law does not absolve a State of its legal obligations,³⁷⁶ however, and it is also contrary to the duty to perform treaty obligations in good faith.³⁷⁷

It will seldom be possible for States to extradite³⁷⁸ or prosecute persons for the alleged crimes that have led to their exclusion from refugee or complementary protection status.³⁷⁹ Excluded but non-removable individuals are commonly left in a legal limbo, with their on-going status a matter of executive discretion.³⁸⁰ This protection gap has been described as a ‘fundamental system error’.³⁸¹ State practice is marked by unsystematic, *ad hoc* approaches, but seems to pursue a common objective: that any leave to remain will be temporary and regularly reviewed in order to determine whether removal might be possible.³⁸²

For example, in Norway, individuals are granted a temporary residence permit that is reviewed every six months, with very limited rights,³⁸³ while Germany provides a toleration permit (*Duldung*) which ‘stays’ the obligation for the individual to leave the territory.³⁸⁴ In the UK, the period of leave granted to excluded individuals is at the discretion of the Secretary of State, but is usually no more than six months unless justified by the particular circumstances of the case. This may be subject to restrictions on work, residence, and study; a condition requiring the person to maintain and accommodate themselves and any dependants, without recourse to public funds; and a requirement for regular reporting to an immigration official or the Secretary of State.³⁸⁵ Failure to comply with stipulated conditions can lead to criminal prosecution. Several legal challenges have been made to the effects of such policies, on the ground that they interfere with the right to private life under article 8 ECHR 50, but it is difficult to show that the degree of interference in the individual case is disproportionate to the aims of the policy.³⁸⁶

Nevertheless, an empirical study of excluded but non-removable individuals in the Netherlands found that they suffer from considerable economic, social, and health deprivation.³⁸⁷ The vast majority do not work and are dependent on assistance from NGOs or relatives. They are not entitled to social allowances and have access only to minimal services (for example, legal aid and urgent primary healthcare). Their cases are regularly reviewed to determine whether removal is still precluded. Interestingly, this has prompted the Dutch government to invest significant financial and other resources in improving Rwanda’s justice system,

so that human rights impediments to the extradition of excluded individuals may be removed.³⁸⁸ The Netherlands has also developed a mechanism which, over time, may enable someone who has been excluded to have the bar revoked. It effectively involves a post-exclusion balancing test weighing up the seriousness of the alleged offence against humanitarian concerns for the particular individual. If the balance tips in favour of the individual, there is ministerial discretion to grant a temporary residence permit.³⁸⁹ States may also seek to relocate excluded individuals to other States (for example, through family reunion),³⁹⁰ or to obtain diplomatic assurances that they will not be subjected to harm if returned (for example, the death penalty).³⁹¹

¹ States' international obligations towards this extended class of refugees, both under treaty and customary law, predate the formalization and naming of the concept of 'complementary protection' or 'subsidiary protection'. See s. 2.

² 'Complementary protection' should be distinguished from protection granted solely on compassionate grounds, such as age or health unrelated to an international protection need, or for practical reasons, such as the inability to obtain travel documents. Even though this type of protection is humanitarian in nature, it is not based on an international protection obligation and therefore does not come within the legal boundaries of 'complementary protection'. See UNHCR, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime': EC/50/SC/CRP.18 (9 Jun. 2000) paras. 4–5; Executive Committee Conclusion No. 103 (LVI), 'The Provision of International Protection including through Complementary Forms of Protection' (2005) para. (j). Sometimes health or family reasons may also be tied to an international protection need, such as under arts. 3 or 8 ECHR 50, and there remains some scope to test the extent to which compassionate reasons may in fact have a legal basis. During the drafting of the 1951 Convention, France had proposed that refugee status should extend to a person 'unable to obtain from [his or her] country [of origin] permission to return': *Ad hoc Committee on Refugees and Stateless Persons*, 'France: Proposal for a Draft Convention Preamble': UN doc. E/AC.32/L.3 (17 Jan. 1950). Some States, such as New Zealand and Canada, have a separate process for considering humanitarian and compassionate grounds for remaining. In New Zealand, the humanitarian interview procedure 'was introduced to guard against what might otherwise have been a failure to observe New Zealand's international obligations, and also to provide what counsel called a backstop or safety net at the final stages of compulsory removal ... [including] to reflect the obligation to observe art 3(1) and humanitarian concerns generally': *Ye v Minister of Immigration* [2009] NZSC 76, para. 26. The court observed (at para. 34) that it 'is unnecessary and undesirable to attempt to define the compass of the word "humanitarian" '.

³ For instance, it is clear from Executive Committee Conclusion No. 103 (n 2) that ‘complementary protection’ is conceived as a mechanism that affords a legal status. It is premised on—but not wholly constituted by—States’ *non-refoulement* obligations beyond the Refugee Convention. The Inter-American Court of Human Rights (IACtHR) considers that ‘some type of standardized protection should exist for persons who have not been recognized as regular migrants nor qualifying under refugee status, but whose return would, however, be contrary to the general obligations of *non-refoulement* under international human rights law’: IACtHR, Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (2014) Series A, No. 21, para. 237, noting the court’s remarks in *MSS v Belgium and Greece*, App. No. 30696/09 (Grand Chamber, 21 Jan. 2011) paras. 249–64 that States must guarantee a minimum level of treatment to asylum seekers.

⁴ IACtHR (n 3) para. 240. The court also stated that it covers persons who do not qualify for ‘any other migratory status’, but this seems to go too far: ordinarily, asylum applicants are not considered (or eligible to apply) for visas beyond those in the protection/humanitarian category. See also IACtHR, Advisory Opinion OC-25/ 18 of 30 May 2018 requested by the Republic of Ecuador: The Institution of Asylum and Its Recognition as a Human Rights in the Inter- American System of Protection (Interpretation and Scope of Articles 5, 22.7, and 22.8 in relation to Article 1(a) of the American Convention on Human Rights) paras. 180 ff.

⁵ 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT 84).

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR 66); art. 7 also prohibits ‘cruel’ treatment or punishment.

⁷ UN Human Rights Committee, ‘General Comment No. 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7)’ (10 Mar. 1992) para. 9; UN Human Rights Committee, ‘General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’: UN doc. CCPR/C21/Rev.1/Add.13 (29 Mar. 2004) para. 12; European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) (drafted 4 November 1950, entered into force 3 September 1953) ETS No. 5 (ECHR 50): see, for example, *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413. This was affirmed most recently by States in the Global Compact for Safe, Orderly and Regular Migration UNGA res. 73/195 (19 Dec. 2018) para. 37. The Committee on the Elimination of Discrimination against Women has confirmed that ‘[g]ender-based violence is outlawed under human rights law primarily through the prohibition of torture and other cruel, inhuman or degrading treatment or punishment’: *MNN v Denmark*, UN doc. CEDAW/C/55/D/33/2011 (15 Jul. 2013) para. 8.9.

⁸ American Declaration of the Rights and Duties of Man (adopted at the 9th International

Conference of American States, Bogota, 2 May 1948) art. I.

⁹ Cantor, D. J. & Barichello, S. E., ‘The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?’ (2013) 17 *International Journal of Human Rights* 689, 692–3.

¹⁰ *Ibid.*, 690.

¹¹ Arbitrary deprivation of life and the death penalty are discussed further below. With respect to enforced disappearance, see International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art. 16. This requirement is reflected in Japanese law, for instance, which protects people from being removed where there are substantial grounds for believing that they would be in danger of being subjected to enforced disappearance: Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 4 October 1951) art. 53(3)(iii). Enforced disappearance could potentially also be encompassed by the concept of cruel, inhuman, or degrading treatment. For example, in *Tshishimbi v Zaire*, UN doc. CCPR/C/53/D/542/1993 (25 Mar. 1996) para. 5.5, the UN Human Rights Committee found that ‘the removal of the victim and the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment’. See also *Shikhmuradov v Turkmenistan*, UN doc. CCPR/C/112/D/ 2069/2011 (17 Oct. 2014); *Zineb Terafi v Algeria*, UN doc. CCPR/C/110/D/ 1899/2009 (21 Mar. 2014).

¹² See Perluss, D. & Hartman, J. F., ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 *VirgJIL* 551; Goodwin-Gill, G. S., ‘Non-Refoulement and the New Asylum Seekers’ (1986) 26 *VirgJIL* 897; cf. Hailbronner, K., ‘Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 *VirgJIL* 857; Goodwin-Gill, G. S., ‘Non-Refoulement, Temporary Refuge, and the “New” Asylum Seekers’, in Cantor, D. J. & Durieux, J.-F., eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014). The principle of refuge applies at least with respect to mass influxes, but in some cases also with respect to individuals: see, for example, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive (original)) art. 15(c); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive (recast)) art. 15(c). On the principle of international cooperation in situations of mass influx, see Eggli, A. V., *Mass Refugee Influx and the Limits of Public International Law* (2002).

¹³ Model Treaty on Extradition, UNGA res. 45/116 (14 Dec. 1990) art. 3(f).

¹⁴ UN Human Rights Committee, ‘General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life’: UN doc.

CCPR/C/GC/36 (30 Oct. 2018) para. 7.

¹⁵ *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin) para. 154, referring to *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, para. 107(2), where the court stated that ‘the nature of the Contracting State’s responsibility under article 3 [of the ECHR] in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment’. This is also relevant for jurisdictional purposes in establishing liability.

¹⁶ *Al-Saadoon* (ⁿ 15) para. 197.

¹⁷ The breach is established ‘simply by showing the existence of substantial grounds for believing that the individual in question would face a real risk of being subjected to treatment contrary to article 3 if sent to the receiving state’: *ibid.* (ⁿ 15) para. 166. ‘[I]t is not an answer to an allegation of breach of the non-refoulement obligation to show that the individual was not, in the event, subjected to ill-treatment’: para. 154, referring to *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9. In the latter case, the UK remained liable for exposing the applicants to a real risk of being condemned to death and executed even though original charges of murder were subsequently replaced by charges that did not carry the death penalty, and which were later set aside by an Iraqi court.

¹⁸ UNHCR, *Agenda for Protection* (3rd edn., 2003) Goal 1, Objective 3; Executive Committee Conclusion No. 103 (ⁿ 2) para. (q).

¹⁹ This is the case in the EU, Canada, Australia, and New Zealand, for instance.

²⁰ In Chetail’s view, the ‘refugee definition has been critically shaped by human rights law through a gradual process of pollination’: Chetail, V., ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’, in Rubio-Marín, R., ed., *Human Rights and Immigration* (2014) 23; see also Chetail, V., ‘Moving Towards an Integrated Approach of Refugee Law and Human Rights Law’, in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021). Equally, however, refugee law and doctrine will have had no less an impact on human rights, for example, by way of its concentrated focus on discrimination, protection, and the indices of persecution. For a critique of the human rights ‘turn’ in refugee law, see Bhandari, R., *Human Rights and the Revision of Refugee Law* (2020).

²¹ In *McAdam and Chong’s 2014* analysis of the 49 published ‘successful’ Australian complementary protection cases (as at 13 June 2014), only two applicants had been granted protection on the basis that they faced a risk of harm not amounting to ‘persecution’: 1219395 [2013] RRTA 633 (26 Jun. 2013); 1301683 [2013] RRTA 765 (20 Jun. 2013), cited in McAdam, J. & Chong, F., ‘Complementary Protection in Australia Two Years On: A Developing Human Rights Jurisprudence’ (2014) 42 *Federal Law Review* 441, 444. The New Zealand Immigration and Protection Tribunal has clarified that in that jurisdiction, ‘persecution’ already encompasses inhuman or degrading treatment and as such, the latter does not involve a lower level of harm: *AC (Syria)* [2011] NZIPT 800035, paras. 70–80.

²² UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/799 (25 Jul. 1992) para. 5.

²³ See McAdam, J., *Complementary Protection in International Refugee Law* (2007) Ch. 1.

²⁴ For history, see Simpson, J. H., *The Refugee Problem: Report of a Survey* (1939); Holborn, L. W., ‘The Legal Status of Political Refugees, 1920–1938’ (1938) 32 *AJIL* 680; Marrus, M. R., *The Unwanted: European Refugees from the First World War through the Cold War* (2nd edn., 2002); Weis, P., ‘The International Protection of Refugees’ (1954) 48 *AJIL* 193; Hathaway, J. C., ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33 *ICLQ* 348; Skran, C. M., *Refugees in Inter-War Europe: The Emergence of a Regime* (1995).

²⁵ Note the remarks of the Swiss delegation that, as late as 1938, Switzerland received refugees daily who had lost their nationality due to events of the First World War, but who remained unprotected by any international refugee instrument: International Conference on German Refugees, ‘Provisional Minutes: Fourth Meeting’ (8 Feb. 1938) Doc. CONF.CSRA/PV4, 8.

²⁶ 1933 Convention relating to the International Status of Refugees (28 Oct. 1933) 159 LNTS 199.

²⁷ Spanish refugees were defined as ‘les personnes possédant ou ayant possédé la nationalité espagnole, ne possédant pas une autre nationalité et à l’égard desquelles il est établi, qu’en droit ou en fait, elles ne jouissent pas de la protection du gouvernement espagnol’: Décret No. 45–766 du 15 mars 1945 accordant aux réfugiés espagnols le bénéfice de diverses dispositions (*Journal Officiel de la République Française*, 21 avril 1945) *Gazette du Palais* (1945), art. 2.

²⁸ International Conference on German Refugees (n 25) 8. The British *Kindertransport*, a quasi-protection, quasi-humanitarian assistance scheme, enabled Jewish children forced to flee Germany to stay in Britain. It was reminiscent of a First World War programme that admitted several thousand Belgian children to Britain, and the admission in May 1937 of 3,800 Basque children as refugees of the Spanish Civil War: Sherman, A. J., *Island Refuge: Britain and Refugees from the Third Reich 1933–1939* (2nd edn., 1994) 183–7; Göpfert, R., *Der jüdische Kindertransport von Deutschland nach England 1938/39: Geschichte und Erinnerung* (1999).

²⁹ This pattern is followed by the 1969 OAU Convention, the ‘regional complement’ to the 1951 Convention (see art. VIII(2)).

³⁰ Jackson, I. C., *The Refugee Concept in Group Situations* (1999); see also Council of Europe, Parliamentary Assembly Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe, paras. 2–3.

³¹ See, for example, UNGA resolutions 1499 (XV) (5 Dec. 1960); 1673 (XVI) (18 Dec. 1961); 1959 (XVIII) (12 Dec. 1963); 2294 (XXII) (11 Dec. 1967); 3143 (XXVIII) (14 Dec. 1973).

³² This was affirmed by the 1977 Conference on Territorial Asylum: see Melander, G., ‘The Two Refugee Definitions’ Raoul Wallenberg Institute of Human Rights and

Humanitarian Law, *Report No. 4* (1987) 11; Grahl-Madsen, A., *Territorial Asylum* (1980) 61 ff.

³³ See also UNHCR, ‘Protection of Persons of Concern to UNHCR who fall outside the 1951 Convention: A Discussion Note’: EC/1992/SCP.CRP.5 (2 Apr. 1992) para. 1; Jackson ([n 30](#)).

³⁴ The 1969 OAU Convention has been widely ratified and, at 30 April 2021, 46 States were party: see List of States, xxi. See also Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018); Sharpe, M., ‘Regional Refugee Regimes: Africa’, in Costello, Foster, & McAdam ([n 20](#)); van Garderen, J. & Ebenstein, J., ‘Regional Developments: Africa’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011); UNHCR, ‘Key Legal Considerations on the Standards of Treatment of Refugees Recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2018) 30 *IJRL* 166; Wood, T., ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *IJRL* 555; Beyani, C., *Protection of the Right to Seek and Obtain Asylum under the African Human Rights System* (2013); Sharpe, M., ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2012) 58 *McGill Law Journal* 95; Edwards, A., ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204; Rankin, M. B., ‘Extending the Limits or Narrowing the Scope: Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal on Human Rights* 406; Rutinwa, B., ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21(1–2) *RSQ* 12; Okoth-Obbo, G., ‘Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20(1) *RSQ* 79; generally see (2002) 21(1–2) *RSQ*; OAU/UNHCR Commemorative Symposium on Refugees and the Problems of Forced Population Displacements in Africa, Addis Ababa (8–10 September 1994) (1995) 7 *IJRL Special Issue*.

³⁵ Latin America is covered by a complex network of treaties and asylum practices: see 1889 Montevideo Treaty on International Penal Law; 1928 Havana Convention on Asylum; 1933 Montevideo Convention on Political Asylum; 1940 Montevideo Treaty on International Penal Law (revising that of 1889); 1954 Caracas Convention on Diplomatic Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 18; 1954 Caracas Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 19. See also Cuellar, R. and others, ‘Refugee and Related Developments in Latin America: The Challenges Ahead’ (1991) 3 *IJRL* 482; D’Alotto, A. & Garretón, R., ‘Developments in Latin America: Some Further Thoughts’ (1991) 3 *IJRL* 499; UNHCR, ‘The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration of Refugees of 1984’ (2006) 18 *IJRL* 252; Fischel de Andrade, J. H., ‘Regional Policy Approaches and Harmonization: A Latin American Perspective’ (1998) 10 *IJRL* 389; Jubilut, L. L., ‘Refugee Law and Protection in Brazil: A Model in South America?’ (2006) 19 *JRS* 22; Fischel de Andrade, J. H., ‘The 1984 Cartagena

Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance' (2019) 38 *RSQ* 341; Fischel de Andrade, J. H., 'Regional Refugee Regimes: Latin America', in Costello, Foster, & McAdam ([n 20](#)).

[36](#) OAU Convention, art. I(2).

[37](#) Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984, conclusion III(3). Article 22(8) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR 69) provides: 'In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.' This applies to all aliens, not just refugees. See further Cantor & Barichello ([n 9](#)) 696.

[38](#) A cogent account and analysis of State practice is given in Perluss & Hartman ([n 12](#)); see also Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (1989); Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers' ([n 12](#)); Goodwin-Gill, 'Non-Refoulement, Temporary Refuge, and the "New" Asylum Seekers' ([n 12](#)).

[39](#) UNHCR, 'Note on International Protection': UN doc. A/AC.96/830 (7 Sep. 1994) para. 39.

[40](#) See [Ch. 5](#), s. 7.1.

[41](#) Coles, G. J. L., *The Question of a General Approach to the Problem of Refugees from Situations of Armed Conflict and Serious Internal Disturbance* (1989) 21.

[42](#) See, for example, discussion of discretionary visas in McAdam, J., *Climate Change, Forced Migration, and International Law* (2012) Ch. 4; McAdam, J., 'From Humanitarian Discretion to Complementary Protection: Reflections on the Emergence of Human Rights-Based Refugee Protection in Australia' (2011) 18 *Australian International Law Journal* 53; Cantor, D. J., 'Law, Policy, and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters: States of the Regional Conference on Migration and Others in the Americas' (Background Study for the Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disasters, San José, 10–11 Feb. 2015) <https://www.nanseninitiative.org/central-america-consultations-intergovernmental/>.

[43](#) *X v Belgium*, App. No. 984/61 (29 May 1961); *X v Federal Republic of Germany* (1963) 6 *Yearbook* 462, 480, cited in Alleweldt, R., 'Protection against Expulsion under Article 3 of the European Convention on Human Rights' (1993) 4 *EJIL* 360, 351 fn 5. The European Court did not affirm the principle until *Soering* ([n 7](#)); see also *Chahal* ([n 7](#)).

[44](#) Council of Europe Parliamentary Assembly Recommendation 434 (1965) concerning the Granting of the Right of Asylum to European Refugees.

[45](#) Council of Europe Parliamentary Assembly Recommendation 773 (1976) on the Situation of *de facto* Refugees, para. 1. This definition was later considered by the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of

Refugees, Annex to ‘International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General’: UN doc. A/41/324 (13 May 1986) 24.

⁴⁶ For further detail, see McAdam ([n 23](#)); Recommendation 773 ([n 45](#)); Council of Europe Parliamentary Assembly Recommendation 817 (1977) on Certain Aspects of the Right to Asylum; Council of Europe Parliamentary Assembly Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers; Council of Europe Committee of Ministers Recommendation No. R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees; Council of Europe Parliamentary Assembly Recommendation 1088 (1988) on the Right to Territorial Asylum; Communication from the Commission to the Council and the European Parliament on the Right of Asylum SEC 91 1857 final (11 Oct. 1991); Council of Europe Parliamentary Assembly Recommendation 1236 (1994) on the Right of Asylum; Council of Europe Parliamentary Assembly Recommendation 1237 (1994) on the Situation of Asylum-Seekers Whose Asylum Applications Have Been Rejected; Council Resolution of 14 October 1996 laying down the Priorities for Cooperation in the Field of Justice and Home Affairs for the period from 1 July 1996 to 30 June 1998 (96/C 319/01); Council of Europe Parliamentary Assembly Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe; Council of Europe Committee of Ministers Recommendation R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights; Council of Europe Parliamentary Assembly Recommendation 1440 (2000) on Restrictions on Asylum in the Member States of the Council of Europe and the EU; Council of Europe Committee of Ministers Recommendation R (2001) 18 on Subsidiary Protection; Council of Europe Parliamentary Assembly Recommendation 1525 (2001) on the United Nations High Commissioner for Refugees and the Fiftieth Anniversary of the Geneva Convention.

⁴⁷ Recommendation 773 ([n 45](#)) para. 5(II).

⁴⁸ For national examples, see Weis, P., ‘Convention Refugees and De Facto Refugees’, in Melander, G. & Nobel, P., eds., *African Refugees and the Law* (1978) 20.

⁴⁹ *Ibid.*, 22.

⁵⁰ The modern notions of ‘complementary protection’ and ‘temporary protection’ both arose from the principle of temporary refuge.

⁵¹ ‘Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees’, San Remo, Italy (12–14 Jul. 1989) para. 8, included as Annex to UNHCR, ‘Solution to the Refugee Problem and the Protection of Refugees’ (SCIP) (23 Aug. 1989): EC/SCP/55. The experts, governmental and non-governmental, attended in a personal capacity.

⁵² *Ibid.* para. 33, Conclusion, para. 13.

⁵³ *Ibid.*

⁵⁴ Executive Committee Conclusion No. 56 (XL) ‘Durable Solutions and Refugee

Protection' (1989) para. (c).

⁵⁵ Executive Committee, 'Report of the Working Group on Solutions and Protection to the 42nd Session of the Executive Committee of the High Commissioner's Programme': EC/SCP/64 (12 Aug. 1991), para. 8. See also Report of the Group of Governmental Experts ([n 45](#)).

⁵⁶ Executive Committee ([n 55](#)) para. 12.

⁵⁷ UNHCR, 'Report of the 13–14 April Meeting of the Sub-Committee of the Whole on International Protection': EC/SCP/71 (7 Jul. 1992) para. 32.

⁵⁸ Ibid., para. 33.

⁵⁹ Executive Committee ([n 55](#)) Recommendations, para. 55(b); see also UNHCR ([n 39](#)) para. 35; UNHCR, 'Note on International Protection': UN doc. A/AC.96/930 (7 Jul. 2000) paras. 40–1.

⁶⁰ OAU Convention, art. VIII(2).

⁶¹ Cartagena Declaration, conclusion III(8).

⁶² See the very detailed analysis of the OAU Convention (and relevant scholarship) by Sharpe, 'The 1969 African Refugee Convention' ([n 34](#)). See also Sharpe, *The Regional Law of Refugee Protection in Africa* ([n 34](#)) 90–121, who concludes (at 146) that the OAU Convention is 'innovative in, among other things, incrementally expanding the range of individuals who could qualify for refugee status.' She notes, however, that there is a gap for refugees 'in states party to the 1969 Convention but not its universal counterpart, or in states that are party to the 1951 and 1969 Conventions but not the 1967 Protocol, or in states party to the 1951 and 1969 Conventions that have retained the former instrument's geographical limit' (146, fn omitted). UNHCR ([n 34](#)) para. 5 states that the OAU Convention 'contains a more limited set of rights for refugees' than the 1951 Convention and does not 'explicitly incorporate the entire standard of treatment found in Articles 3 to 34' of that instrument. UNHCR notes, though, that for most refugees in Africa, this 'does not pose a significant problem in practice' (para. 6), since the majority of African Union Member States are also parties to the international refugee instruments. It emphasizes that the same status should apply to refugees under the expanded definition since any 'difference in treatment would be neither reasonable nor objectively justified, would disregard the complementary character of the 1969 OAU Convention, and would amount to discrimination' (para. 6, fns omitted). There is nothing in the Cartagena Declaration that suggests a different status should be accorded, and indeed that instrument refers to the OAU Convention as a precedent: Cartagena Declaration, conclusion paras. III(3), III(8). See also Fitzpatrick, J., 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *AJIL* 270, 293: 'the definition of refugee was expanded to embrace war victims and other groups, without any suggestion that the quality or durability of their protection should be diminished as compared to that enjoyed by persons meeting the definition in the 1951 Convention.'

⁶³ UNHCR, 'Note on International Protection': UN doc. A/AC.96/777 (9 Sep. 1991) para. 56; see also UNHCR, 'Note on International Protection' ([n 22](#)) para. 1. The links between

international refugee law, human rights law, and humanitarian law have long been recognized in UNGA and UNSC resolutions, although the language has varied. See, for example, UNGA res. 51/210 (17 Dec. 1996) paras. 3–4; UNGA res. 54/160, ‘Human rights and mass exoduses’ (17 Dec. 1999); UNGA res. 60/1, ‘2005 World Summit Outcome’ (24 Oct. 2005) para. 85; UNSC res. 1456 (2003) (20 Jan. 2003) para. 6; UNGA res. 71/1, ‘New York Declaration for Refugees and Migrants’ (3 Oct. 2016) para. 66.

⁶⁴ UNHCR ([n 33](#)) para. 11.

⁶⁵ See [n 62](#). UNHCR ([n 34](#)) para. 6 (fn omitted) states that in countries that are parties to both the OAU Convention and the 1951 Convention and/or 1967 Protocol, ‘refugees recognized under the 1969 OAU Convention, whether under Article I(1) or I(2), benefit from the 1951 Convention’s rights framework.’

⁶⁶ *Ibid.*, para. 7. Even refugee protection may not be permanent if certain conditions are met: see the cessation clauses in art. 1C of the 1951 Convention, and the pursuit of durable solutions, including naturalization (art. 34).

⁶⁷ This aspect is discussed later in the context of the Qualification Directive. For ‘cessation’ of status under the 1951 Convention, see [Ch. 4](#), ss. 1, 2.

⁶⁸ UNHCR ([n 33](#)) paras. 20–1.

⁶⁹ *Ibid.*, para. 21.

⁷⁰ *Ibid.*, para. 3; cf. Executive Committee ([n 55](#)) para. 25.

⁷¹ Executive Committee ([n 55](#)) para. 25; UNHCR ([n 33](#)) para. 7.

⁷² UNHCR ([n 39](#)) para. 52.

⁷³ *Ibid.*, para. 53.

⁷⁴ *Ibid.*, para. 54.

⁷⁵ *Ibid.*, para. 55.

⁷⁶ *Soering* ([n 7](#)); see also *Chahal* ([n 7](#)).

⁷⁷ Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 9.

⁷⁸ *Mutombo v Switzerland*, UN doc. CAT/C/12/D/13/1993 (27 Apr. 1994).

⁷⁹ *Ibid.*, para. 40.

⁸⁰ Parliamentary Assembly Recommendation 1236 (1994) on the Right of Asylum, para. 8(iii) (emphasis added); see also Parliamentary Assembly Recommendation 1309 (1996) on the Training of Officials Receiving Asylum-Seekers at Border Points, para. 7(ii)(a), referring to the ‘basics of asylum law’ as including ECHR 50.

⁸¹ See also Kälin, W., *Grundriss des Asylverfahrens* (1990) 211.

⁸² It is both legally and morally illogical to distinguish between a protection need arising by virtue of flight as part of a large group, and individual or smaller group flight. Nevertheless, as the EU Directives demonstrate, States do differentiate between the two.

⁸³ Note that the original or recast version of the Qualification Directive ([n 12](#)) is only named specifically if there is a material difference between them.

⁸⁴ Executive Committee Conclusion No. 103 ([n 2](#)) para. (h).

⁸⁵ Ibid., para. (i).

⁸⁶ Ibid., para. (k).

⁸⁷ Ibid., para. (s).

⁸⁸ NGO delegations sought to have a statement to this effect included ‘Draft Conclusion on the Provision of International Protection including through Complementary Forms of Protection’, NGO version (12 Jul. 2005) para. 11 (copy with authors). See s. 5.

⁸⁹ Law on Asylum in the Republic of Albania, No. 121/2014, art. 78. This example, along with Bosnia, Macedonia, Montenegro, Norway, Serbia, South Korea, Turkey, and Ukraine, are cited in Frelick, B., ‘What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime’ (2020) 8 *Journal on Migration and Human Security* 42. He also cites South Africa’s Refugees Act, 1998, s. 3, but this definition is based solely on the expanded definition in the OAU Convention.

⁹⁰ Migration Act 1958 (Cth), s. 36(2A)–(2C).

⁹¹ Bosnia and Herzegovina, Law on Asylum, No. 11/ 2016, art. 22.

⁹² *Immigration and Refugee Protection Act*, SC 2001, c 27, s. 97.

⁹³ Ley General de Migración y Extranjería No. 8764 (10 Sep. 2009) arts. 6(6), 94(12).

⁹⁴ CAT 84-based protection only; refugee status determination is conducted by UNHCR. See also Loper, K., ‘Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong’ (2010) 22 *IJRL* 404.

⁹⁵ Law on Asylum and Temporary Protection, L. No. 07-3664/1 (2003), arts. 2, 5.

⁹⁶ Ley sobre Refugiados Protección Complementaria y Asilo Político. See also IACtHR (ⁿ 3) para. 238 fn 472.

⁹⁷ Law on International and Temporary Protection of Foreigners (29 Dec. 2016), arts. 4, 25.

⁹⁸ *Immigration Act 2009*, ss. 130, 131. With respect to Australia, New Zealand, Canada, and the EU, ‘[a]lthough disparities exist between the different regimes, there are sufficient similarities to allow courts across these jurisdictions to derive interpretive guidance from each other’s decisions’: Hart, N., ‘Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom?’ (2016) 28 *IJRL* 171, 179.

⁹⁹ Ley No. 761—Ley General de Migración y Extranjería (7 Jul. 2011) art. 220.

¹⁰⁰ Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm (Immigration Act), s. 28.

¹⁰¹ Law on Asylum (2007), arts. 2, 4.

¹⁰² Refugee Act, Law No. 11298 of 2012, art. 2(3).

¹⁰³ Federal Act on Foreign Nationals and Integration of 16 Dec. 2005, art. 83(3)–(4).

¹⁰⁴ Law No. 6458 of 2013 on Foreigners and International Protection (as amended 29 Oct. 2016), arts. 46, 48, 55, 63. Of note is that in addition to EU-like subsidiary protection grounds (in art. 63), a humanitarian permit may be granted *inter alia* ‘where the best interest of the child is of concern’, ‘where, notwithstanding a removal decision or ban on entering

Turkey, foreigners cannot be removed from Turkey or their departure from Turkey is not reasonable or possible', or 'in extraordinary circumstances'.

¹⁰⁵ Law of Ukraine on Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine 2011, No. 3671-VI, art. 1(4), (13).

¹⁰⁶ Immigration Rules Part 11: Asylum (as updated 2 May 2017) paras. 339C–339CA.

¹⁰⁷ 8 CFR §§ 208.16, 208.17 (CAT 84-based protection only). Hart argues that the focus of such limited protection 'on the negative obligation of *non-refoulement*, rather than the positive obligation to grant refugee status or complementary protection, makes this regime difficult to compare with the other national and regional laws': Hart ([n 98](#)) 178.

¹⁰⁸ Qualification Directive (original), arts. 2(e), 15; Qualification Directive (recast), arts. 2(f), 15.

¹⁰⁹ Cantor, D. J. & Chikwanha, F., '[Reconsidering African Refugee Law](#)' ([2019](#)) 31 *IJRL* 182 provide the following overview: Angolan law states that aliens cannot be 'returned, removed, extradited or expelled' to a country where they will be subjected to torture or cruel or degrading treatment: Lei No. 10/15, art. 54(3). In Sierra Leone, refugees must not be expelled to a risk of torture: Refugees Act, s 16. In the Central African Republic, rejected asylum seekers must not be expelled to a risk of torture: Loi No. 07.019, art. 22. Burundian law provides that asylum may be granted to any non-national 'whose life or liberty are threatened in their country or who is exposed to inhuman or degrading treatment when such threats or risks emanate from persons or groups other than the public authorities of their country'. Beneficiaries are granted the same rights as refugees: Loi No. 1/32, art. 5.

¹¹⁰ OAU Convention, art. I(2).

¹¹¹ Cartagena Declaration, conclusion III(3).

¹¹² See also the discussion of *non-refoulement* in [Chs. 5–6](#).

¹¹³ Art. 4 of the Qualification Directive (recast) sets out the terms for a case-by-case assessment. The Grand Chamber has held that: 'considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often find themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion': *FG v Sweden*, App. No. 43611/11 (23 Mar. 2016) para. 127.

¹¹⁴ See generally Foster, M., *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* ([2007](#)).

¹¹⁵ That said, the UN Human Rights Committee rarely identifies the precise type of ill-treatment under art. 7 ICCPR 66, instead simply noting that the provision has been breached.

¹¹⁶ The international treaty-monitoring bodies should, technically, operate as a fallback mechanism, since States have treaty obligations to implement rights at a domestic level and thereby codify non-return beyond the scope of art. 33 of the 1951 Convention. However,

according to Cali, Costello, and Cunningham, around 80 per cent of individual matters taken to the Committee against Torture concern the principle of *non-refoulement*, as do a third of all matters before the four UN treaty-monitoring bodies combined (namely, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of All Forms of Discrimination against Women, and the Committee on the Rights of the Child): Cali, B., Costello, C., & Cunningham, S., ‘Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies’ (2020) 21 *German Law Journal* 355, 356. In States that have not incorporated their international obligations into national law, the international committees may provide the only opportunity for asylum seekers to have their claims considered against the relevant treaty provisions: Gil-Bazo, M.-T., ‘Refugee Protection under International Human Rights Law: From *Non-Refoulement* to Residence and Citizenship’ (2015) 34(1) *RSQ* 11.

¹¹⁷ Chetail, ‘Are Refugee Rights Human Rights?’ (n 20) 65 describes them as having a ‘palliative function’.

¹¹⁸ See, for example, *Vijayanathan v France* (1993) 15 EHRR 62; *Ahmed v Austria* (1997) 24 EHRR 278 and discussion in Andrysek, O., ‘Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures’ (1997) 9 *IJRL* 392.

¹¹⁹ *Soering* (n 7).

¹²⁰ This was established in *Chahal* (n 7) paras. 79–80 and has been affirmed in a long line of cases. See generally Mavronicola, N., *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (2021) Ch. 7.

¹²¹ See, for example, *Israil v Kazakhstan*, UN doc. CCPR/C/103/D/2024/2011 (31 Oct. 2011) para. 9.4; *Maksudov, Rakhimov, Tashbaev and Pirmatov v Kyrgyzstan*, UN doc. CCPR/C/93/D/1461, 1462, 1476, and 1477/2006 (16 Jul. 2008) para. 12.4; *Valetov v Kazakhstan*, UN doc. CCPR/C/110/D/2104/2011 (17 Mar. 2014) para. 14.2.

¹²² For example, *Saadi v United Kingdom*, App. No. 13229/03 (Grand Chamber, 29 Jan. 2008); *Ramzy v The Netherlands*, App. No. 25424/05 (20 Jul. 2010) (challenge by Lithuania, Portugal, Slovakia, and the UK)—see discussion in the third edition of this work, 311–12.

¹²³ Chetail, ‘Are Refugee Rights Human Rights?’ (n 20) 28. By contrast, Costello argues that the ECtHR, in particular, ‘is not an ersatz refugee law court, but rather lags behind developments in refugee law. In important ways, there is greater dynamism in the decentralised context of international refugee law than in the supranational ECtHR’, and (referring to Chetail, ‘Are Refugee Rights Human Rights?’ (n 20), at 28 and 22, respectively), ‘reject[s] the contention that “human rights law has become the ultimate benchmark for who is a refugee” and that “human rights law is the primary source of refugee protection, while the [Refugee Convention] is bound to play a complementary and secondary role”’. See Costello, C., ‘The Search for the Outer Edges of *Non-Refoulement* in Europe: Exceptionality and Flagrant Breaches’, in Burson, B. & Cantor D. J., eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 181–2, 198–201; see also her analysis of *F v UK*, App. No. 17341/03 (22 Jun. 2004) and *Z and T v UK*, App. No. 27034/05

(28 Feb. 2006) vis-à-vis parallel developments in refugee law. See also McAdam ([n 23](#)) 203, who argues that ‘[e]ven though the Convention repeats many of the same rights as the universal treaties, its retention as a specialist refugee instrument is not redundant’.

[124](#) *Ahmed v Austria* ([n 118](#)). Blake and Husain have remarked that a ‘text that at first blush failed to afford any rights to those seeking protection from persecution, has thus now extended protection in some areas beyond that provided by the Refugee Convention itself’: Blake, N. & Husain, R., *Immigration, Asylum and Human Rights* (2003) para. 2.4. Gil-Bazo ([n 116](#)) 13 argues that it has led to ‘a transformation of the refugee definition’.

[125](#) See s. 7.1.

[126](#) CAT 84, art. 3.

[127](#) ICCPR 66, art. 7.

[128](#) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC 89), art. 37(a).

[129](#) ECHR 50, art. 3; African Charter on Human and Peoples’ Rights (adopted 17 June 1981, entered into force 21 October 1986) (1982) 21 *ILM* 58, art. 5; Inter-American Convention to Prevent and Punish Torture (adopted 9 February 1985, entered into force 28 February 1987) OASTS 67, art. 13(4); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), art. 8.

[130](#) *Tapia Paez v Sweden*, UN doc. CAT/C/18/D/39/1996 (28 Apr. 1997) para. 14.5: ‘The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention’; *Aemei v Switzerland*, UN doc. CAT/C/18/D/34/1995 (9 May 1997) para. 9.8. The approach of the Supreme Court in *Suresh v Canada* [2002] 1 SCR 3, which balances the right against compelling national security concerns, is contrary to international law and has been criticized by the Human Rights Committee: ‘Consideration of Reports: Concluding Observations on Canada’: UN doc. CCPR/C/79/Add.105 (7 Apr. 1999) para. 13; cf. the approach of the ECtHR in *Selmouni v France* (1999) 29 EHRR 403, para. 95. While some domestic complementary protection regimes apply exclusion clauses (for example, the EU and Australia), such clauses do not countenance removal but rather preclude the grant of a protection visa to the applicant.

[131](#) Article 3(1) provides that: ‘No State Party shall expel, return (“refoul”) 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.’ Article 16 of CAT 84 provides that States parties ‘shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture’. The Committee against Torture has observed that art. 3 ‘does not encompass situations of ill-treatment envisaged by article 16’: *BS v Canada*, UN doc. CAT/C/27/D/166/2000 (14 Nov. 2001) para. 7.4. For a non-exhaustive list of the kinds of considerations to be taken into account, see UN Committee against Torture, ‘General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the context of Article 22’: UN doc. CAT/C/GC/(6 Dec. 2017),

para. 29.

¹³² The rationale behind restricting the definition to acts of an official kind was the assumption that criminal acts carried out by private individuals would be prosecuted under domestic criminal law: Burgers, J. H. & Danelius, H., *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 119–20. Cautioning against this rationale: Fitzpatrick, J., ‘Harmonized Subsidiary Protection in the European Union: A View from the United States’, in Bouteillet-Paquet, D., ed., *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002) 126. In the 2019 case of *R v TRA (Appellant)* [2019] UKSC 51, the UK Supreme Court accepted a broader notion of ‘public official’, holding that it was ‘sufficiently wide to include conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control’ (para. 76), thus going beyond State officials alone.

¹³³ See s. 3.3. Human Rights Committee, ‘General Comment No. 20’ (ⁿ 7) para. 2 specifically states that a claim under art. 7 of the ICCPR 66 can relate to acts committed by persons acting in an official capacity, in a non-official capacity, or in a purely private capacity. ECHR 50: *Ahmed v Austria* (ⁿ 118) para. 44 (absence of State authority immaterial); *HLR v France*, App. No. 24573/94 (29 Apr. 1997) para. 40; *D v United Kingdom* (1997) 24 EHRR 423, para. 49; *Altun v Federal Republic of Germany* (1984) 36 D & R 209, para. 5.

¹³⁴ Committee against Torture, ‘General Comment No. 4’ (ⁿ 131) para. 30.

¹³⁵ Ibid., para. 28.

¹³⁶ *Report of the Committee against Torture*, UN GAOR 53rd Session Supp. No. 44 Annex IX: UN doc. A/53/44 (1998), 52–3; *Korban v Sweden*, UN doc. CAT/C/21/D/88/1997 (16 Nov. 1998).

¹³⁷ *Korban* (ⁿ 136).

¹³⁸ Eggli (ⁿ 12) 203. See also *Mutombo* (ⁿ 78) para. 9.6; see also *Khan v Canada*, UN doc. CAT/C/13/D/15/1994 (15 Nov. 1994) para. 12.5.

¹³⁹ Art. 3(2) CAT 84 requires decision-makers to ‘take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ See further Committee against Torture, ‘General Comment No. 4’ (ⁿ 131) paras. 27 ff.; *Alan v Switzerland*, UN doc. CAT/C/16/D/21/1995 (8 May 1996) para. 11.5.

¹⁴⁰ *Elmi v Australia*, UN doc. CAT/C/22/D/120/1998 (14 May 1999) para. 6.4. See also *Chipana v Venezuela*, UN doc. CAT/C/21/D/110/1998 (10 Nov. 1998) para. 6.3; *TA v Sweden*, UN doc. CAT/C/34/D/226/2003 (6 May 2005) para. 7.2. For an example of an individual being unable to demonstrate a personalized nature of risk in Sudan, see *AE v Switzerland*, UN doc. CAT/C/36/D/278/2005/Rev.1 (8 May 2006) para. 6.5. The absence of a pattern of gross, flagrant or mass violations of human rights does not mean that a person is

not in danger of being subjected to torture in a specific case: *Elmi v Australia* (n 140) para. 6.4; *Mutombo* (n 78) para. 9.3; *Kisoki v Sweden*, UN doc. CAT/C/16/D/41/1996 (8 May 1996) para. 9.2; *TA v Sweden* (n 140) para. 7.2. Omissions, such as denying food, may amount to an extreme form of ill-treatment and would be contrary to CAT 84's object and purpose. On this point, see Joseph, S. & Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn., 2013) 219 para. 9.08; Boulesbaa, A., *The UN Convention on Torture and the Prospects for Enforcement* (1999) 15; Foster (n 114).

¹⁴¹ *PQL v Canada*, UN doc. CAT/C/19/D/57/1996 (17 Nov. 1997) para. 5.4.

¹⁴² Conditions of detention have been found to amount to inhuman or degrading treatment on a number of occasions, for example: *FKAG v Australia*, UN doc. CCPR/C/108/D/2094/2011 (26 Jul. 2013); *MMM v Australia*, UN doc. CCPR/C/108/D/2136/2012 (25 Jul. 2013); *GB v Bulgaria*, App. No. 42346/98 (11 Mar. 2004); *Bati v Turkey*, App. Nos. 33097/96 and 57834/00 (3 Jun. 2004); *Ostrovar v Moldova*, App. No. 35206/03 (13 Sep. 2005); *Alver v Estonia*, App. No. 64812/01 (8 Nov. 2005); *MSS v Belgium and Greece* (n 3); *ZA v Russia*, App. Nos 61411/15, 61420/15, 61427/15, 3028/16 (Grand Chamber, 21 Nov. 2019) para. 195. For analysis of European decisions, see International Association of Refugee Law Judges (IARLJ) European Chapter, *Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis* (2016) 108.

¹⁴³ *AS v Sweden*, UN doc. CAT/C/25/D/149/1999 (24 Nov. 2000). See also *Jabari v Turkey*, App. No. 40035/98 (11 Jul. 2000).

¹⁴⁴ *Ng v Canada*, UN doc. CCPR/C/49/D/469/1991 (5 Nov. 1993) para. 16.1. The Committee against Torture has also suggested that it may be contrary to the prohibition on torture in CAT 84: 'Concluding Observations of the US', *Report of the Committee against Torture*, UN GAOR, 61st sess.: UN doc. A/61/44 (2006) para. 37(31).

¹⁴⁵ The relevant intention relates to causing pain and suffering, not the intention to commit an act per se: Joseph & Castan (n 140) 219, para. 9.09, referring also to Burgers & Danelius (n 132) 119.

¹⁴⁶ See generally the third edition of this work, 100–2. Although the Rome Statute, art. 7(2) (g) defines 'persecution' as requiring the 'intentional and severe deprivation of fundamental rights', this definition operates exclusively in an international criminal law context where it is necessary to establish *mens rea*. See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

¹⁴⁷ Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA res. 3452 (XXX) (9 Dec. 1975), cited also in *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para. 167.

¹⁴⁸ *Ireland v United Kingdom* (n 147) para. 167 (emphasis added). However, Clayton, R. & Tomlinson, H., *The Law of Human Rights* (2000) para. 8.22, argue that: 'In view of the absolute nature of Article 3 [of the ECHR], it seems unlikely that this makes any difference in practice; if treatment amounts to very serious and cruel suffering it will be found to be

torture, whether or not there is “intent”.

¹⁴⁹ *D v United Kingdom* (1997) 24 EHRR 423 was the first case where the ECtHR found a violation of art. 3 in the absence of intentionally inflicted harm. In *Peers v Greece* (2001) 33 EHRR 1192, para. 74, the court said there does not need to be any intention to humiliate (relying also on *V United Kingdom*, App. No. 24888/94 (16 Dec. 1999) para. 71). Cf Australia’s Migration Act 1958 (Cth), ss. 5, 36(2A) which does impose an intent requirement. The courts have noted that the Act adopts different tests and definitions from international human rights law (*SZSPE v Minister for Immigration & Border Protection* [2013] FCCA 1989, paras. 57–8; *Minister for Immigration and Citizenship v MZYLY* [2012] FCAFC 147, paras. 18–20), and thus in any inquiry, ‘[t]he starting point must be the words of the Act’: *MZYLY*, para. 29. In that context, although the courts have stated that it is neither ‘necessary nor useful to ask how the CAT or any of the International Law Treaties would apply’ (*MZYLY*, para. 20), this should be interpreted to mean not that international and comparative jurisprudence is irrelevant per se, but rather that it cannot supplant contrary definitions in the Australian legislation. This accords with the approach taken by Australian courts and tribunals generally: see, for example, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, para. 5 (see [n 153](#)).

¹⁵⁰ *Labita v Italy*, App. No. 26772/95 (6 Apr. 2000) para. 120 (emphasis added). See also *Peers v Greece* ([n 149](#)); *Poltoratskiy v Ukraine*, App. No. 33812/97 (29 Apr. 2005) para. 131; *ZA v Russia*, App. Nos. 61411/15, 61420/15, 61427/15, 3028/16 (28 Mar. 2017) para. 109 (this particular point was not discussed by the Grand Chamber ([n 142](#))); cf. Migration Act 1958 (Cth) (Australia), s. 5(1).

¹⁵¹ Case C-542/13 *M’Bodj v Etat Belge* [2015] CMLR 16, para. 41; C-353/16 *MP v Secretary of State for the Home Department*, (CJEU, 24 Apr. 2018) para. 51. See further IARLJ ([n 142](#)) 109, referring also to Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* (CJEU, Grand Chamber, 17 Feb. 2009) para. 28; Case C-364/11 *El Kott and Others v Bevándorlási és Állampolgársági Hivatal* (CJEU, 19 Dec. 2012) para. 43. For a detailed discussion of health cases, see [Ch. 12](#), s. 4.2.

¹⁵² Migration Act 1958 (Cth), s. 5(1).

¹⁵³ *SZTAL* ([n 149](#)) para. 8 (Kiefel CJ, Nettle, & Gordon JJ); para. 114 (Edelman J). This was despite the acknowledgement that: ‘The ICCPR does not expressly require that humiliation of the requisite degree be intentionally caused; nor has it subsequently been interpreted as importing such a requirement’ (para. 5).

¹⁵⁴ Art. 7. See further analysis in [Ch. 12](#), s. 4.2.

¹⁵⁵ Art. 37(a).

¹⁵⁶ For example, ECHR 50, art. 3; Charter of Fundamental Rights of the European Union (2000), art. 4; ACHR 69, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 13(4); Arab Charter on Human Rights, art. 8; African Charter on Human and Peoples’ Rights, art. 5.

¹⁵⁷ ICCPR 66, art. 4(2); Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para.

3.

¹⁵⁸ *GT v Australia*, UN doc. CCPR/C/61/0/706/1996 (4 Nov. 1997) para. 8.1. See also Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 9: ‘In the view of the Committee, 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. States parties should indicate in their reports what measures they have adopted to that end.’

¹⁵⁹ Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 10; see also Human Rights Committee, ‘General Comment No. 15: The Position of Aliens under the Covenant’ (11 Apr. 1986).

¹⁶⁰ Although see text to [nn 134–5](#).

¹⁶¹ On that point, however, the Committee against Torture has stated that ‘[e]qually, States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities’: Committee against Torture, ‘General Comment No. 4’ ([n 131](#)) para. 30 (citations omitted).

¹⁶² *HLR v France* ([n 133](#)) para. 40; Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 2.

¹⁶³ For example, *Ireland v United Kingdom* ([n 147](#)) para. 167.

¹⁶⁴ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, para. 82 (Elias CJ), referring to *Miller v R* [1977] 2 SCR 680, 690 (Laskin CJ). Elias CJ summed up as follows (para. 83): ‘In most cases treatment which is incompatible with the dignity and worth of the human person will be all three. And, even if separately classified, I think they are properly regarded as equally serious.’

¹⁶⁵ *Ibid.*, para. 82.

¹⁶⁶ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak: UN doc. E/CN.4/2006/6 (23 Dec. 2005) para. 39.

¹⁶⁷ Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 4.

¹⁶⁸ *Selmouni v France* ([n 130](#)) para. 101; Human Rights Committee, ‘General Comment No. 20’ ([n 7](#)) para. 4. See also *Taunoa* ([n 164](#)) para. 81, 93 (Elias CJ). Note that some domestic regimes separate out the terms and/or seek to define them: for example, Migration Act 1958 (Cth) (Australia), ss. 5, 36(2A).

¹⁶⁹ That provision does not include a reference to ‘cruel’ treatment or punishment. For a detailed discussion of all terms, see McAdam, J., ‘Australian Complementary Protection: A Step-by-Step Approach’ (2011) 33 *SydLR* 687.

¹⁷⁰ See *Selmouni v France* ([n 130](#)) para. 101. ‘Cruel’ treatment or punishment is not an element of art. 3 ECHR 50. The Inter-American Court of Human Rights ([n 3](#)) para. 137 also adopts the ‘living instrument’ approach.

¹⁷¹ *Greek Case*, European Commission on Human Rights, App. Nos. 3321/67, 3322/67,

3323/67, 3344/67 (18 Nov. 1969), 12 *Yearbook of the European Convention on Human Rights* 170, 186. See also *Ireland v United Kingdom* (n 147).

¹⁷² *Soering* (n 7) para. 167.

¹⁷³ Referred to in *Becciev v Moldova* (2008) 45 EHRR 331, para. 39.

¹⁷⁴ *Greek Case* (n 171) para. 11; *Ireland v United Kingdom* (n 147) para. 162; *Tyrer* (1979–80) 2 EHRR 1, paras. 29–30; *Soering* (n 7) para. 10.

¹⁷⁵ *Soering* (n 7) paras. 100, 104. See also *Ireland v United Kingdom* (n 147) paras. 162, 167, 174; *Tyrer* (n 174) paras. 29, 80.

¹⁷⁶ *R v Smith (Edward Dewey)* [1987] 1 SCR 1045, para. 94.

¹⁷⁷ See *Tyrer* (n 174) para. 32. A lack of intent to humiliate will not conclusively rule out a violation of art. 3: *Peers v Greece* (n 149) para. 74.

¹⁷⁸ *Pretty v United Kingdom* (2002) 35 EHRR 1, para. 52; see generally *East African Asians v United Kingdom* (1973) 3 EHRR 76, paras. 189, 195; also *Ireland v United Kingdom* (n 147) para. 167.

¹⁷⁹ *East African Asians v United Kingdom* (n 178).

¹⁸⁰ See, for example, *Sufi and Elmi v United Kingdom*, App. Nos. 8319/07 and 11449/07 (28 Jun. 2011); *MSS v Belgium and Greece* (n 3); Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* (CJEU, Grand Chamber, 21 Dec. 2011) para. 106; Case C-163/17 *Jawo v Bundesrepublik Deutschland* (Grand Chamber, 19 Mar. 2019); Joined Cases C-297/17, C-318/17, C-319/17, and C-438/17 *Ibrahim v Bundesrepublik Deutschland* (Grand Chamber, 19 Mar. 2019). See also Ch. 8, s. 6.4.5 and Ch. 12, s. 4.2.

¹⁸¹ See analysis of Australian cases in *McAdam & Chong* (n 21), as well as the European Database of Asylum Law (<http://www.asylumlawdatabase.eu/en>), the UK Asylum and Immigration Tribunal, the Canadian Immigration and Refugee Board, and the 2006 analysis of Canadian and French jurisprudence undertaken for the IARLJ: Reekie, J. & Layden-Stevenson, C., ‘Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)’; Zederman, V., ‘The French Reading of Subsidiary Protection’; and Dufour, L., ‘The 1951 Geneva Convention and Subsidiary Protection: Uncertain Boundaries’, in IARLJ, ed., *Forced Migration and the Advancement of International Protection* (Proceedings of the 7th World Conference, 2006) <http://www.iarlj.org/general/working-parties/154-wp-papers-7th-world-conference>.

A violation of art. 7 ICCPR 66 from a proposed deportation has been substantiated on the facts in cases such as *X v Denmark*, UN doc. CCPR/C/110/D/2007/2010 (26 Mar. 2014); *Valetov v Kazakhstan*, UN doc. CCPR/C/110/D/2104/2011 (17 Mar. 2014); *Thuraisamy v Canada*, UN doc. CCPR/C/106/D/1912/2009 (31 Oct. 2012); *Arshidin Israil v Kazakhstan*, UN doc. CCPR/C/103/D/2024/2011 (31 Oct. 2011); *XHL v The Netherlands*, UN doc. CCPR/C/102/D/1564/2007 (22 Jul. 2011); *Hamida v Canada*, UN doc. CCPR/C/98/D/1544/2007 (18 Mar. 2010); *Kaba v Canada*, UN doc. CCPR/C/98/D/1465/2006 (25 Mar. 2010); *Maksudov, Rakhimov, Tashbaev and Pirmatov v Kyrgyzstan*, UN doc. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006 (16 Jul. 2008); *Ng v*

Canada, UN doc. CCPR/C/49/D/469/1991 (5 Nov. 1993).

¹⁸² For claims based on socio-economic grounds, see Ch. 12.

¹⁸³ Committee against Torture, ‘General Comment No. 4’ (n 131) para. 29.

¹⁸⁴ Ibid.

¹⁸⁵ See, for example, Qualification Directive (original), art. 8 (internal protection), recital (26) (with respect to general risk); Qualification Directive (recast), art. 8 (internal protection), recital (35) (with respect to general risk). *Immigration and Refugee Protection Act 2001* (Canada), c 27, s. 97(1)(b) (general risk, lawful sanctions, health/medical care); *Immigration Act 2009* (New Zealand) s. 131 (lawful sanctions, health/medical care); *Migration Act 1958* (Cth) (Australia), s. 5 (lawful sanctions).

¹⁸⁶ For a discussion of health cases, such as *D v United Kingdom* (n 149) *N v United Kingdom* [2008] ECHR 453, and *Paposhvili v Belgium*, App. No. 41738/10 (13 Dec. 2016), see Ch. 12.

¹⁸⁷ Foster, M. & Pobjoy, J., Submission No. 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Complementary Protection) Bill 2009* (28 Sep. 2009) 24.

¹⁸⁸ See, for example, *Herczegfalvy v Austria* (1992) 15 EHRR 437, para. 82; *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 645, paras. 96–106; *Jalloh v Germany*, App. No. 54810/00 (11 Jul. 2006) para. 69; *Ciorap v Moldova*, App. No. 12066/02 (19 Jun. 2007) para. 77; *Juhnke v Turkey*, App. No. 52515 (13 May 2008) para. 71; *Gorobet v Moldova*, App. No. 30951/10 (11 Oct. 2011) para. 51.

¹⁸⁹ *Kröcher v Switzerland* (1982) 26 Eur Comm HR 24.

¹⁹⁰ Of course, some people will qualify for refugee status, and there will be no need for their claim to be assessed under the complementary protection criteria.

¹⁹¹ *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para. 148.

¹⁹² *Surajnarain v Canada (Minister of Citizenship and Immigration)* 2008 FC 1165, para. 11. See also *Salibian v Canada (Minister of Citizenship and Immigration)* [1990] 3 FC 250, 259; *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791 (TD) para. 37; *Prophète v Canada (Minister of Citizenship and Immigration)* 2008 FC 331; *Prophète v Canada (Minister of Citizenship and Immigration)* 2009 FCA 31; *Re WXY* [2003] RPDD No. 81; see also *Re WVZ* [2003] RPDD No. 106 (in relation to a Sri Lankan claimant).

¹⁹³ The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that an applicant show ‘a pattern or practice … of persecution of a group of persons *similarly situated* to the applicant’, and his or her ‘own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable’: ‘Aliens and Nationality’, 8 CFR §§ 208.13(b)(2)(iii)(A) (emphasis added), 208.16(b)(2)(iii)(B).

¹⁹⁴ Qualification Directive (original and recast), art. 15(c); this has been the subject of considerable academic and judicial scrutiny. See, for example, Cantor & Durieux (n 12); IARLJ, *Article 15(c) Qualification Directive (2011/95/EU): A Judicial Analysis* (2015)

<https://www.easo.europa.eu/sites/default/files/public/Article-15c-Qualification-Directive-201195EU-A-judicial-analysis.pdf>>; McAdam, J., ‘Individual Risk, Armed Conflict and the Standard of Proof in Complementary Protection Claims: The European Union and Canada Compared’, in Simeon, J. C., ed., *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (2010); Errera, R., ‘The CJEU and Subsidiary Protection: Reflections on *Elgafaji*—and After’ (2011) 23 *IJRL* 93; Tiedemann, P., ‘Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive’ (2012) 31(1) *RSQ* 123; Magnusson, J., ‘A Question of Definition: The Concept of Internal Armed Conflict in the Swedish Aliens Act’ (2008) 10 *EJML* 381; Bauloz, C., ‘The Definition of Internal Armed Conflict in Asylum Law: The 2014 *Diakité* Judgment of the EU Court of Justice’ (2014) 12 *Journal of International Criminal Justice* 835; Cantor, D. J., ‘The Laws of War and the Protection of “War Refugees”: Reflection on the Debate and Its Future Directions’ (2014) 12 *International Journal of Criminal Justice* 931; Storey, H., ‘Armed Conflict in Asylum Law: The “War- Flaw” ’ (2012) 31(2) *RSQ* 1; Durieux, J.-F., ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ (2012) 31(3) *RSQ* 161; Fernández-Sánchez, P. A., ‘The Interplay Between International Humanitarian Law and Refugee Law’ (2010) 1 *Journal of International Humanitarian Legal Studies* 329; Juss, S.S., ‘Problematizing the Protection of “War Refugees”: A Rejoinder to Hugo Storey and Jean-François Durieux’ (2013) 32(1) *RSQ* 122; Lambert, H. & Farrell, T., ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22 *IJRL* 237; Lambert, H., ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence’ (2013) 25 *IJRL* 207; Moreno-Lax, V., ‘Systematising Systemic Integration: “War Refugees”, Regime Relations, and a Proposal for a Cumulative Approach to International Commitments’ (2014) 12 *Journal of International Criminal Justice* 907; Hart (n 98) 194–200.

¹⁹⁵ 12199/02 ASILE 45 (25 Sep. 2002). Cf. CNDA (Grande formation) 19 novembre 2020 M. M. n° 18054661 R *Recueil* 2020 69–76, in which the CNDA determined that the level of violence (‘*violence aveugle*’) required an assessment of both quantitative and qualitative criteria, that the choice of sources must conform with the demands of EU law, and take account of the recommendations of the European Asylum Support Office (EASO).

¹⁹⁶ 12382/02 ASILE 47 (30 Sep. 2002) para. 4.

¹⁹⁷ *Elgafaji* (n 151) para. 45.

¹⁹⁸ Ibid., para. 42.

¹⁹⁹ Ibid., para. 37. See also the approach in *AM & AM (Armed Conflict: Risk Categories)* *Somalia CG* [2008] UKAIT 00091, para. 110; *Lukman Hameed Mohamed v Secretary of State for the Home Department AA/14710/2006* (UK Asylum and Immigration Tribunal, unreported, 16 Aug. 2007): ‘It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk’, cited in UNHCR, ‘UNHCR Statement: Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence’ (Jan. 2008), 6. See

also European Council on Refugees and Exiles (ECRE) & European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection* (Oct. 2008) 26–9.

²⁰⁰ As UNHCR noted in the context of the Qualification Directive, provided that the risk is real, rather than remote, this should be sufficient to establish the individual requirement: UNHCR Statement ([n 199](#)) 6.

²⁰¹ UNHCR has stressed the importance of a full and inclusive interpretation of the refugee definition in the 1951 Convention, including recognizing its applicability in situations of generalized violence and armed conflict where a nexus to at least one of the five Convention grounds can be demonstrated: UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive* (2007) 99; see also UNHCR Statement ([n 199](#)) 5; UNHCR, ‘Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions’: HCR/GIP/16/12 (Dec. 2016).

²⁰² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art. 2(c). There is a proposal to repeal and replace the Temporary Protection Directive: European Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final 2020/0277 (COD), art. 14. For discussion of the norm of temporary refuge, see s. 9.1; also the third edition of this work, 328–9.

²⁰³ With respect to other rights that might entail a *non-refoulement* obligation, a different standard may apply: see s. 4.

²⁰⁴ The standard of proof in art. 3 CAT 84 is that there are ‘substantial grounds’ for believing that a person would be in danger of being subjected to torture if sent to another State. Although neither the ICCPR 66 nor ECHR 50 contains an express standard, since the *non-refoulement* obligation is implied, a consistent approach has emerged.

²⁰⁵ Committee against Torture, ‘General Comment No. 4’ ([n 131](#)) para. 11 (citations omitted).

²⁰⁶ *Report of the Committee against Torture* ([n 136](#)).

²⁰⁷ *EA v Switzerland*, UN doc. CAT/C/19/D/28/1995 (10 Nov. 1997) para. 11.3.

²⁰⁸ *Aemei v Switzerland* ([n 130](#)) para. 9.5.

²⁰⁹ *Ibid.*, para. 9.6.

²¹⁰ Individual opinion (concurring) by Committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L. Neuman, Mr Michael O’Flaherty, and Sir Nigel Rodley in *Pillai v Canada*, UN doc. CCPR/C/101/D/1763/2008 (25 Mar. 2011) 22.

²¹¹ Individual opinion (concurring) ([n 210](#)) 22, referring to the following earlier

jurisprudence: Human Rights Committee, ‘General Comment No. 31’ ([n 7](#)); *Kindler v Canada*, UN doc. CCPR/C/48/D/470/1991 (30 Jul. 1993); *Cox v Canada*, UN doc. CCPR/C/52/D/539/1993 (31 Oct. 1994) paras. 10.4, 16.1; *GT v Australia* ([n 158](#)) paras. 8.4, 8.6.

[212](#) Individual opinion (concurring) ([n 210](#)) 22.

[213](#) *Soering* ([n 7](#)) para. 100.

[214](#) See Lauterpacht, E. & Bethlehem, D., ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’, in Feller, E., Türk, V., & Nicholson, F., eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) paras. 246, 249, 252. However, art. 3 ECHR 50 also applies to the manner in which an expulsion is carried out: see Mole, N., ‘Asylum and the European Convention on Human Rights’ Council of Europe H/Inf (2002) 9, 40–1.

[215](#) *Salah Sheekh v The Netherlands* ([n 191](#)) para. 136.

[216](#) Einarsen, T., ‘The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum’ (1990) 2 *IJRL* 361, 372.

[217](#) See [Ch. 3](#), s. 6.2. Den Heijer notes that ‘[d]espite the differences in wording, the probability standard actually employed in domestic and international practice shows convergence in respect of the respective treaty provisions ... In line with UNHCR guidelines and case law of the ECtHR, the Human Rights Committee and the Committee against Torture, the test most commonly applied focuses on “a real risk” or “reasonable degree”’: den Heijer, M., ‘*Refoulement*’, in Nollkaemper, A. & Plakokefalos, I. (eds.), *The Practice of Shared Responsibility in International Law* (2017) 499.

[218](#) During the drafting of the original EU Qualification Directive, Sweden sought to replace ‘substantial grounds’ with ‘well-founded fear’ (as per the original draft art. 5(2) of the EU Qualification Directive) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees.

[219](#) *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, para. 12. This threshold has also been used in Canada with respect to ‘well-founded fear’ in Convention refugee claims: *Ponniah v Canada (Minister of Employment and Immigration)* (1991) 13 Imm LR (2d) 241, 245 (FCA).

[220](#) *Kacaj* ([n 219](#)) para. 10. See also *Bagdanavicius v Secretary of State for the Home Department* [2005] UKHL 38, para. 30.

[221](#) *Kacaj* ([n 219](#)) para. 15.

[222](#) *AK (South Africa)* [2012] NZIPT 800174 (16 Apr. 2012) para. 79.

[223](#) IARLJ ([n 142](#)) 114–5, referring to Joined Cases C-71/11 and C-99/11 *Germany v Y and Z* (CJEU, Grand Chamber, 5 Sep. 2012) paras. 75, 79, 80.

[224](#) See 8 CFR § 208.16(c)(2); *Li v Canada (Minister for Citizenship and Immigration)* [2005] 3 FCR 239 (FCA) paras. 27–9, in relation to claims brought under ss. 97(1)(a) (torture) and 97(1)(b) (risk to life or of cruel and unusual treatment or punishment) of the Immigration and Refugee Protection Act 2001. This is contrary to the position espoused by

the Immigration and Refugee Board when the Act came into force in June 2002 (and followed by the courts until *Li*) that ‘all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, “reasonable chance or serious possibility”’: Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (15 May 2002) 39.

²²⁵ For analysis of why these jurisdictions have adopted a different test, see McAdam ([n 169](#)); Kaldor Centre for International Refugee Law submission to the inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014 (4 Aug. 2014) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional

²²⁶ Compare 8 CFR §208.16(c)(2) and §208.13(b)(2). See also Fitzpatrick ([n 132](#)) 130.

²²⁷ *Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680, 57 DLR (4th) 153 (CA).

²²⁸ Individual opinion (concurring) ([n 210](#)) 22.

²²⁹ Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting (10 May 2000), 24th Sess, CAT/C/SR.424 (9 Feb. 2001) para. 17; Miller, B. P., Keith, L. C., & Holmes, J. S., ‘Beyond Grant or Deny: A More Nuanced Ordering of US Asylum Outcomes’ (2013) 97 *Judicature* 172.

²³⁰ Universal Declaration of Human Rights, UNGA res. 217A (III) (10 Dec. 1948) (UDHR 48) art. 3; ICCPR 66, art. 6; CRC 89, art. 6; ECHR 50, art. 2; American Convention on Human Rights, art. 4; African Charter on Human and Peoples’ Rights, art. 4; Arab Charter on Human Rights, art. 5. It is also contained in domestic complementary protection legislation, for example Migration Act 1958 (Cth) (Australia) s. 36(2A)(a); *Immigration and Refugee Protection Act 2001* (Canada) s. 97(1)(b); *Immigration Act 2009* (New Zealand) s. 131. For more detailed analysis of non-return in this context, see [Ch. 12](#), s. 4.1.

²³¹ Human Rights Committee, ‘General Comment No. 36’ ([n 14](#)) para. 2 (and see previously Human Rights Committee, ‘General Comment No. 6: Article 6 (Right to Life)’ (30 Apr. 1982) para. 1); Human Rights Committee, ‘General Comment No. 14: Nuclear Weapons and the Right to Life (Art. 6)’ (9 Nov. 1984) para. 1.

²³² Human Rights Committee, ‘General Comment No. 36’ ([n 14](#)) para. 3.

²³³ *Ahani v Canada*, UN doc. CCPR/C/80/D/1051/2002 (29 Mar. 2004); *Warsame v Canada*, UN doc. CCPR/C/102/D/1959/2010 (21 Jul. 2011); Human Rights Committee, ‘General Comment No. 31’ ([n 7](#)) para. 12; Human Rights Committee, ‘General Comment No. 36’ ([n 14](#)) paras. 30–1. See also Committee on the Rights of the Child, ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin’: UN doc. CRC/GC/2005/6 (1 Sep. 2005) para. 27; *Teitiota v New Zealand*, UN doc. CCPR/C/127/D/2728/2016 (24 Oct. 2019).

²³⁴ For example, in *Bader and Kanbor v Sweden*, App. No. 13284/04 (8 Nov. 2005), the court found that the applicants’ deportation would constitute a breach of arts. 2 and 3. Similarly, in *AL (XW) v Russia*, App. No. 44095/14 (29 Oct. 2015) para. 64, the court found

that Russia was ‘bound by an obligation that stems from Articles 2 and 3 not to extradite or deport an individual to another State where there exist substantial grounds for believing that he or she would face a real risk of being subjected to the death penalty there’. In *NA v Finland*, App. No. 25244/18 (14 Nov. 2019), the court considered arts. 2 and 3 together, noting that ‘the Finnish authorities and courts failed to comply with their obligations under Articles 2 and/or 3 of the Convention’ and ‘[t]here has accordingly been a violation of Articles 2 and 3 of the Convention’ (paras. 85, 86, respectively).

²³⁵ For example, *Tatete v Switzerland*, App. No. 41874/98 (6 Jul. 2000) (settlement reached); *D v United Kingdom* ([n 149](#)) (decided on art. 3); *Mamatkulov v Turkey* (2005) 41 EHRR 494 (Grand Chamber). Thus, in *D v United Kingdom*, for example, the court did not regard the art. 2 claim as unfounded in principle, but thought it unnecessary to review it separately from the art. 3 claim.

²³⁶ *Z and T* ([n 123](#)) 6, referring to *Soering* ([n 7](#)).

²³⁷ See, for example, analysis of Australian cases in *McAdam & Chong* ([n 21](#)). As Lord Steyn posited in the House of Lords: ‘If article 3 may be engaged it is difficult to follow why, as a matter of logic, article 2 could be peremptorily excluded. There may well be cases where article 3 is not applicable but article 2 may be’: *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26, para. 40. In *Bader* ([n 234](#)), the court found that the applicants’ deportation to Syria, if implemented, would be a violation of both arts. 2 and 3.

²³⁸ *Al-Saadoon* ([n 15](#)) para. 19.

²³⁹ On the role of diplomatic assurances, see [Ch. 5](#), s. 5.2.

²⁴⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, UNGA res. 44/128 (15 Dec. 1989).

²⁴¹ *Judge v Canada*, UN doc. CCPR/C/78/D/829/1998 (13 Aug. 2003) para. 10.4: A State that has abolished the death penalty ‘may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out’. This reversed the previous position in *Kindler* ([n 211](#)). The International Law Commission (ILC) has argued for progressive development of the law in two respects: first, the focus should be on assurances that the death penalty will not be imposed in the first place; and secondly, States that retain the penalty in their legislation but do not apply it in practice should also be restrained from removing a person in such circumstances. See ILC Draft Articles on the Expulsion of Aliens, with Commentaries (2014), Commentary to draft art. 23.

²⁴² *Wong Ho Wing v Peru* (IACtHR, 30 Jun. 2015) para. 134.

²⁴³ Protocol No. 13 to ECHR 50, ETS No. 187; see also Protocol No. 6 to ECHR 50: ETS No. 114.

²⁴⁴ Protocol No. 13 to ECHR 50; Qualification Directive (original and recast), art. 15(a); Migration Act 1958 (Cth) (Australia), s. 36(2A).

²⁴⁵ See [Ch. 5](#), s. 5.2.

²⁴⁶ See, for example, EU Charter of Fundamental Rights, art. 19; EU Qualification

Directive, art. 15(a); *Bader* (n 234) paras. 42, 44–8; Council of Europe Committee of Ministers, ‘Guidelines on human rights and the fight against terrorism’ (adopted 11 July 2002); Committee of Ministers written reply to the Council of Europe Parliamentary Assembly on the meaning and application of the principle of *non-refoulement* in the context of Articles 2 and 3 of the ECHR (23 Feb. 2007, doc. 11192); the Joint European Union/Council of Europe Declaration establishing a ‘European Day against the Death Penalty’ (10 Oct. 2008).

²⁴⁷ *Judge v Canada* (n 241) para. 10.9.

²⁴⁸ ICCPR 66, art. 2(3); CAT 84, art. 14; ECHR 50, art. 13. There must, of course, be an arguable complaint: see, for example, *Čonka v Belgium*, App. No. 51564/99 (5 Feb. 2002) para. 76; see also *Chahal* (n 7) para. 147.

²⁴⁹ *Čonka* (n 248) para. 75. Even if a single remedy does not entirely satisfy the requirements, an aggregate of remedies may do so: para. 75, referring also to *Kudła v Poland*, App. No. 30210/96 (Grand Chamber, 26 Oct. 2000) para. 157.

²⁵⁰ *Čonka* (n 248) paras. 82–3.

²⁵¹ The Committee against Torture stated that ‘the right to an effective remedy contained in article 3 requires ... an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise’: *Agiza v Sweden*, UN doc. CAT/C/34/D/233/2003 (20 May 2005) para. 13.7. See also the UN Human Rights Committee in *Alzery v Sweden*, UN doc. CCPR/C/88/D/1416/2005 (25 Oct. 2006) para. 11.8.

²⁵² *Gebremedhin v France*, App. No. 25389/05 (26 Apr. 2007) paras. 58, 66.

²⁵³ *Hirsi Jamaa v Italy*, App. No. 27765/09 (23 Feb. 2012).

²⁵⁴ *IM v France*, App. No. 9152/09 (2 Feb. 2012) paras. 148, 154.

²⁵⁵ Committee on the Rights of the Child, ‘General Comment No. 6’ (n 233) para. 27; Human Rights Committee, ‘General Comment No. 31’ (n 7) para. 12; *Judge v Canada* (n 241). For a critique of this standard, see Noll, G., *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000) 464–7.

²⁵⁶ IACtHR, *Advisory Opinion* (n 3) para. 231. See also Cantor & Barichello (n 9).

²⁵⁷ Human Rights Committee, ‘General Comment No. 31’ (n 7) para. 12; Committee on the Rights of the Child, ‘General Comment No. 6’ (n 233) para. 27. While neither Committee has commented further on the meaning of ‘irreparable harm’ in the context of removals, the Human Rights Committee has indicated in the case of interim measures, ‘what may constitute “irreparable damage” to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits’: *Stewart v Canada*, UN doc. CCPR/C/58/D/538/1993 (1 Nov. 1996) para. 7.7 (emphasis added). The only dissent against the expansion of the principle of *non-refoulement* in this way was expressed in an individual opinion by Christine Chanet in *Judge v Canada* (n 241) 20 on the grounds that ‘legal and

practical problems would immediately arise' (noted in Foster, M., 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' [2009] 2 *New Zealand Law Review* 257, 277).

²⁵⁸ Despite the acceptance in principle that any ICCPR 66 right could entail a *non-refoulement* obligation, in all cases in which a violation has been found, it has been regarded as being encompassed by art. 6 or art. 7. For instance, in *BL v Australia*, UN doc. CCPR/C/112/D/2052/2011 (16 Oct. 2014) para. 6.5, the Committee stated: 'the author's allegations under [art. 18] cannot be dissociated from his claims under articles 6 and 7, which must be determined on the merits'. See also *Choudhary v Canada*, UN doc. CCPR/C/109/D/1898/2009 (28 Oct. 2013) para. 8.8; *Thuraisamy v Canada*, UN doc. CCPR/C/106/D/1912/2009 (31 Oct. 2012) paras. 6.6, 7.8; *X v Denmark*, UN doc. CCPR/C/110/D/2007/2010 (26 Mar. 2014) para. 8.4; *Z v Australia*, UN doc. CCPR/C/111/D/2049/2011 (18 Jul. 2014) para. 8.3.

²⁵⁹ *Soering* (n 7) para. 113; see also *Cruz Varas v Sweden* (1991) 14 EHRR 1, paras. 69–70; *Vilvarajah* (n 15) para. 103; *FG v Sweden* (n 113) Joint separate opinion of Judges Ziemele, De Gaetano, Pinto de Albuquerque, and Wojtyczek, para. 7. See generally McAdam (n 23) Ch. 4. For a detailed discussion of the case law on provisions other than art. 3 in this context, see den Heijer, M., *Europe and Extraterritorial Asylum* (2012) 280–5; Costello (n 123) 181–2. In *R v Secretary of State for the Home Department, ex parte Razgar* [2004] UKHL 27 (para. 9), Lord Bingham invoked *Bensaid v United Kingdom* (2001) 33 EHRR 205 as authority for placing reliance on art. 8 'to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country'. For a clear overview of the relevant ICCPR 66 rights, see Affidavit made by Ben Saul on 18 August 2014 (evidence file, folio 6980), *Wong Ho Wing* (n 242).

²⁶⁰ The court entertained an art. 4 non-removal claim in *Ould Barar v Sweden* (1999) 28 EHRR CD 213 but found no risk of a violation; see also *MO. v Switzerland*, App. No. 41282/16 (20 Jun. 2017). In *J v Austria*, App. No. 58216/12 (17 Jan. 2017), the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Tsotsoria, para. 40 recognized that expulsion to a risk of treatment contrary to art. 4 'raises an issue under this provision'. See also *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, paras. 22–37. In *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, the European Court of Human Rights held that trafficking is encompassed by art. 4.

²⁶¹ See, for example, *El-Masri v Macedonia* (2013) 57 EHRR 25; *Abu Zubaydah v Lithuania*, App. No. 46454/11 (31 May 2018) paras. 657–8; *Al Nashiri v Romania*, App. No. 33234/12 (31 May 2018) paras. 691–2.

²⁶² See, for example, *Soering* (n 7); *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Mamatkulov* (n 235); *Einhorn v France*, App. No. 71555/01 (16 Oct. 2001); *Al-Moayad v Germany* (2007) 44 EHRR SE22; *Stapleton v Ireland*, App. No. 56588/07 (4 May 2010); *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09 (9 May 2012) (all noted in Costello (n 123) 181); *Tomic v United Kingdom*, App. No. 17837/03 (14 Oct. 2003);

Yefimova v Russia, App. No. 39786/09 (19 Feb. 2013) para. 218. For analysis, see Battjes, H., ‘The Soering Threshold: Why Only Fundamental Values Prohibit *Refoulement* in ECHR Case Law’ (2009) 11 *EJML* 205; den Heijer, M., ‘Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights’ (2008) 10 *EJML* 277. See also text to nn 13–14.

²⁶³ See, for example, *F v United Kingdom*, App. No. 17341/03 (22 Jun. 2004); *Bensaid* (n 259); *Razgar* (n 259); *Üner v The Netherlands*, App. No. 46410/99 (5 Jul. 2005); *Boultif v Switzerland*, App. No. 54273/00 (2 Aug. 2001); *Al Nashiri* (n 261) paras. 698–9; *Abu Zubaydah* (n 261) para. 665. For a summary of cases other than those based on art. 3 considered by the ECtHR, see *Ullah* (n 237) paras. 15–19, 24; see also Ktistakis, Y., *Protecting Migrants under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners* (2013) 89–97.

²⁶⁴ See, for example, *Z and T* (n 123). The House of Lords (as it then was) has acknowledged that a breach of *any* human right could potentially engage a *non-refoulement* obligation if the breach were so flagrant as completely to deny or nullify the right: *Ullah* (n 237).

²⁶⁵ *Soering* (n 7) para. 113; *Othman* (n 262); *El-Masri* (n 261); *Al Nashiri v Poland*, App. No. 28761/11 (24 Jul. 2014); *Husayn (Abu Zubaydah) v Poland*, App. No. 7511/13 (24 Jul. 2014); *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64. For a detailed overview of the relevant cases, see Costello (n 123). Compare the approach of the Inter-American Commission on Human Rights in *Mortlock v United States*, Case 12.534 Commission Report No. 63/08, (25 Jul. 2008).

²⁶⁶ *Z and T* (n 123); see also *Ullah* (n 237). Multiple rights may, however, be breached: see, for example, *El-Masri* (n 261).

²⁶⁷ *Mamatkulov* (n 235) 537, para. O-III14 (joint partly dissenting opinion of Judges Bratza, Bonello, and Hedigan), adopted by the court in *Othman* (n 262) para. 260. See also the parallel cases of *Ullah* (n 237) and *Razgar* (n 259) in the House of Lords, discussed in more detail in the third edition of this work; *EM* (n 265) paras. 17, 60.

²⁶⁸ *Z and T* (n 123) 7.

²⁶⁹ Costello (n 123) 184 (fn omitted) and 205, respectively. As Lady Hale acknowledged in the House of Lords, ‘[t]here clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned’: *Razgar* (n 259) para. 42. See also *F v United Kingdom* (n 263). However, den Heijer argues that the art. 3 threshold ‘is a jurisprudential construction which can very well be extrapolated to other provisions if considered necessary’: den Heijer (n 259) 294.

²⁷⁰ *Ullah* (n 237) para 24 citing *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1, para 111.

²⁷¹ Foster (n 257) 276 (fn omitted); Spijkerboer, T., ‘Gender, Sexuality, Asylum and European Human Rights’ (2018) 29 *Law Critique* 221, 225, 228. For analysis of the court’s various rationales as to when and why a *non-refoulement* obligation exists, see Foster, *ibid.*,

268–72; Costello ([n 123](#)) 206. Costello (at 184) argues that the ‘flagrant breach’ test ‘is symptomatic of the lack of a single coherent normative rationale for the *non-refoulement* case law.’

[272](#) See also *Wong Ho Wing* ([n 242](#)) 136.

[273](#) *Soering* ([n 7](#)) para. 113. In contrast to the practice of the International Criminal Tribunal for Rwanda, the ECtHR does not require the sending State to ensure that the extradited person will enjoy all the fair trial rights to which they would be entitled were they to remain, and be prosecuted, in the European State instead: Bolhuis, M. P., Middelkoop, L.P., & van Wijk, J., ‘Refugee Exclusion and Extradition in the Netherlands: Rwanda as Precedent?’ (2014) 12 *Journal of International Criminal Justice* 1115, 1127, referring to *Ahorugeze v Sweden*, App. No. 37075/09 (27 Oct. 2011) para. 113.

[274](#) *Othman* ([n 262](#)) para. 285; see also paras. 267, 282.

[275](#) Ibid., para. 260. But see *Kapri v Lord Advocate* [2013] UKSC 48, para. 32 in which the UK Supreme Court found that systemic judicial corruption did not satisfy the test. In *Al-Nashiri v Poland* and *Husayn v Poland*, the court found that there was a ‘sufficiently high probability’ that evidence obtained by torture would be used in military commission proceedings: *Al-Nashiri v Poland*, App. No. 28761/11 (24 Jul. 2014) para. 567; *Husayn (Abu Zubaydah) v Poland*, App. No. 7511/13 (24 Jul. 2014) para. 557. Noting the European case law, the Inter-American Court of Human Rights similarly stated that ‘a flagrant violation of the basic guarantees of due process may result in the violation of the principle of *non-refoulement*’: IACtHR, *Advisory Opinion* ([n 3](#)) para. 230.

[276](#) *El-Masri* ([n 261](#)) para. 239.

[277](#) Ibid., citing *Babar Ahmad v United Kingdom*, App. Nos. 24027/07, 11949/08, and 36742/08 (6 Jul. 2010) paras. 113–4.

[278](#) *Razgar* ([n 259](#)) para. 20; see also para. 59. Saul notes that in some immigration cases, the UN Human Rights Committee has found that the expulsion of family members, resulting in family separation, is an unjustified interference in the family contrary to art. 17 and/or art. 23 ICCPR 66. While such cases are not strictly about *refoulement* (since the unlawful interference occurs in the sending State itself), they nevertheless show the importance of considering the impact of removal on families: Saul ([n 13](#)) 33, referring to *Winata v Australia*, UN doc. CCPR/C/72/D/930/2000 (26 Jul. 2001) para. 7.1; *Madafferi v Australia*, UN doc. CCPR/C/81/D/1011/2001 (26 Jul. 2004) para. 9.7. On determining whether interference is arbitrary and unlawful, see *Byahuranga v Denmark*, UN doc. CCPR/C/82/D/1222/2003 (1 Nov. 2004) paras. 11.6–11.7. There is a discrepancy between the jurisprudence of the ECtHR and the approach in refugee law in relation to the removal of people who are gay and may not be able to live freely as such. Even though the court has recognized that within the territory of contracting States, the criminalization of homosexual acts violates the right to privacy under art. 8, it has considered that this did not amount to a ‘flagrant breach’ when it came to non-removal because the individual could live discreetly: *Dudgeon v UK* (1982) 4 EHRR 149. The New Zealand courts have held that there is no

common law right to family life (derived from international human rights law): *M v Minister of Immigration* [2013] NZSC 9, para. 20.

²⁷⁹ *Chikwamba v United Kingdom* [2008] UKHL 40, para 46.

²⁸⁰ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 27.

²⁸¹ Ibid., para. 28. For further analysis, see Pobjoy, J. M., *The Child in International Refugee Law* (2017) 192–6.

²⁸² Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 84, cited in IACtHR, *Advisory Opinion* ([n 3](#)) para. 231.

²⁸³ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 27.

²⁸⁴ IACtHR, *Advisory Opinion* ([n 3](#)) para. 233.

²⁸⁵ *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, paras. 26, 33; *EB (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1189, para. 49; *EM* ([n 265](#)); *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568; *Ye* ([n 2](#)) para. 53. For examples of factors that have been considered to outweigh the child’s best interests, see Pobjoy ([n 281](#)) 236–7. The Committee against Torture has also stressed that a child should only be returned to his or her country of origin if it is in his or her best interests: *Report of the Committee against Torture, Official Records of the UNGA*, 65th Sess., Supp. No. 44: UN doc. A/65/44 (2010) 56. A child’s best interests are also a primary consideration under art. 24. ICCPR 66: *Bakhtiyari v Australia*, UN doc. CCPR/C/79/D/1069/2002 (29 Oct. 2003) para. 9.7.

²⁸⁶ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 86.

²⁸⁷ *Tarakhel v Switzerland*, App. No. 29217/12 (4 Nov. 2014) para. 99; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App. No. 13178/03 (12 Oct. 2006) para. 55; *Popov v France*, App. Nos. 39472/07 and 39474/07 (19 Jan. 2012) para. 91.

²⁸⁸ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 19. See paras. 20, 84 for details of what needs to be considered. Note, too, UNHCR, ‘*Guidelines on Assessing and Determining the Best Interests of the Child*’ (Nov. 2018).

²⁸⁹ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 84. The use of ‘in particular’ indicates that the principle of *non-refoulement* is not the only relevant consideration in the case of a child. See also Human Rights Council, ‘Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the context of Migration’: UN doc. A/HRC/15/29 (5 Jul. 2010) paras. 46–7. See generally Pobjoy, J. M., ‘The Best Interests of the Child Principle as an Independent Source of International Protection’ (2015) 64 *ICLQ* 327; Lundberg, A., ‘The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children’s Rights’ (2011) 3 *Journal of Human Rights Practice* 49; McAdam, J., ‘Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection’ (2006) 14 *International Journal of Children’s Rights* 251.

²⁹⁰ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 84.

While there is a general presumption in favour of family reunification for children, in some cases this will not be in a child's best interests. This might be because of the risk of harm in the place to which return is contemplated, or because of the risk represented by the parents themselves, for example, if they have been involved in trafficking the child in the past, or are unable to protect the child from being trafficked in the future: UNICEF and the Office of the UN High Commissioner for Human Rights (Regional Office for Europe), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children* (Jun. 2012) 42. In undertaking a proportionality assessment in accordance with art. 8 ECHR 50 (right to respect for private and family life), the children's best interests are a primary, but not *the* primary, consideration: *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74.

²⁹¹ Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)': UN doc. CRC/C/GC/14 (29 May 2013) para. 6; see also Pobjoy ([n 281](#)) 6, 27–8, [Ch. 2](#). In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (fn omitted) (HCA), the High Court of Australia held that Australia's ratification of CRC 89 gave rise to a 'legitimate expectation' that 'administrative decision-makers [would] act in conformity with the Convention and treat the best interests of the children as "a primary consideration"'; cf. *Baker v Canada* [1999] 2 SCR 817, para. 29. In *Re Minister for Immigration and Ethnic Affairs, ex parte Lam* [2003] HCA 6, the High Court seriously questioned the findings in *Teoh*, although did not overrule it. See further Groves, M., 'Treaties and Legitimate Expectations: The Rise and Fall of *Teoh* in Australia' (2010) 15 *Judicial Review* 323.

²⁹² Committee on the Rights of the Child, 'General Comment No. 14' ([n 291](#)) para. 6; see also Pobjoy ([n 281](#)) 6–7, 28–30, [Chs. 3–5](#).

²⁹³ Committee on the Rights of the Child, 'General Comment No. 14' ([n 291](#)) para. 6; see also Pobjoy ([n 281](#)) 7, 30–1, [Ch. 6](#); McAdam ([n 23](#)) [Ch. 5](#).

²⁹⁴ Goodwin-Gill, G. S. & Hurwitz, A., 'Memorandum', in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 Apr. 2002) para. 10, in House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (2002) Oral Evidence Section, 2.

²⁹⁵ In Sweden, for instance, the Aliens Act, [ch. 1](#), s. 10 requires the best interests of the child to be considered in all cases concerning children. Drafting documents state that the best interests of the child can allow residence permits to be granted on humanitarian grounds for less compelling reasons when children are affected than otherwise, and children have been permitted to stay even when they could not demonstrate the normal requisite level of harm (for example, when they were physically or mentally ill). See Gov. Bill Prop, 1996/97: 25 at 249, cited in Schiratzki, J., 'The Best Interests of the Child in the Swedish Aliens Act' (2000) 14 *International Journal of Law, Policy and the Family* 206, 218 and cases discussed there (Aliens Appeals Board 970130, 970314). However, Lundberg ([n 289](#)) argues that there is a discrepancy between the 'best interests' principle and its actual implementation in asylum

procedures at the Swedish Migration Board. See also UNHCR, ‘*Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*’: HCR/GIP/09/08 (22 Dec. 2009), paras. 6–9.

²⁹⁶ Case C-112/20 *MA. v Etat belge* (CJEU, Tenth Chamber, 11 Mar. 2021) (Member States are bound to take account of the child’s best interests when considering the return of a father of a minor with Belgian nationality); Teoh ([n 291](#)); *Baker* ([n 291](#)); C-112/20 *Belgian State (Retour du parent d’un mineur)* (CJEU, 11 Mar. 2021). In *Baker*, the Supreme Court of Canada stated (at para. 75) that ‘for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C [humanitarian and compassionate] claim even when children’s interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable’. On ‘assessment of hardship’ under the H & C grounds, and the need to take the child’s best interests into account in this context, see *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61. The court noted there that ‘the status of the applicant as a child triggers not only the requirement that the “best interests” be treated as a significant factor in the analysis, it should also influence the manner in which the child’s other circumstances are evaluated. And since “[c]hildren will rarely, if ever, be deserving of any hardship”, the concept of “unusual and undeserved hardship” is presumptively inapplicable to the assessment of the hardship invoked by a child to support his or her application for humanitarian and compassionate relief’ (para. 41, citations omitted).

²⁹⁷ See, for example, Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 27; *IAM (on behalf of KYM) v Denmark*, UN doc. CRC/C/77/D/3/2016 (25 Jan. 2018) para. 11.3.

²⁹⁸ See McAdam ([n 23](#)) 173.

²⁹⁹ Goodwin-Gill, G. S., ‘Who to Protect, How, … and the Future?’ (1997) 9 *IJRL* 1, 6, reaffirmed in Goodwin-Gill, G. S., ‘Expert Roundtable Discussion on “The United Nations Convention on the Rights of the Child and Its Application to Child Refugee Status Determination and Asylum Processes”: Introduction’ (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 226, 226.

³⁰⁰ UNHCR ([n 288](#)) 99; UNHCR ([n 295](#)). Note also Executive Committee Conclusion No. 107 (LVIII) on Children at Risk (2007).

³⁰¹ Committee on the Rights of the Child, ‘General Comment No. 14’ ([n 291](#)) para. 80.

³⁰² Goodwin-Gill, ‘Expert Roundtable Discussion’ ([n 299](#)) 230.

³⁰³ UNHCR ([n 295](#)) para. 10 (fn omitted) and paras. 15–36.

³⁰⁴ Ibid., para. 13. They should also enjoy specific procedural and evidentiary safeguards:

paras. 65–77. On the child’s right to be heard, see UN Committee on the Rights of the Child, ‘General Comment No. 12 (2009): *The Right of the Child to be Heard*’ (20 Jul. 2009).

³⁰⁵ Goodwin-Gill, ‘Expert Roundtable Discussion’ ([n 299](#)) 230. For an overview of how a best interests assessment should take place, see Pobjoy ([n 281](#)) 223–38. The Committee on the Rights of the Child has observed that the evaluation of a risk for a child to be submitted to an irreversible harmful practice, such as female genital mutilation, ‘should be adopted following the principle of precaution, and where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from returning the child’: *IAM (on behalf of KYM) v Denmark* ([n 297](#)) para. 11.8.

³⁰⁶ See further McAdam ([n 23](#)) Ch. 5; Goodwin-Gill, G. S., ‘Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions’ (1995) 3 *International Journal of Children’s Rights* 405; Goodwin-Gill, ‘Who to Protect, How, ... and the Future?’ ([n 300](#)); Goodwin-Gill, ‘Expert Roundtable Discussion’ ([n 300](#)); Pobjoy ([n 281](#)) Ch. 6. See also Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 84; UNHCR, ‘Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum’ (Feb. 1997) para. 9.2. According to Pobjoy (at 344), this ‘is not merely a theoretical aspiration, but finds support in a fast-evolving body of regional and domestic jurisprudence’. For an overview of State practice showing the increasingly central role of the best interests principle in decisions involving the possible removal of children, see Pobjoy ([n 281](#)) 203–23.

³⁰⁷ See, for example, Qualification Directive (original), art. 2(e); Qualification Directive (recast), art. 2(f); Migration Act 1958 (Cth) (Australia), s. 36(2)(a)–(aa). Also note C-604/12 *HN* (CJEU, 2014): consideration of the complementary protection claim must take place within a reasonable length of time.

³⁰⁸ Denmark opted out of both the original and recast Directives, in accordance with arts. 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5, and the Treaty establishing the European Community [2002] OJ C325/33: Directive, recital (40). Ireland (and the UK) opted out of the recast Directive.

³⁰⁹ See, generally, Bouteillet-Paquet ([n 132](#)).

³¹⁰ See s. 2.

³¹¹ Denmark opted out (see [n 309](#)); for the Danish position, see Kjær, K. U., ‘The Abolition of the Danish *de facto* Concept’ (2003) 15 *IJRL* 254.

³¹² European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (13 Jul. 2016) COM(2016) 466 final.

³¹³ Explanatory Memorandum to the Commission of the European Communities Proposal for a Council Directive on minimum standards for the qualification and status of third

country nationals and stateless persons as refugees or as persons who otherwise need international protection COM(2001) 510 final (12 Sep. 2001) 5. This was drafted before the 1 May 2004 enlargement of the EU and hence relied on the State practice of the 15 Member States at that time.

³¹⁴ Council of the EU Outcome of Proceedings of CIREA Meeting with Representatives of the Courts and Other Review Bodies Dealing with Asylum on 28 November 2001, ‘Summary of Discussions’ doc. 5585/02 CIREA 7 Brussels (22 Mar. 2002) 4.

³¹⁵ McAdam (n 23) 90 ff.

³¹⁶ For example, the Qualification Directive (original and recast) applies only to people who are ‘third-country nationals’. As noted in Ch. 3, s. 3.1, this is inconsistent with art. 42 of the 1951 Refugee Convention, which prohibits reservations to art. 1 (and therefore to the personal scope of the refugee definition), and to art. 3; EU citizens are thus barred from accessing subsidiary protection. However, since the Member States remain bound by their obligations under international law, the effect of the ‘third-country nationals’ limitation is to deny the status set out in the Qualification Directive to people who may remain protected by the principle of *non-refoulement* under the 1951 Convention or human rights law. On the relationship between EU Directives and international obligations, see Costello, C., ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *Human Rights Law Review* 87. See also the discussion of Qualification Directive exclusion clauses in Ch. 4, s. 4.4.

³¹⁷ Precisely what legal status/rights they receive under domestic law is unclear and varies from State to State. Note that art. 14(6) of the Qualification Directive (original and recast) states that those whose refugee status is revoked, ceased, or not renewed remain entitled to the rights set out in arts. 3, 4, 16, 22, 31, 32, and 33 of the Refugee Convention, but no equivalent entitlement exists for those denied subsidiary protection for the same reasons (see Qualification Directive, art. 19). See also Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides* (CJEU, Grand Chamber, 14 May 2019), where the CJEU held (with respect to refugees) that Member States are required to accord ‘only the rights expressly referred to in Article 14(6) of that directive *and* the rights set out in the Geneva Convention that are guaranteed for any refugee who is present in the territory of a Contracting State and do not require a lawful stay’: para. 105. This is, however, without prejudice to Member States’ obligations under the Charter, including in relation to private and family life, the freedom to choose an occupation and the right to engage in work, social security and social assistance, and the protection of health: para. 109. UNHCR has recommended that these rights (and those contained in arts. 13, 20, 22, 25, 27, and 29 of the Refugee Convention) be extended to those whose subsidiary protection status is refused or revoked: UNHCR, ‘UNHCR Comments on the European Commission Proposal for a Qualification Regulation—COM(2016) 466’ (Feb. 2018) 23.

³¹⁸ Moreno-Lax, V., ‘Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law’, in Cantor & Durieux (n 12), referring to art. 78 of the Treaty on the Functioning of the European Union

[2010] OJ C83/47. She argues that this is especially evident in the judgments of the CJEU on subsidiary protection.

³¹⁹ Earlier drafts contained another category of ‘serious harm’: a ‘violation of a human right, sufficiently severe to engage the Member State’s international obligations’. For discussion of this, see McAdam, J., ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) 17 *IJRL* 461, 490–3; IARLJ ([n 142](#)); IARLJ ([n 194](#)).

³²⁰ Protocol No. 6 to ECHR 50.

³²¹ Protocol No. 13 to ECHR 50. Furthermore, all Member States are parties to the Second Optional Protocol to ICCPR 66, which is interpreted as containing a similar requirement: see [n 240](#).

³²² See, for example, *Soering* ([n 7](#)) para. 88.

³²³ Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum, 25 Sep. 2002, Doc. 12148/02 ASILE 43 (20 Sep. 2002) 6. This was reinforced by the CJEU in *M'Bodj* ([n 151](#)), which distinguished art. 15(b) of the Qualification Directive from art. 3 ECHR 50 on the basis that the former applies ‘only to the inhuman or degrading treatment of an applicant in his country of origin’ (para. 33). Further, the list of actors in art. 6 of the recast Directive supports the view that harm must derive from conduct by a third party and cannot simply result from generally poor conditions (see also recital (35)). Thus, under the Directive, protection will only be forthcoming if someone is intentionally deprived of health care: *M'Bodj* ([n 151](#)) paras. 32–6.

³²⁴ *M'Bodj* ([n 151](#)) para. 40.

³²⁵ In *Bonger v The Netherlands*, App. No. 10154/04 (15 Sep. 2005) (inadmissible) 14, the ECtHR stated that ‘neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit’; see also *MP* ([n 152](#)). On the implications of the ‘in the country of origin’ limitation, see Battjes, H., *European Asylum Law and International Law* (2006).

³²⁶ Costello ([n 123](#)) 208.

³²⁷ *MP* ([n 151](#)) para. 47.

³²⁸ Ibid., para. 45.

³²⁹ Ibid.

³³⁰ Ibid., para. 51.

³³¹ Ibid., para. 57. The court concluded that: ‘a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine’: para. 58.

³³² See ELENA, ‘Complementary/Subsidiary Forms of Protection in the EU States: An Overview’ (Apr. 1999). UNHCR’s mandate extends to such persons: see, for example, UNGA res. 1671 (XVI) (18 Dec. 1961); UNGA res. 1673 (XVI) (18 Dec. 1961); UNGA res. 3143 (XXVIII) (14 Dec. 1973). The UK also includes ‘unlawful killing’ in its definition of ‘humanitarian protection’ (its name for ‘subsidiary protection’): Immigration Rules, Rule 339C; Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525.

³³³ Although the scope of the Temporary Protection Directive (art. 2(c)) is wider than art. 15(c) of the Qualification Directive, it is carefully controlled by the requirement that the Directive can only be activated by a Council decision.

³³⁴ Council of Europe’s Recommendation (2001) 18 of the Committee of Ministers on Subsidiary Protection (27 Nov. 2001).

³³⁵ Commission of the European Communities Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection COM (2001) 510 final (12 Sep. 2001), art. 15(c).

³³⁶ Qualification Directive (original), recital (26); Qualification Directive (recast), recital (35).

³³⁷ *Elgafaji* ([n 151](#)) para. 45. See discussion in s. 3.5 above. For the previously divergent approaches in Member States, see McAdam ([n 194](#)); Lambert & Farrell ([n 194](#)). For general analysis, see Introduction and chapters by Storey, Lambert, Jacquemet, Bauloz, Tsourdi, and Moreno-Lax in Cantor & Durieux ([n 12](#)).

³³⁸ *Elgafaji* ([n 151](#)) para. 37. For a very detailed analysis of art. 15(c), see IARLJ ([n 194](#)).

³³⁹ IARLJ ([n 194](#)) 23; Tsourdi, E., ‘What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime’, in Cantor & Durieux ([n 12](#)) 277.

³⁴⁰ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (30 Jan. 2014) para. 35. See also the analysis of the Court of Appeal in *QD (Iraq) v Secretary of State for the Home Department* [2009] EWCA Civ 620, para. 35: the phrase ‘situations of international or internal armed conflict’ in art. 15(c) ‘has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*.’ See generally Bauloz, C., ‘The Definition of Internal Armed Conflict in Asylum Law: The 2014 *Diakité* Judgment of the EU Court of Justice’ (2014) 12 *Journal of International Criminal Justice* 835.

³⁴¹ For example, the French, Bulgarian, and Czech authorities regarded the situation in Iraq as an ‘internal armed conflict’, while the Swedish and Romanian authorities did not, and there was inconsistency of interpretation across the various state jurisdictions in Germany: UNHCR Study ([n 201](#)) 76; ECRE & ELENA ([n 199](#)) 215. This meant that applicants from Iraq could not be assured a consistent assessment of their situation across the Member States.

³⁴² See, for example, McAdam ([n 194](#)).

³⁴³ Proposed Qualification Regulation, recital (35).

³⁴⁴ *Diakité* ([n 340](#)) para. 36.

³⁴⁵ IACtHR, *Advisory Opinion* ([n 3](#)) para. 235.

³⁴⁶ Durieux, J.-F., ‘The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection’, in Lambert, H., McAdam, J., & Fullerton, M., eds., *The Global Reach of European Refugee Law* (2013) 247.

³⁴⁷ *Ibid.*, 252. Durieux views the starting point as being very different from refugee law: ‘Whereas the 1951 Convention-based form of asylum denotes a positive inclination to protect, complementary protection flows from a negative obligation, namely *non-refoulement*. This radically distinct point of departure suggests that, even though complementary protection also denotes a status—*i.e.*, a form of ‘asylum’—the moral impulse behind it should be teased out independently from the classic “refugee” paradigm’: Durieux, J.-F., ‘Three Asylum Paradigms’ (2013) 20 *International Journal on Minority and Group Rights* 147, 168–9.

³⁴⁸ States tend to regard Convention rights as a *status* required by international law (whether through a grant of permanent residence or otherwise) once a person has been formally recognized as a ‘refugee’. Conversely, the strong theoretical claims of human rights law do not always sit comfortably with the realities of State practice, where ‘rights’ may be elusive, hampered by poor implementation and a lack of access to domestic enforcement mechanisms: see McAdam ([n 23](#)) 6.

³⁴⁹ Committee on the Rights of the Child, ‘General Comment No. 6’ ([n 233](#)) para. 77.

³⁵⁰ *AD v The Netherlands*, UN doc. CAT/C/23/D/96/1997 (12 Nov. 1999) para. 7.3, discussed in Gil-Bazo ([n 116](#)) 33. See also the discussion (34–7) of Human Rights Committee jurisprudence on requirements when individuals have longstanding connections to a State (in the context of ‘own country’).

³⁵¹ France: Conseil constitutionnel DC 93–325 (13 Aug. 1993), DC 97–39 (22 Apr. 1997), DC 79–109 (9 Jan. 1980); Belgium: Judgment of the Court of Arbitration (22 Apr. 1998), Judgment of Labour Tribunal of Liège 2nd Chamber (24 Oct. 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 Jan. 1959) BVerfGE 9, 89, Judgment (21 Jun. 1987) BVerfGE 45, 187; Judgment (17 Jan. 1979) BVerfGE 50; Judgment (24 Apr. 1986) BVerfGE 172, cited in Bouteillet-Paquet, “Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union” in Bouteillet-Paquet ([n 132](#)) 240, note 98. In South Africa, the Supreme Court of Appeal held that denying employment to asylum seekers, who had no entitlement to social security support, constituted a breach of their right to human dignity under the Bill of Rights ([Chapter 2](#) of the Constitution of the Republic of South Africa, 1996). It noted that although the State did not have a positive obligation to provide employment, deprivation of the opportunity to work attains a different dimension ‘when it threatens positively to degrade rather than merely to inhibit the realization of the potential for self-fulfilment’: *Minister of*

Home Affairs v Watchenuka (2004) 4 SA 326, para. 32. Subsequently, in *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143, 43, the Supreme Court of Appeal of South Africa stated that: ‘if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him—or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid.’ See also *Sisojeva v Latvia*, App. No. 60654/00 (16 Jun. 2005) and discussion in Gil-Bazo ([n 116](#)) 37–40; *NVH v Minister for Justice and Equality* [2017] IESC 35 (Ireland).

[352](#) This is the case, for instance, in Canada (Immigration and Refugee Protection Act 2001, c. 27, ss. 95–7); Australia (Migration Act 1958 (Cth), s. 36); NZ (Immigration New Zealand Operational Manual: Refugees and Protection (8 May 2017) C5.15.1: ‘Claimants who are recognised as having refugee or protection status may apply for residence on the basis of that recognition’); and throughout the EU (see Qualification Directive (recast), recital (39)); cf. US 8 CFR §208.17. The 2005 Executive Committee Conclusion No. 103 ([n 2](#)) on complementary protection does not address the issue of status, but calls on States to provide beneficiaries with ‘the highest degree of stability and certainty ensuring [their] human rights and fundamental freedoms … without discrimination’ para. (n). The Inter-American Court of Human Rights notes that ‘both refugees and those who receive complementary protection have fled their countries to avoid the violation or the continuing violation of their human rights so that they should obtain similar protection’: IACtHR, *Advisory Opinion* ([n 3](#)) para. 239.

[353](#) They had less extensive entitlements with respect to family unity; access to and length of residence permits; eligibility for travel documents; access to employment; social welfare; health care; access to integration facilities; and rights of accompanying family members. See arts. 23–6, 28–9, 33.

[354](#) ECRE and ELENA ([n 199](#)) 7.

[355](#) Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009) 551 final, 21 Oct. 2009) 8. Analysis of the original Qualification Directive drafting records reveals that the creation of a two-tier system was politically motivated, rather than based on any solid legal foundation: see discussion in McAdam ([n 23](#)) 90–3. Germany would only agree to the Directive if social and economic rights were reduced further for beneficiaries of subsidiary protection: British Refugee Council, ‘International Protection Project Update’ (Sep. 2002) 2.

[356](#) See Qualification Directive (recast), recital (39).

[357](#) The original proposal for the recast Qualification Directive included amendments to draft arts. 24 and 29 that would have removed distinctions between refugees and

beneficiaries of subsidiary protection. The Explanatory Memorandum explained that whereas it was originally assumed that subsidiary protection would be temporary, practical experience had shown this was inaccurate, and it was ‘thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified’: Proposal for a Directive (n 355) 8. Furthermore, aligning the two categories would ‘streamline procedures and reduce administrative costs and burdens associated with maintaining two protection statuses’: 4. UNHCR, ECRE, and the European Economic and Social Committee welcomed the amendments, but ultimately they were not passed. See UNHCR, ‘UNHCR Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM(2009) 551, 21 October 2009)’ (Jul. 2010) 9; ‘Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive’ (Mar. 2010) 11–12; ‘Opinion of the European Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted” (recast) COM(2009) 551 final/2—2009/0164 (COD) (2011/C 18/14)’, para. 4.7.

³⁵⁸ Mouzourakis, M., *Refugee Rights Subsiding? Europe’s Two-Tier Protection Regime and Its Effect on the Rights of Beneficiaries* (AIDA and ECRE, 2016) 15–23.

³⁵⁹ On residence conditions imposed on beneficiaries of subsidiary protection constituting a restriction on freedom of movement, see Joined Cases C-443/14 and C-444/14 *Warendorf v Region Hannover* (CJEU, Grand Chamber, 1 Mar. 2016).

³⁶⁰ The Regulation distinguishes between refugees and beneficiaries of subsidiary protection in three key areas: review of protected status (after three years for refugees and after one year for beneficiaries of subsidiary protection); social benefits (which can be reduced to ‘core benefits’ for beneficiaries of subsidiary protection); and exclusion (the grounds for which are broader in relation to beneficiaries of subsidiary protection). See further UNHCR (n 317).

³⁶¹ For a detailed analysis, see Pobjoy, J., ‘Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Protection of Refugees and Beneficiaries of Complementary Protection’ (2010) 34 *Melbourne University Law Review* 181; McAdam, J., ‘Status Anxiety: The New Zealand Immigration Bill and the Rights of Non-Convention Refugees’ [2009] *New Zealand Law Review* 239; McAdam (n 23) Ch. 6; cf. Hathaway, J. C., ‘Leveraging Asylum’ (2010) 45 *Texas International Law Journal* 503.

³⁶² Committee on the Elimination of Racial Discrimination, General Recommendation XIV: Definition of Discrimination (22 Mar. 1993) para. 2; Human Rights Committee, ‘General Comment No. 18: Non-Discrimination’ (10 Nov. 1989) para. 13; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471, para. 78.

³⁶³ Human Rights Committee, ‘General Comment No. 18’, para. 13; ECOSOC Commission on Human Rights, ‘Prevention of Discrimination: The Rights of Non-Citizens’: UN doc. E/CN.4/Sub.2/2003/23 (26 May 2003); *Belilos v Switzerland* (1988) 10 EHRR 466.

³⁶⁴ See, for example, IACtHR, *Advisory Opinion* ([n 3](#)) para. 240.

³⁶⁵ UNHCR ([n 317](#)) 5.

³⁶⁶ UNHCR, ‘Towards a Common European Asylum System’, in Urbano de Sousa, C. D. & De Bruycker, P., eds., *The Emergence of a European Asylum Policy* (2004) 248–9.

³⁶⁷ UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection 14109/01 ASILE 54 (16 Nov. 2001) para. 46; UNHCR, ‘Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive’ (Mar. 2004) 2; UNHCR ([n 366](#)) 249–50. See also Gil-Bazo ([n 116](#)) 32.

³⁶⁸ House of Lords Select Committee on the European Union, *Defining Refugee Status and Those in Need of International Protection* (2002) Minutes of Evidence, para. 111. It noted that giving both groups an equivalent status would also obviate appeals to ‘upgrade’ status. This became an issue in Germany after the arrival of large numbers of Syrian asylum seekers in 2015, when a policy change resulted in many more people being granted subsidiary protection. The change coincided with a legislative amendment in Mar. 2016 that temporarily suspended family reunification for beneficiaries of subsidiary protection. As a result, thousands of people appealed their subsidiary protection determination to try to ‘upgrade’ to refugee status—with over 75 per cent succeeding in 2016: Mouzourakis ([n 358](#)) 8; Asylum Information Database, ‘Differential Treatment of Specific Nationalities in the Procedure: Germany’ Asylum Information Database, ‘Criteria and Conditions: Germany’. More generally, see Explanatory Memorandum Submitted by the Home Office on ‘Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (2001/0207 (CNS))’, in House of Lords Select Committee, para. 22 at 63.

³⁶⁹ *Hode and Abdi v United Kingdom*, App. No. 22341/09 (6 Nov. 2012). See also Council of Europe Commissioner for Human Rights, ‘Realising the Right to Family Reunification of Refugees in Europe’ (Issue Paper, Jun. 2017, prepared by Cathryn Costello, Kees Groenendijk, and Louise Halleskov Storgaard) 23–6. See, in particular, the critique (at 25) of States’ justifications for differential treatment based on the ‘privileged’ position of the refugee in international law, and the time-bound nature of protection for beneficiaries of subsidiary protection, which are described as neither legally nor empirically convincing. That both categories of beneficiary may end up remaining in the country of refuge in the longer term is recognized by the Long-Term Residents Directive.

³⁷⁰ See [nn 60–2](#).

³⁷¹ See, for example, Qualification Directive, art. 17; Immigration and Refugee Protection Act 2001 (Canada), s. 98; Immigration Act 2009 (New Zealand), ss. 137(2), 139; Migration

Act 1958 (Cth) (Australia), s. 5H(2). US law also excludes certain ‘undesirable’ people from ‘withholding of removal’ (pursuant to art. 3. CAT 84), granting them ‘deferral of removal’ status instead (amounting to little more than toleration of their presence). Under 8 CFR § 241(b)(3)(B), an applicant is ineligible for ‘restriction on removal’ if the Attorney General decides that: ‘(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.’ Under 8 CFR § 208.16(d)(2), with respect to the above, ‘an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community’. For the status of refugees to whom art. 33(2) of the 1951 Convention applies, see [Ch. 4](#), s. 4.

³⁷² On destitution, see *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396; *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66. See further McAdam ([n 23](#)) [Ch. 6](#).

³⁷³ Goodwin-Gill, G. S. & Kumin, J., ‘Refugees in Limbo and Canada’s International Obligations’ (Caledon Institute of Social Policy, Sep. 2000) 4. See also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/898 (3 Jul. 1998) para. 45. For an overview of State practice, see special issue of (2017) 36(1) *RSQ* which includes a number of papers presented at the Refugee Law Initiative conference ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot Be Removed’ (London, 25–6 Jan. 2016); see also papers from the earlier Preliminary Workshop, ‘Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot Be Removed’ (Vrije University Amsterdam, 27 Mar. 2015).

³⁷⁴ United Nations, *A Study of Statelessness*: UN docs. E/1112 and E/1112/Add.1 (Aug. 1949); Andrysek ([n 118](#)) 411. As Cantor and others write, such people ‘often languish in an ambiguous and even dangerous state of protracted legal “limbo”, lacking a defined immigration status and attendant access to basic rights in the host State.’ See Cantor, D. J. and others, ‘The Emperor’s New Clothing: National Responses to “Undesirable and Unreturnable” Aliens under Asylum and Immigration Law’ (2017) 36(1) *RSQ* 1, 2. Note that their study relates not only to those excluded from complementary forms of protection, but also to any migrants who are considered undesirable because of alleged involvement in serious criminality and are unreturnable for legal or practical reasons.

³⁷⁵ See further McAdam ([n 23](#)) [Ch. 6](#).

³⁷⁶ 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 27.

³⁷⁷ 1969 Vienna Convention on the Law of Treaties, art. 26.

³⁷⁸ Bolhuis, Middelkoop, & van Wijk ([n 273](#)). Quite aside from legal prohibitions on removal where a person is at risk of persecution or other ill-treatment, ‘a country needs to have the organizational capacity and expertise to investigate, prosecute and try such complex cases. In post-conflict situations, the infrastructure for prosecuting conventional criminal cases, let alone for prosecuting international crimes may often be damaged or even eradicated’: 1119.

³⁷⁹ See generally Gilbert, G. & Rüsch, A. M., ‘Jurisdictional Competence through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?’ (2014) 12 *Journal of International Criminal Justice* 1093. For an empirical overview of criminal prosecutions of excluded persons, see Rikhof, J., *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (2012) 460–9; Goodwin-Gill, G. S., ‘Crimes in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’, in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999).

³⁸⁰ This is the case in New Zealand, for example. Given the small number of people in this position, executive discretion enables the widest degree of flexibility for dealing with matters on a case-by-case basis, but it provides no certainty for the individuals concerned. For an overview of practices in a number of jurisdictions, see Refugee Law Initiative, *Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality Who Cannot Be Removed*, Conference report (2016) 26: <https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf>.

Various papers presented at that and an associated workshop provide statistics on the numbers of people excluded pursuant to art. 1F but non-removable pursuant to art. 3 ECHR 50 (for example, Bolhuis, M., ‘The Issue of Non-Removable Migrants Suspected or Convicted of Serious Crimes in the Netherlands’, paper presented at Preliminary Workshop ([n 373](#))).

³⁸¹ Reijven, J. & van Wijk, J., ‘Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law’ (2014) 26 *IJRL* 248, 249.

³⁸² See further Cantor and others ([n 374](#)) 4–5.

³⁸³ Christiansen, M & Einarsen, T., ‘The Situation in Norway’, paper presented at Preliminary Workshop ([n 373](#)) 2; see also Reijven & van Wijk ([n 381](#)) 269, who note that s. 74 of the 2008 Immigration Act grants excluded persons whose expulsion is prevented by art. 3 ECHR 50 a temporary residence permit for six months at a time. Such persons are also insured, allowed to stay in an asylum centre, and have access to higher education and paid employment.

³⁸⁴ See ss. 60(a) and 104(a) of the Residence Act, cited in Reijven & van Wijk ([n 381](#)) 268.

³⁸⁵ Home Office, Restricted Leave (version 3.0) (25 May 2018) 14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/

[leave-v3.0ext.pdf](#). See also Singer, S., ‘“Undesirable and Unreturnable” in the United Kingdom’ (2017) 36(1) *RSQ* 9, 30, who describes this form of leave as ‘extremely precarious’.

³⁸⁶ See, for example, *R (Kardi) v Secretary of State for the Home Department* [2014] EWCA Civ 934. See also earlier cases on ‘discretionary leave’ (pre-2011 policy): *R (C) v Secretary of State for the Home Department* [2008] EWHC 2448 (Admin); *R (Boroumand) v Secretary of State for the Home Department* [2010] EWHC 225 (Admin).

³⁸⁷ Reijven & van Wijk ([n 381](#)) 260.

³⁸⁸ Bolhuis, Middelkoop, & van Wijk ([n 273](#)).

³⁸⁹ Reijven & van Wijk ([n 382](#)).

³⁹⁰ van Wijk, J., ‘Undesirable but Unreturnable: Removal, Voluntary Return and Relocation: A Case Study of 1F Excluded Individuals in the Netherlands’, paper presented at Refugee Law Initiative conference ([n 373](#)).

³⁹¹ See also Ch. 5, s. 5.2; Giuffré, M., ‘An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)’ (2013) 2 *International Human Rights Law Review* 266.

The Concept of Asylum

1. Introduction

The meaning of the word ‘asylum’ tends to be assumed by those who use it, but its content is rarely explained. The Universal Declaration of Human Rights refers to ‘asylum from persecution’, the UN General Assembly urges the grant of asylum and observance of the principle of asylum, and many States’ constitutions and laws offer the promise of asylum, yet nowhere is this act of States defined. The word itself and the phrase ‘right of asylum’ have lost much of their pristine simplicity.¹

A distinction may be made between the clear, discretionary, sovereign right of States to grant asylum without it being considered a hostile act, which other States are bound to respect; and the individual right to asylum, which thus far has only been explicitly recognized in some regional human rights instruments and national constitutions,² but not in any treaty applying universally.

With the growth of nation States and the corresponding development of notions of territorial jurisdiction and supremacy, the institution of asylum underwent a radical change. It came to imply not only a place of refuge, but also the right to give protection, not so much to the ordinary criminal, as to the one class previously excluded, namely, exiles and refugees.³ The anomalous position of exiles had already been noted by the jurist Wolff who, writing in 1764, observed that ‘exiles do not cease to be men ... [By] nature the right belongs to them to dwell in any place in the world which is subject to some other nation’.⁴ But this was a ‘right’ that even Wolff tempered with recognition of the fact of sovereignty. Compassion ought to be shown to those in flight, but admission might be refused for good reasons.⁵ The interest of the State in admission or non-admission continued to predominate.⁶ Moore, in 1908, noted that the right to grant asylum ‘is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order’.⁷ Hackworth similarly observed the freedom of each sovereign State to deal with refugees ‘as its domestic policy or its international obligations may seem to dictate’.⁸ In 1949, Morgenstern settled the competence of States to grant asylum upon ‘the

undisputed rule of international law’ that every State has exclusive control over the individuals in its territory, including all matters relating to exclusion, admission, expulsion, and protection against the exercise of jurisdiction by other States.⁹

This element, protection granted to a foreign national against the exercise of jurisdiction by another State, lies at the heart of the traditional institution of asylum,¹⁰ but today it also connotes protection against harm, specifically violations of fundamental human rights, and is implicitly linked to the goal of *solution*. Protection must nevertheless be distinguished in its international law and municipal law aspects. In international law, protection is founded in an exercise of territorial jurisdiction, in the ‘jurisdiction’ and responsibility that attaches to the exercise of authority and control, or on treaty or some regional or local custom. The latter bases are particularly relevant to the institution of ‘diplomatic asylum’, understood in the sense of protection against *local* jurisdiction granted in embassies and consulates and on warships.¹¹ In such cases, the asylum seeker remains within the territory (or, in the case of ships, the jurisdiction) of the pursuing State. Although the notion of extraterritoriality has been relied on in support of the practice,¹² regional treaty and custom appear to be its surer foundations.¹³ In the *Asylum Case* in 1950 the International Court of Justice described the practice as involving ‘a derogation from the sovereignty of [the local] State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State’.¹⁴

By contrast,

In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.¹⁵

The generality of these last dicta can be misleading unless the normative effect of extradition treaties is taken into account, as well as more recent developments which limit or qualify the ‘normal exercise’ of sovereignty.¹⁶ From the point of view of international law, therefore, the grant of protection in its territory derives from the State’s sovereign competence, a statement of the obvious. The content of that grant of protection—whether it embraces permanent or temporary

residence, freedom of movement and integration or confinement in camps, freedom to work and attain self-sufficiency or dependence on national and international charity—is less easy to determine.¹⁷ What cannot be ignored, however, is the close relationship between the issue of refugee status and the principle of *non-refoulement*, on the one hand, and the concept of asylum, on the other hand. These three elements are, as it were, all links in the chain between the refugee's flight and his or her attainment of a durable solution. While the principle of *non-refoulement* is '[c]entral to the realization of the right to asylum',¹⁸ asylum encompasses more than *non-refoulement* alone.¹⁹ It has been described by UNHCR as beginning with admission to a safe territory and concluding with the attainment of a durable solution.²⁰

Certain legal consequences flow from the principle of *non-refoulement*, and, in particular, the existence of a class of refugees known to and defined by general international law.²¹ Additionally, States have obligations under extradition law.²² In regard to asylum more generally, however, it will be seen that the argument for obligation fails, both on account of the vagueness of the institution in international law and of the continuing reluctance of States formally to accept such an obligation (as in a right to reside or remain, in contrast to a right not to be returned) enforceable at the insistence of the individual. Nevertheless, while individuals may not be able to claim a right to be granted asylum, States have a duty under international law not to obstruct the individual's right to seek asylum. This includes the obligation to provide access to an asylum procedure (refugee status determination),²³ which necessarily calls into question the legality of non-arrival and non-admission policies increasingly employed by States as tools of migration control.

2. Asylum in international conventions, other instruments, and acts

The refusal of States to accept an obligation to grant asylum, in the sense of admission to residence and lasting protection against the jurisdiction of another State, is amply evidenced by the history of international conventions and other instruments. Measures taken between the two world wars related, initially, to arrangements for the issue of identity and travel documents which would facilitate the resettlement of refugees, but no obligations to resettle were assumed. The 1933 Convention, which proposed non-rejection of refugees at the frontier, was ratified by only a few States, while it, too, made no provision in

respect of permanent asylum. Likewise, those States that subscribed to the constitution of the International Refugee Organization, though urged to cooperate in its function of resettling refugees, accepted no obligations to that end.

Little progress was marked by the statement in article 14(1) UDHR 48 that ‘everyone has the right to seek and to enjoy ... asylum from persecution’. Lauterpacht rightly noted that States had no intention to assume even a moral obligation in the matter,²⁴ although the drafting debates do reveal a tension between States that regarded asylum as their sovereign prerogative, and those that saw it as a duty of the international community.²⁵

The original text proposed by the Commission on Human Rights had indeed provided that ‘[e]veryone has the right to seek *and be granted*, in other countries, asylum from persecution’.²⁶ At the suggestion of the United Kingdom, the text was altered to remove the obligation on States to accord asylum to individuals seeking it, replacing the words ‘*and be granted*’ with the vaguer and far more innocuous ‘*and to enjoy*’.²⁷ For the UK by this time (compared to its position at the start of the twentieth century), the ‘right of asylum’ simply meant ‘the right of every State to offer refuge and to resist all demands for extradition’ (encompassed by the notion ‘*to enjoy ... asylum*’).²⁸

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.²⁹

A number of States explained their support for the amended text on the ground that it imposed no legal obligation on them to grant asylum.³⁰ Contemporary opinion thus held that to grant asylum to refugees within its territory was the sovereign right of every State, while the corresponding duty was respect for that grant of asylum by all other States.

While the UK delegation expressed its sympathy towards the plight of persecuted persons, ‘no foreigner could claim the right of entry into any State unless that right were granted by treaty’.³¹ It defined the right of asylum as the right of States, not individuals, noting that this was also its understanding of the expression ‘*to enjoy asylum*’ contained in its draft.³² However, once a State had given an individual permission to enter, ‘the right to enjoy fully the asylum granted him by that State could not be disputed’.³³ If article 14 were to include a right to be granted asylum, as the original text had proposed, ‘its application

might actually lead to persecution by encouraging States to take action against an undesirable minority and then to invite it to make use of the right of asylum'.³⁴ The Australian delegation similarly objected to 'formulas implying obligation', regarding the Universal Declaration as a statement of human rights that should not refer to any corresponding State duties. In its view, each State must be free to decide the form in which the right of asylum should be applied.³⁵

By contrast, the French representative viewed asylum as an issue where national interests should yield to those of the international community. Mr Cassin disagreed with the UK's 'restrictive conception' of the term 'to enjoy', arguing that for the right to have any meaning, a persecuted individual 'would need to receive asylum, not merely the right of asylum'.³⁶ Although ultimately voting for the amended text 'because it was essential for the declaration to contain an article dealing with the right of asylum', Mr Cassin argued 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'.³⁷ The USSR's delegate similarly regarded the right to seek asylum as having little value without provisions for implementing it.³⁸ The Lebanese representative understood the expression 'and to enjoy ... asylum' as meaning that 'the individual should be guaranteed the right of being granted asylum, and not merely the right of enjoying asylum in the country which had received him, once that right had been acquired'.³⁹ The inclusion of a right in the Universal Declaration should not be dependent on States' ability to comply with it.⁴⁰ Brazil described the right of asylum as 'recognized and accepted by the chief civilizations of the world' and an essential component of any human rights declaration.⁴¹ Pakistan appears to have supported a very wide concept of asylum, available to any individual whose human rights, as set out in the Universal Declaration, were violated. In its view, article 14 was a corollary to the breach of other human rights: 'If everyone had the right of freedom of thought and expression, a person could obviously preserve his intellectual and moral integrity only by seeking refuge abroad, should his own country deny him the enjoyment of those essential liberties.'⁴²

Lauterpacht was highly critical of the final text of article 14. In his view, it simply restated States' existing right under international law to grant refuge to individuals. Its inclusion in a declaration of human rights, posited as though it were a right pertaining to individuals, was 'artificial to the point of flippancy',⁴³ since it lacked any correlative duty on States to give effect to that right and thus

any assurance that the right to seek asylum would result in protection. In fact, the correlative duty, if any, is that which obliges other States to respect the grant of asylum, as it must respect any other lawful exercise of territorial jurisdiction.

Recognizing the Declaration's shortcomings, the Commission on Human Rights resolved in 1947 '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'.⁴⁴ Debate about the desirability of such a right thus re-opened as the Commission on Human Rights began drafting the human rights covenants in the 1950s. Supporters argued that the right was 'one of the fundamental rights of the human being' and the 'natural corollary' of other human rights in international law.⁴⁵ A joint proposal by Chile, Uruguay, and Yugoslavia deemed that the right should be granted to 'any person accused of political offences, and in particular to any person accused or persecuted on account of his participation in the struggle for national independence or political freedom or on account of his activities for the achievement of the purposes and principles proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights'.⁴⁶ An alternative USSR proposal would have accorded the right to 'all persons persecuted for their activities in defence of democratic interests, for their scientific work or for their participation in the struggle for national liberation',⁴⁷ while a French amendment to both proposals provided simply that '[e]veryone has the right to seek asylum from persecution', stressing the importance of international cooperation in safeguarding that right.⁴⁸ The French and USSR each proposed that asylum be denied to those who had committed acts contrary to the purposes and principles of the United Nations, while the joint proposal noted above excluded those who had committed acts that were inconsistent with the principles of the UN Charter or the UDHR.⁴⁸ The French amendment also excluded persons wanted for prosecution for non-political crimes, while the USSR excluded persons wanted for war crimes or other criminal offences.

Other States noted the desirability of granting asylum, but regarded the formulation of the right in the three proposals as insufficiently precise.⁴⁹ Accordingly, they were ultimately rejected on the grounds 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.⁵⁰

This approach had already been reflected in the UN General Assembly resolution establishing UNHCR, which simply urged States to cooperate with the High Commissioner by, among other matters, admitting refugees.⁵¹ Draft conventions submitted by France and the UN Secretariat in the course of debate on the 1951 Convention both contained an article on admission of refugees,⁵² but the Conference of Plenipotentiaries preferred to leave asylum and admission to be covered by exhortatory statements in the Final Act.⁵³

Nevertheless, efforts continued in other fora. In 1957, France proposed a declaration on the right of asylum to the UN Economic and Social Council,⁵⁴ and in 1959, the General Assembly called on the International Law Commission (ILC) to work on its codification.⁵⁵ The subject was included in the ILC's future work programme in 1962,⁵⁶ but in the absence of progress generally it fell to the Commission on Human Rights and to the UN's Third and Sixth Committees to take up the cause, culminating in the Declaration on Territorial Asylum, adopted unanimously by the General Assembly in 1967.⁵⁷

The Declaration on Territorial Asylum recommends that States should base their asylum practice upon the principles declared, but it stresses throughout the sovereign competence aspect of territorial asylum and reaffirms the position of each State as sole judge of the grounds upon which it will extend such protection.⁵⁸ Article 2, however, acknowledges that the plight of refugees remains of concern to the international community, and that where a State finds difficulty in granting or continuing to grant asylum, other States 'shall consider', in a spirit of international solidarity, measures to lighten the burden. Article 3 declares the principle of *non-refoulement* and, should a State contemplate making an exception, it 'shall consider' the possibility of according those affected the opportunity, 'by way of provisional asylum or otherwise', of going to another State.

Discussions in the UN Sixth Committee shortly before the Declaration's adoption had revealed some expectation that it would be the precursor to a universal convention.⁵⁹ The first draft of such a convention on asylum was in fact proposed, not by the ILC (as General Assembly resolutions might have anticipated), but by a group of experts meeting in 1971 and 1972 under the auspices of the Carnegie Endowment for International Peace, in consultation with UNHCR. Article 1 of their text proposed that contracting States 'acting in an international and humanitarian spirit, *shall use [their] best endeavours to grant asylum* in [their] territory, which ... includes permission to remain in that territory'.⁶⁰ The draft was discussed in the Third Committee later in 1972, where it was decided that the High Commissioner should consult governments, with a view to the eventual convening of an international conference.⁶¹ When governments were canvassed, many appeared to favour a convention,⁶² and the General Assembly decided that the text should be reviewed.⁶³

The UN Group of Experts' revision indicated continuing adherence to the discretionary aspect of asylum practice.⁶⁴ Article 1 proposed that '[e]ach Contracting State, *acting in the exercise of its sovereign rights, shall use its best endeavours* in a humanitarian spirit to grant asylum in its territory'.⁶⁵ The same 'best endeavours' formula was again introduced in article 3 where, following a statement of the principle of *non-refoulement* on behalf of those 'in the territory of a contracting State', it would have operated to reduce the level of obligation in relation to rejection at the frontier from that previously adopted in both the 1967 Declaration and the 1969 OAU Convention.⁶⁶ Acting on the Group of Experts' report, the General Assembly requested the Secretary-General, in consultation with the High Commissioner, to convene a conference on territorial asylum in early 1977.⁶⁷

Dissatisfaction with much of the proposed text inspired a working group of non-governmental organizations to suggest an alternative version,⁶⁸ the asylum provisions of which were largely supported by consensus at a Nansen Symposium held in 1976.⁶⁹ In both cases, the proposals favoured an obligation to grant asylum, subject to certain exceptions; confirmation of the notion of non-rejection at the frontier within the principle of *non-refoulement*; and general recognition of the principle of provisional admission as a minimum requirement.

Notwithstanding the apparent support of many States, the 1977 United Nations Conference on Territorial Asylum was an abject failure, with close voting on major issues apparently heralding emerging divisions between States and on

matters of principle.⁷⁰ One article only, that on asylum, was considered by the drafting committee, which reduced the ‘best endeavours’ formula of the Group of Experts draft to that of ‘shall endeavour … to grant asylum’.⁷¹ Non-rejection at the frontier was endorsed overall within the principle of *non-refoulement*, though the latter generally would have been qualified by States’ preoccupation with numbers and security. Recognizing that little of substance had been achieved, the Conference at its final session recommended that the General Assembly consider reconvening it at a suitable time.⁷² Later that year, however, the Third Committee declined to submit any formal proposal to that effect, and it was thought more appropriate that the High Commissioner continue consultations with governments.⁷³

Since 1977, there has been no further progress towards reconvening the Conference; on the contrary, refugee problems, including aspects of asylum, status, *non-refoulement*, and solutions have responded more to regional initiatives, such as the comprehensive programmes implemented for Central America (CIREFCA), Indo-China (CPA),⁷⁴ and the Common European Asylum System (CEAS).⁷⁵ Though there has been no progress towards a universal instrument on asylum, various resolutions and declarations have consistently affirmed its importance. In 1993, the Vienna Declaration on Human Rights and Programme of Action reaffirmed the right to seek and enjoy asylum.⁷⁶ The Sub-Commission on Human Rights in 2000 adopted a resolution on the right to seek and enjoy asylum, which expressed deep concern that,

restrictive policies and practices of many States may lead to difficulties for people to gain effective access to protection in the territory of asylum States while escaping persecution and serious human rights violations in their own countries, [and noted] that such policies and practices, including certain incidents of the detention of asylum-seekers, may be incompatible with the principles of applicable refugee and human rights law.⁷⁷

This was reaffirmed in subsequent resolutions.⁷⁸ Each year, the UN General Assembly adopts a resolution that stresses the importance of safeguarding access to asylum,⁷⁹ while UNHCR’s Executive Committee has repeatedly emphasized the importance of the right to seek asylum,⁸⁰ and has also gone some way to defining its content.⁸¹ In the 2016 New York Declaration for Refugees and Migrants, States reaffirmed their ‘respect for the institution of asylum and the right to seek asylum’.⁸²

While it still remains for each State to ‘evaluate’ the grounds for the grant of asylum, today that discretionary competence is necessarily qualified by increased recognition of the individual’s protected rights and interests, on the one hand, and by the powerful normative weight of the principle of *non-refoulement*, on the other. Further, the exclusion from protection of the most serious ‘international criminals’ has developed with the extension and consolidation of international criminal law, particularly through the work of the tribunals for the former Yugoslavia and Rwanda and the International Criminal Court. The 2012 judgment of the International Court of Justice in the *Obligation to Prosecute or Extradite Case* also highlights potential qualifications to the right of the State to grant asylum to individuals accused of serious human rights violations.⁸³

3. Asylum in regional agreements

At the regional level, there have been important developments. Human rights treaties in Africa, the Americas, and the European Union make express reference to asylum as an individual right, while a range of other instruments also contain relevant principles. In each case, the grant of asylum is conditioned on national and/or international law, which provides the content of (or the framework for interpreting) the right.

In Latin America, the notion of asylum has been reflected since at least 1889,

when States, after gaining their independence, began to organize themselves politically and to adopt bilateral or multilateral treaties to regulate asylum for the benefit of politically persecuted persons, at the same time . . . they established the rule of non-extradition in the case of persons who, according to the qualification of the requested State, are persecuted for political crimes, or common crimes prosecuted for a political purpose or reason.⁸⁴

The 1954 Caracas Convention on Territorial Asylum reaffirms the territorial State’s sovereign right to grant asylum, the duty of other States to respect such asylum, and the exemption from any obligations to surrender or expel persons ‘sought for political offenses’ or ‘persecuted for political reasons or offenses’.⁸⁵ As regards diplomatic asylum,⁸⁶ another Caracas Convention of the same year stresses that while ‘every State has the right to grant asylum ... it is not obligated to do so or state its reasons for refusing it’; and that it rests with ‘the State granting asylum to determine the nature of the offense or the motives for the

persecution'.⁸⁷ The Convention provides further that 'the State granting asylum is not bound to settle him in its territory, but it may not return him to his country of origin, unless this is the express wish of the asylee'.⁸⁸

In terms of human rights law, the 1948 American Declaration on the Rights and Duties of Man contains the right to asylum (and was the first human rights instrument to do so).⁸⁹ The American Convention on Human Rights, adopted two decades later, further 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'.⁹⁰ The Inter-American Commission on Human Rights only recognized a right to asylum under the American Convention if it was also established in domestic law,⁹¹ but in its recent Advisory Opinion, the Inter-American Court of Human Rights went considerably further in its analysis of the duties of States.⁹² Within the Americas, the right to asylum is constitutionally enshrined in Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Venezuela, although its precise scope differs from State to State.⁹³

In Africa, article 12(3) of the 1981 African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'.⁹⁴ While the court has not yet interpreted the right to asylum specifically, nor the distinction between 'obtain' and 'enjoy' (the language in its international counterpart, article 14 UDHR 48), the African Commission on Human and Peoples' Rights has noted that the provision 'should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum'.⁹⁵

The 1969 OAU Convention also strengthens the institution of asylum, proclaiming in article II that Member States 'shall use their best endeavours ... to receive refugees and to secure the settlement' of those unable or unwilling to be repatriated. The principle of *non-refoulement* is declared without exception, although a call is made to lighten the burden on countries of first refuge.⁹⁶ A further provision, dealing with the refugee who has not received the right to reside in any country, merely acknowledges that he or she 'may' be granted temporary residence pending resettlement. On asylum at large, the OAU Convention affirms that its grant is a peaceful and humanitarian act, and thus not

to be regarded as unfriendly. It also emphasizes the duty of refugees to abide by the laws of the country in which they find themselves and to refrain from subversive activities against any Member State. Finally, in African domestic law, the right to asylum is reflected in the constitutions of Angola, Bénin, Burundi, Cape Verde, Chad, Democratic Republic of Congo, Côte d'Ivoire, Egypt, Guinea, Mali, and Mozambique. Its precise scope varies and may be defined in legislation.⁹⁷

In Europe, article 18 of the 2000 EU Charter of Fundamental Rights 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 establishing the European Community.⁹⁸ At first blush, it seems to go further than the two other regional human rights instruments, in that it provides for a right *to* asylum (not just a right to seek and be granted it, which was considered but rejected during the drafting process).⁹⁹ However, the Charter was intended simply as a reaffirmation, or consolidation, of existing rights under international, EU, and domestic law, including in relation to asylum, and was not intended to create new rights.¹⁰⁰ Even so, Costello suggests that the provision’s ‘full potential has yet to be explored’,¹⁰¹ while Gil-Bazo goes further, arguing that neither the wording of the provision nor the drafters’ intention was to restrict it to a ‘mere procedural right to apply for asylum’.¹⁰²

The precise content of article 18 remains unclear since there is no agreed definition of ‘asylum’ in international law, and the Court of Justice of the European Union (CJEU) has thus far avoided requests to elaborate its scope and application within the EU.¹⁰³ In terms of what ‘asylum’ means in the EU context, UNHCR submits that it contains the following elements:

- (i) protection from *refoulement*, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible authorities and access to legal representation and other organizations providing information and support) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organizations); and (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status when the criteria are met; (vii) ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status.¹⁰⁴

Moreno-Lax argues that under EU law, the ‘right to asylum’ includes, ‘as a minimum, the liberty to leave other countries in search of international protection’,¹⁰⁵ which, in turn, ‘entails procedural and substantive (including physical/flight-related) components requiring effective access to a procedure to determine protection needs and exclude *refoulement* risks’.¹⁰⁶ She concludes that ‘a duty to grant territorial protection has crystallized in European practice’,¹⁰⁷ requiring pre-entry control measures to conform to, and be applied consistently with, the right to asylum. However, in practice, much remains to be achieved, and what asylum seeking requires, particularly at the pre-entry stage, continues to be contested.

While some scholars argue that there is now an individual right of asylum,¹⁰⁸ in our view, it still cannot be said that States have accepted an *international* obligation to grant asylum to refugees, in the sense of admission to residence and lasting protection against persecution and/or the exercise of jurisdiction by another State.¹⁰⁹ Limited references apart, a certain disjuncture still remains, as a matter of general international law, between the individual seeking asylum and the grant of asylum. State practice is replete with examples of asylum given; the humanitarian practice exists but the sense of obligation is missing. The practice of international organizations tends to support this view, while simultaneously revealing an awareness of the need for pragmatic, flexible responses. In the years after the Second World War, for example, many thousands of refugees had the benefit, at least, of asylum in the refugee camps of Europe.¹¹⁰ Their principal need was for resettlement, and the General Assembly repeatedly called upon immigration countries to allow refugees access to their programmes.¹¹¹ On other occasions, the General Assembly reiterated that permanent solutions should be sought in voluntary repatriation and assimilation within new national communities, either locally in countries of first refuge or in countries of immigration.¹¹² The initial burden may fall in fact upon the receiving country,¹¹³ but solutions are the responsibility of the international community at large.¹¹⁴

Although neither the 1967 Declaration on Territorial Asylum nor any other international instrument defines ‘asylum’, it can be considered as the grant to a non-citizen of lasting protection in the territory of a State, the opportunity to make a life and a living, and the possibility to enjoy fundamental human rights and freedoms. The Declaration certainly moved the debate forward, and the individual’s standing in international law has also strengthened; States, however, appear no less anxious to retain their sovereign competence on the ultimate

asylum decision.

Ironically, this position continues to be maintained even as States recognize their obligations of *non-refoulement*. Between these obligations and the pillar of asylum itself, the individual in flight, in search of a solution and unable to return to his or her country, can often fall into legal limbo—protected against a certain risk of harm, but unable, as a matter of law, effectively to enjoy even the minimum conditions for a meaningful life.

4. Obstructing asylum: trends in State practice

The following section examines various ways in which States seek to block asylum seekers' access to their territory and asylum procedures.¹¹⁵ It describes the nature of these practices and general aspects of their legality. A more detailed analysis of specific legal principles engaged, in particular that of *non-refoulement*, can be found in Chapter 5.

4.1 Access

The question of access to protection and assistance has acquired critical dimensions over the last two decades, touching directly on issues of territorial sovereignty, control, and the reserved domain of domestic jurisdiction. Denial of access is the objective for many States anxious to avoid the requirement to abide by certain fundamental obligations, such as *non-refoulement*. Refugees and asylum seekers are directly ‘interdicted’ while outside territorial jurisdiction, and their movements are increasingly controlled indirectly, through the application of restrictive visa policies and/or carrier sanctions.¹¹⁶ Those who arrive in the territory of the State may be denied access to a procedure for the determination of asylum or refugee status, or to courts and tribunals generally for the protection of their rights, or to the sources of information that ought to be the essential foundation for informed decision-making. Even where refugees secure admission, they may be denied access to relief or basic services, such as health care and education. This approach seems often to be driven by the assumption that asylum seekers are ‘profiteer economic migrants in disguise, using the asylum system to evade migration controls’, which must therefore be strengthened.¹¹⁷

Access has another dimension in situations of conflict, when internally displaced populations requiring humanitarian assistance become hostages to

fortune, with international efforts to relieve their suffering linked to political or military advantages sought by one or other side.

One of the difficulties with evaluating these various deflection techniques through the lens of international refugee law is the 1951 Convention's silence on admission procedures. Though human rights law provides a general standards framework, States retain considerable discretion to construct sophisticated interception and non-arrival policies within the letter, if not the spirit, of the law. However, while it is true that no international instrument imposes an express duty on States to grant asylum to persons fleeing persecution, the right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by UDHR 48 and ICCPR 66, implies an obligation on States to respect the individual's right to leave his or her country in search of protection. Thus, States that impose barriers on individuals seeking to leave their own country,¹¹⁸ or that seek to deflect or obstruct access to asylum procedures, may breach this obligation and, more generally, demonstrate a lack of good faith in implementing their treaty obligations.¹¹⁹ As Guiraudon has observed, these are attempts at 'short-circuiting judicial constraints on migration control'.¹²⁰

The question of access to territories, and therefore also to procedures for the determination of refugee status and the grant of asylum, falls between competing responsibilities, only some of which are clearly regulated by rules of international law. For example, State agents who intercept refugees on the high seas and return them directly to a country in which they are persecuted violate the principle of *non-refoulement*.¹²¹ However, State agents who, by refusing a visa to individuals with a well-founded fear of persecution, prevent or obstruct their flight to safety, do not clearly breach the prohibition on *returning* refugees to persecution.¹²² Nonetheless, the Human Rights Committee has expressed concern at States' imposition of carrier sanctions and 'other pre-frontier arrangements' that affect the right of the individual to leave any country, raising the question of their compatibility with article 12(2) ICCPR 66.¹²³ At the same time, though, it has acknowledged that article 12 'does not guarantee an unrestricted right to travel from one country to another', and does not confer a right for a person to enter a country other than his or her own.¹²⁴ In the *Roma Rights Case*, the House of Lords held that State practice did not support the proposition that a State's *non-refoulement* obligations extend to general deterrence measures, especially those whose impact is felt *within* the country of origin or transit, noting in particular the widespread practice of visa regimes

enforced by carrier sanctions.¹²⁵

The ‘right to seek asylum’ is certainly restricted, and State practice to date has not recognized directly correlative duties obliging States to adjust visa or immigration policies accordingly. On the contrary, States have repeatedly insisted on their right to apply visa and related controls, including sanctions against transportation companies that bring undocumented or insufficiently documented passengers to their ports and airports. Thus, while some have argued that the Universal Declaration on Human Rights, in whole or part, has acquired the status of customary international law,¹²⁶ there remains insufficient State practice or *opinio juris* to support a concomitant duty on the State to grant asylum to those seeking it.¹²⁷

4.2 Interception

There is no internationally accepted definition of ‘interception’, but the term describes measures applied by States outside their national boundaries which prevent, interrupt, or stop the movement of people lacking the necessary immigration documentation from crossing their borders by land, sea, or air.¹²⁸ Interception encompasses both physical or ‘active’ interception, such as the interdiction of boats, as well as administrative or ‘passive’ measures, such as stationing immigration and airline liaison officers in departure and transit countries to identify passengers with false or inadequate documentation and to prevent them from leaving for the destination State.¹²⁹ A 2003 Executive Committee Conclusion adopted a narrower definition focusing solely on active means of interception—preventing embarkation, preventing further onward travel, and asserting control of vessels—but noted that it was specifically for the purposes of that Conclusion and without prejudice to international law.¹³⁰

Interception policies are not new, but increasingly have become a standard migration tool for industrialized States.¹³¹ In the past two decades in particular, States have taken advantage of the absence of a concrete obligation to grant asylum both to deter asylum seekers from leaving their countries in search of protection, and to deflect those already on the move. As such, restrictive measures have become routine.¹³² While they are in part a response to people smuggling and trafficking networks, they are frequently exploited under the rubric of national security and reflect a wider practice among States to curtail ‘irregular’ migration. Though the trend towards increasingly restrictive asylum policies pre-dates 11 September 2001, security concerns following the terrorist

attacks on the United States and elsewhere reshaped asylum regimes in a number of States. Detention grounds were expanded, exclusion clauses began to be applied more broadly than international law permits, and stronger links were forged between immigration, intelligence services, and criminal law enforcement agencies.¹³³

Protection is strongly emphasized both in the Palermo Protocol on Trafficking—to protect and assist the victims—and again in the Palermo Protocol on Smuggling.¹³⁴ In each case, the protocol includes ‘savings clauses’ preserving the ‘rights, obligations and responsibilities of States and individuals’ under the refugee treaties and the principle of *non-refoulement*, and specifically requires that States afford appropriate protection and assistance to migrants.¹³⁵ However, since the primary purpose of interception is migration control, States’ focus is often on preventing unauthorized arrivals without inquiring into their reasons for movement. Interception measures therefore typically lack sufficient safeguards for distinguishing those in need of international protection from other migrants, and in practice may impede the individual’s right to seek asylum. Executive Committee Conclusion No. 97 (2003) attempts to reconcile States’ interests in interception, as a migration control tool, with the international protection needs of asylum seekers. It contains eight guiding principles to ensure ‘adequate treatment’ of intercepted persons: the State primarily responsible for protection needs is the one in whose territory or territorial waters the interception occurs; intercepted persons are to be treated humanely in accordance with human rights law; States must take into account the fundamental differences between asylum seekers and other migrants; asylum seekers must be given access to international protection mechanisms and, where needed, durable solutions, and States must respect the principle of *non-refoulement*; States must take into account the special needs of women, children, and vulnerable persons; those intercepted should not be liable to criminal prosecution or punished for illegal entry; those not in need of international protection should be swiftly returned; and those acting for the State in implementing interception measures should have specialized human rights and refugee protection training.

NGOs have criticized this Conclusion for placing the primary responsibility for intercepted persons on the State within whose territory or territorial waters the interception occurs, rather than on the State engaging in the act of interception.¹³⁶ As explained in detail in Chapter 6, States are required to observe their international obligations extraterritorially and will generally be accountable

for their actions wherever they occur (depending on the scope and content of the particular obligation). Others have noted that the Conclusion fails to refer to the principle of non-discrimination, which imposes limits on interception measures targeting particular groups.¹³⁷

Existing principles of international refugee law, human rights law, criminal law, the law of the sea, and the law of State responsibility nevertheless provide a framework for the regulation of interception.¹³⁸ Key among these is the principle of *non-refoulement*, which not only applies without geographical limitation, but also prohibits the indirect return of a refugee to a place where he or she risks persecution or other serious harm. Moreover, States remain liable under international human rights law if the methods they employ to deflect or deter asylum seekers constitute torture or cruel, inhuman, or degrading treatment or punishment under CAT 84, ICCPR 66, or relevant regional instruments.¹³⁹

4.3 Other non-arrival policies

States employ a variety of ‘non-arrival’ policies to prevent asylum seekers from ever reaching their territory. While passive measures, such as visa regimes, carrier sanctions, and pre-entry clearance procedures, are typically distinguished from active acts of interception,¹⁴⁰ the effect of both is to deny access to territory and thereby hamper the refugee’s ability to lodge an asylum claim. As Simon Brown LJ observed in *Adimi*: ‘The combined effect of visa requirements and carrier’s liability has made it well-nigh impossible for refugees to travel to countries of refuge without false documents.’¹⁴¹ Increased measures to control the movement of people means that ‘more migrants take extreme risks to obtain entry, and increasing numbers are dying in the attempt’.¹⁴²

Additionally, the imposition of fines on airline carriers that allow the embarkation of passengers without the appropriate travel documentation has effectively shifted migration control away from State authorities to private, commercial entities. As a matter of international law, States cannot contract out or ‘privatize’ their legal obligations: they may contract out performance, but not responsibility. While the imposition of carrier sanctions on airlines and transport companies shifts immigration screening to private corporations, this does not absolve States of responsibility if asylum seekers are denied the right to leave a country and/or subjected to *refoulement*.¹⁴³ The law of State responsibility attributes the conduct of private entities ‘empowered by the law of that State to exercise elements of the governmental authority’ to the State itself.¹⁴⁴ Similarly,

the conduct of an individual or group of persons is ‘considered as an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’.¹⁴⁵

4.3.1 Visa regimes

Visa regimes are a standard feature of most immigration systems and can be a permissible tool for immigration control, but they are not always lawful. For example, a visa policy that is racially discriminatory clearly violates international law, while visa regimes that seek to obstruct access to protection undermine the institution of asylum and international human rights and refugee law principles.¹⁴⁶

In some circumstances, visa controls may indeed reflect a reasonable, non-abusive policy and programme of restriction. This may be the case where other protection opportunities exist, such as an ‘internal flight alternative’ or internationally guaranteed safety zone, where the quality of the protection conforms with regional and international human rights standards.¹⁴⁷ In the absence of such alternatives, the possibility for abuse of rights and the violation of specific obligations arises. Gammeltoft-Hansen notes that while simply denying a visa may not equate to *refoulement*, the enforcement of visa requirements in some cases may do so (as well as contravening article 31 of the 1951 Convention).¹⁴⁸

Visa regimes are frequently exploited by States as a means of curbing the arrival of unwanted migrants. They typically do not apply in a uniform manner to all foreign nationals but ‘reflect a state’s political, economic, or historical ties’.¹⁴⁹ Some States have introduced visa requirements in direct response to increased numbers of refugee claims from nationals of particular countries, sometimes with considerable success.¹⁵⁰ The imposition of visa requirements on nationals of refugee-producing countries has been described as ‘the most explicit blocking mechanism for asylum flows’,¹⁵¹ since it hinders the individual’s ability to seek asylum and may force asylum seekers into illegal migration channels, such as trafficking and smuggling networks. Furthermore, the imposition of visa requirements by one State may have a domino effect, as other States fear that without visa regimes they may become target countries for asylum seekers. During the Bosnian crisis in 1992, the visa regimes applied by many European States meant that countries that might otherwise have only been used as transit

countries, such as Croatia and Slovenia, had to accommodate large numbers of refugees who were effectively ‘locked in’.¹⁵²

For many refugees, obtaining passports from persecutory State authorities is too dangerous, while in countries where national institutions have broken down, consular authorities may be non-existent.¹⁵³ Flight is commonly very sudden, and there may not be time to obtain the requisite travel documents. Furthermore, visas are not generally issued to allow people to seek asylum,¹⁵⁴ and even a standard tourist visa may not be granted if it is suspected that the individual will seek asylum on arrival in the destination State. The visa regimes of Australia, the EU, and North America effectively close off whole parts of the world to asylum seekers.

If external movement is premised on the acquisition of a visa, and visas for asylum are not forthcoming, then all legal means of seeking asylum are denied. Individuals are either forced into trying to obtain a visa on false premises simply to gain entry into a State in which they can claim protection, or into moving irregularly.¹⁵⁵ Though States may lawfully control their borders, ‘such control policies—if pursued in isolation—can be counterproductive’.¹⁵⁶ It is estimated that around 90 per cent of asylum seekers rely on irregular methods to enter the EU.¹⁵⁷

4.3.2 Pre-entry clearance and carrier sanctions

Many States, including the UK,¹⁵⁸ the US, Canada, Australia, and throughout the EU have immigration officials posted abroad to advise airlines and other States about fraudulent travel documents.¹⁵⁹ In conjunction with carrier sanctions imposed on airlines, shipping, and other transport companies,¹⁶⁰ these practices are designed to prevent passengers who do not possess valid visas or passports from leaving for a third State. The focus is on verifying documents, not on the motivations for travel.¹⁶¹ Guild, Costello, Garlick, and Moreno-Lax argue that the dangerous journeys undertaken by refugees to reach the EU ‘are a result of EU visa policies and carrier sanctions’.¹⁶²

Gallagher and David describe the issue of carrier sanctions as ‘vexed’, stating that ‘although *prima facie* not contrary to international law, it is undeniable that such mechanisms can and often do lead to violations of important legal rules’.¹⁶³ In their assessment, there is ‘little doubt that States have used the carrier sanctions beyond their accepted purpose of migration control to actively prevent the physical arrival of refugees into their territory and thereby to thwart

applications for protection'.¹⁶⁴ Indeed, this was exemplified by Sweden's imposition of carrier sanctions on public transport companies in 2015, in the context of temporary intra-Schengen border controls within Europe.¹⁶⁵ In relation to similar Danish proposals, UNHCR expressed concern that such measures 'could have the effect of preventing individuals from exercising the right to seek asylum' and risked inconsistency with obligations under the Schengen Borders Code and other international instruments.¹⁶⁶

Further problems with carrier sanctions and pre-arrival screening include the fact that many of the officers checking documents do not have sufficient training to identify those with protection needs;¹⁶⁷ checks are carried out quickly prior to boarding;¹⁶⁸ and there are rarely mechanisms in place for referring people without adequate documentation to a protection screening process.¹⁶⁹ Screening is often outsourced to private companies which are not bound directly by human rights or refugee law, and whose priorities are more likely to be the validity of documents and the avoidance of fines than the assessment of protection needs.¹⁷⁰ Some States do provide waivers where people are admitted to an asylum procedure,¹⁷¹ although Taylor argues that these have little impact on carriers' decision-making.¹⁷² The UNODC Model Law against the Smuggling of Migrants provides that carriers should be exempted from sanctions in relation to persons who have claimed asylum or been granted refugee status or complementary protection.¹⁷³

As UNHCR has observed, while States may have a legitimate interest in curtailing irregular migration through interception measures, they must also respect their international obligations and implement transparent systems for identifying individuals in need of international protection.¹⁷⁴ In 2004, the UK House of Lords considered the legality of certain pre-entry screening measures operated by the UK government within the Czech Republic. Since mid-2001, the UK had intermittently stationed immigration officials at Prague Airport to 'pre-clear' passengers before they boarded flights to the UK. The objective was to 'stem the flow of asylum seekers from the Czech Republic' by denying leave to enter 'to those who stated that they were intending to claim asylum in the UK and those who the officers concluded were intending to do so'.¹⁷⁵ The case was not strictly about asylum since it concerned the lawfulness of procedures applied to potential asylum seekers who had not yet left their country of origin. However, the appellants and UNHCR (as intervener) challenged the procedures on the grounds, first, that they were incompatible with the UK's obligations under the

1951 Convention/1967 Protocol and customary international law, and secondly, that they involved discrimination on the ground of race, contrary to international and domestic law. The case was brought by six Czech nationals of Roma ethnic origin, who had been denied leave to enter the United Kingdom K (and thus to depart the Czech Republic for that destination), and by the European Roma Rights Centre, a non-governmental organization that seeks to protect the rights of Roma in Europe.

The House of Lords reiterated that the principle of *non-refoulement* under the 1951 Convention can only be triggered once an asylum seeker is outside his or her country of origin or habitual residence. It rejected the idea of a ‘virtual frontier’,¹⁷⁶ created by the imposition of entry controls at foreign border posts from which potential refugees might seek to depart, on the basis that the Convention text makes clear that a refugee is someone already outside his or her home State. The House of Lords held that while the 1951 Convention should be given ‘a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the preamble … the court’s task remains one of interpreting the written document to which the contracting states have committed themselves’.¹⁷⁷ Though States have an obligation to interpret international treaties in good faith, in accordance with the principle of *pacta sunt servanda*,¹⁷⁸ ‘there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do’.¹⁷⁹ The court held that article 33 of the 1951 Convention only applies to asylum seekers either already in or at the frontier of a State, and in the instant case, the individuals concerned had neither ‘left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom’.¹⁸⁰ Accordingly, their argument was inconsistent with the text of the Convention, ‘since it puts those expressly excluded from the protection of the Convention in the same position as those expressly included’.¹⁸¹ Importantly, though, the court recognized that there is ‘general acceptance’ that the principle of *non-refoulement* has evolved to encompass non-rejection at the frontier,¹⁸² which thus implies a right of at least temporary admission for asylum seekers to have their protection needs assessed.¹⁸³ Lord Bingham distinguished this case from that of *Sale v Haitian Centers Council* on the ground that the Haitian asylum seekers were already outside their country of origin and (in contrast to the appellants in the instant case) were not free to travel to any other country.¹⁸⁴

The appeal was successful, however, on the ground that the pre-clearance procedure was discriminatory because it treated Roma seeking to travel to the United Kingdom less favourably on racial grounds than others.¹⁸⁵ Lord Steyn summarized the key features of the operation:

It was designed as a response to an influx of Czech Roma into the United Kingdom. The immigration officers knew that the reason why they were stationed in Prague was to stop asylum seekers travelling to the United Kingdom. They also knew that almost all Czech asylum seekers were Roma, because the Roma are a disadvantaged racial minority in the Czech Republic. Thus there was from the outset a high risk that individuals recognised as Roma would be targeted by specially intrusive and sceptical questioning. There was a striking difference in treatment of Roma and non Roma at the hands of immigration officers operating at Prague Airport. The statistics show that almost 90% of Roma were refused leave to enter and only 0.2% of non Roma were refused leave to enter. Roma were 400 times more likely than non Roma to be refused permission.¹⁸⁶

Accordingly, the court found that the practice was ‘not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party’.¹⁸⁷ However, it did not constitute discrimination under article 3 of the 1951 Convention because that provision applied only to recognized refugees and not to asylum seekers whose status had not yet been determined.¹⁸⁸

International human rights law may offer some of the strongest arguments against States’ implementation of deterrence measures, although admittedly the norm of non-discrimination in international law carries a particular weight not shared by all human rights principles. Apart from discrimination cases, however, human rights law offers a basis upon which to challenge both the procedural and substantive operation of deterrence schemes, and provides the content of those other obligations in international law with which the actions of States must be compatible.¹⁸⁹

Notably, human rights treaties precluding *refoulement* do not require an individual to be outside his or her country before a potential receiving State’s obligations are engaged. Thus, if an airline liaison officer employed by a receiving State were to refuse embarkation to an individual fearing ill-treatment in the country he or she sought to leave,¹⁹⁰ this could potentially constitute a breach of the receiving State’s obligations under article 7 ICCPR 66 or article 3 ECHR 50, for instance, in addition to obstructing the right to leave any country

and to seek asylum.¹⁹¹ The principle articulated in *Soering*—namely, that a State must not send an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other ill-treatment—applies in precisely the same way to transfers from custody across jurisdictional as well as territorial boundaries.¹⁹² The position otherwise would create an absurdity—a State could avoid its full *non-refoulement* obligations by moving a person to a safe third country before he or she were transferred to the State in which the risk of ill-treatment would arise.¹⁹³

5. International law responses

In the *Roma Rights Case*, Lord Bingham held that State practice did not support the proposition that a State's *non-refoulement* obligations under the Refugee Convention extended to general deterrence measures, noting in particular the widespread practice of visa regimes enforced by carrier sanctions,¹⁹⁴ whose effect was likened to the pre-clearance procedures imposed on the appellants. Since ‘it could not plausibly be argued that a visa regime would have been contrary to the practice of the nations ... [t]hat conclusion must in my opinion apply also to the pre-clearance procedure which the appellants challenge’.¹⁹⁵ However, where the *effect* of such regimes is to obstruct the flight of persons at risk of persecution or other serious harm, then other international legal obligations may be triggered which render deterrence measures unlawful.¹⁹⁶

Under international law, the right of asylum is broader than a mere procedural right to lodge an application for protection within or at the frontier of another territory, although that is a necessary component.¹⁹⁷ While it falls short of imposing an obligation on States to grant asylum to anyone seeking it, the operation of principles of international refugee and human rights law, in particular the principle of *non-refoulement*, requires States to consider asylum claims and provide protection to persons with a demonstrated international protection need. To have any meaning, the right to seek asylum implies not only a right to access asylum procedures, but also to be able to leave one's country in search of protection.¹⁹⁸

5.1 The right to leave any country

The right to leave any country, including one's own, is a feature of most international human rights instruments.¹⁹⁹ It immediately precedes the right to

seek asylum in UDHR 48, and is expressed as a binding State duty in article 12 ICCPR 66.²⁰⁰ Although it operates without limitation in article 13(2) UDHR 48, it has never been considered an absolute right and cannot be equated with a right to migrate permanently.²⁰¹ Thus, ICCPR 66 restricts the right to leave where ‘necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others’, provided this is consistent with other ICCPR 66 rights and stipulated by law. The ECHR 50 and ACHR 69 provide that any restrictions must also be ‘necessary in a democratic society’. Such exceptions were incorporated to prevent people from leaving purely to escape legal proceedings, paying fines, taxes, or maintenance allowances, or to avoid obligations such as national service.²⁰² State practice reveals additional limitations on the right to leave, including visa requirements.²⁰³ The European Commission and Court of Human Rights has stated that the right to leave any country under article 2 of Protocol 4 ECHR 50, ‘implies a right to leave for such a country of the person’s choice to which he may be admitted’.²⁰⁴ This caveat is not found in the text of Protocol 4, but has been interpolated from the gap between the individual’s right to leave and the absence of a correlative duty on a third State to admit.

The Human Rights Committee has expressed concerns that domestic legal and bureaucratic obstacles may seriously impinge on the individual’s right to leave a country, emphasizing that any restrictions under article 12(3) ICCPR 66 must be based on clear legal grounds, be necessary to protect the prescribed purposes, conform with the principle of proportionality, and be the least intrusive measure to achieve the desired result.²⁰⁵ As a matter of general policy, immigration controls that prevent an individual’s right to leave a country will not satisfy those requirements.²⁰⁶ As one commentator has observed, the yardstick must be that the exercise of the right to leave is the rule, and limitations the exception.²⁰⁷ Furthermore, any restrictive measures must comply with other principles of human rights law, including non-discrimination. This is why, in the *Roma Rights Case*, the discriminatory application of pre-entry clearance was deemed unlawful by the House of Lords.

The broader enunciation of the right to leave any country in article 13 UDHR 48 lacks a mechanism for international implementation. As expressed, it is a right engaging the responsibility of individual States, rather than the international community as a whole. The right to leave is not a right that other States need to ‘complete’ through a duty to admit; rather, it is simply a right that each State

must guarantee to those within its own territories, as a matter of constitutional principle. However, where a State refuses to let an individual depart because he or she does not possess the necessary documentation to enter a third State, then the right loses its binary State–individual focus and necessarily acquires an international dimension. In the context of asylum, this has important consequences with respect to the host State’s ability to prevent entry, and the receiving State’s obligations to asylum seekers.

The right to leave, the right to seek and to enjoy asylum, and the principle of *non-refoulement* share a delicate but significant relationship. The right to leave suggests a dual obligation on the State: a negative obligation not to prevent departure, and a positive obligation to issue travel documents (at least with respect to nationals).²⁰⁸ It is, however, an incomplete right, since there is no corresponding duty on other States to guarantee entry to persons other than their own nationals or those with ‘special ties to or claims in relation to a given country’.²⁰⁹ While the principle of *non-refoulement* circumscribes State action in this regard, it still cannot be fully equated with a legal right of entry.²¹⁰

At a bare minimum, the right to leave must permit temporary movement and enable the rights with which it is connected to be fulfilled. These include the right to personal liberty; the prohibition on arbitrary arrest, detention, or exile; the right to seek asylum; and the prohibition on arbitrary deprivation of nationality. The right to freedom of thought and expression, especially ‘the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers’, also depends on the right to free movement for its full realization.²¹¹ Reconciling the individual right to leave, as an expression of personal liberty, with the interests of States has always been the challenge.

The right to leave is particularly important for protection purposes because ‘a person who *leaves* the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear’.²¹² Given the protection orientation and objectives of refugee and human rights law, the limited notion of the right to leave *to seek asylum* may be the only aspect of the right to leave one’s country in international law to impose any duty on other States. In this sense, the nearest correlative duty may be not to frustrate the exercise of that right in such a way as to leave individuals exposed to persecution or other violations of their human rights; and that correspondingly intentional

policies and practices of containment *without protection* constitute an abuse of rights.²¹³

This is where the international dimension of the right, alluded to above, is triggered. In situations where individuals or groups in one State are exposed to persecution or serious human rights violations, then, in accordance with international law, States are also obliged to respect the right to leave to seek and to enjoy asylum, and ought not to exercise their own rights to control the movement of people in such a way as to frustrate attempts to find effective protection. This argument is supported by the principle of non-rejection at the frontier and prohibitions on removal under human rights law, which limit States' freedom to remove individuals from their territory.²¹⁴ In *Xhavara v Italy and Albania*,²¹⁵ the European Court of Human Rights held that Italian interception measures on the high seas did not breach the right to freedom of movement under article 2(2) of Protocol 4 ECHR 50, for they were aimed at preventing entry to Italy, rather than preventing departure from Albania. However, more recent statements by the court emphasize a broader construction of State jurisdiction, irrespective of where border control measures are carried out.²¹⁶

5.2 Article 31 of the 1951 Convention

As discussed in Chapter 5, article 31 of the 1951 Convention²¹⁷ recognizes that the circumstances compelling flight may lead refugees to seek entry to States without possessing proper documentation, and in view of this stipulates that States must not penalize refugees for irregular entry. Read in conjunction with article 33 on *non-refoulement*, and the right to leave a country and seek asylum in UDHR 48, article 31 provides support for a limited right of (at least) temporary admission for asylum seekers to access fair and effective refugee status determination procedures.

Article 31 shows that international law does not require asylum seekers to enter a State in a regular manner, provided that they can show 'good cause' for entering without the requisite documentation.²¹⁸ This fundamental aspect of the 1951 Convention underscores the right of people in distress to seek protection, even if their actions constitute a breach of the domestic laws of a country of asylum.²¹⁹ Irregular or no documentation does not reveal anything about the credibility of a protection claim. Article 31 recognizes that the circumstances compelling flight commonly force refugees to travel without passports, visas, or other documentation,²²⁰ while restrictive immigration policies mean that most

refugees are likely to be ineligible for visas through official migration channels. The protection of article 31 also applies while refugees are in transit.²²¹ Both the Protocol against the Smuggling of Migrants by Land, Air and Sea and the Protocol to Prevent, Suppress and Punish Trafficking in Persons must also be applied subject to any protections in refugee law:

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.²²²

5.3 Good faith

A basic principle of international law is that States have a responsibility to implement their obligations in good faith.²²³ This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeats the object and purpose of a treaty. A lack of good faith is distinct from (although may also encompass) a violation of an express term of a treaty. The duty requires parties to a treaty ‘not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty’.²²⁴ Thus, a State lacks good faith ‘when it seeks to avoid or to “divert” the obligation which it has accepted, or to do indirectly what it is not permitted to do directly’.²²⁵ The test for good faith is an objective one; it looks to the practical effect of State action, not its intent or motivations.²²⁶

If the words of a treaty are clear and unambiguous, then they must be interpreted accordingly, in light of the instrument’s object and purpose.²²⁷ Although the principle of good faith cannot broaden States’ treaty obligations beyond what they textually agreed, it is ‘[o]ne of the basic principles governing the creation and performance of legal obligations’.²²⁸ Thus, in the context of a multilateral human rights treaty where the text is ambiguous and individual rights are at stake, a good faith interpretation may require a more nuanced approach that is reasonable in light of all the circumstances and accords with evolving understandings.²²⁹

In the context of the right to seek asylum, measures that have the effect of blocking access to procedures or to territory may not only breach express

obligations under international human rights and refugee law, but may also violate the principle of good faith.²³⁰ Although States do not have a duty to facilitate travel to their territories by asylum seekers, the options available to States wishing to frustrate the movement of asylum seekers are limited by specific rules of international law and by States' obligations to fulfil their international commitments in good faith. Even though immigration control per se may be a legitimate exercise of State sovereignty, it must nevertheless be pursued within the boundaries of international law.

Thus, any State imposing extraterritorial interception or pre-entry clearance measures with regard to those who have an international protection need ought, as a matter of law, to consider the facts relating to conditions in the country of origin, especially with respect to human rights, persecution, and discrimination. It ought further to consider the impact of its proposed regime on the rights and obligations of other States and the rights and interests of individuals, especially where these are protected by treaty or general international law; ensure that its actions are compatible with its international obligations; act in accordance with the rules of general international law; and exercise its rights reasonably—proportionately to a lawful purpose—and with due regard to alternatives. Non-arrival policies, which effectively prevent the occurrence of events that would otherwise trigger breaches of international law, are therefore problematic. Removing the necessity for flight, as in the creation of a 'security zone' or 'safe haven' in northern Iraq in 1991,²³¹ is vastly different from preventing flight for those who are in need of international protection. The deliberate implementation of measures that obstruct the asylum seeker's path to protection, and whose express purpose is to prevent the State's international obligations from ever being triggered, opens up the perennial question of abuse of rights in international law, and the operation of the principle of good faith.

Although the House of Lords ultimately rejected the good faith argument in the *Roma Rights Case*, it did so on the basis of the principle's relation to the 1951 Convention alone, rather than other aspects of human rights law.²³² Lord Hope observed that the 1951 Convention, in terms, 'does not require the state to abstain from controlling the movements of people outside its borders who wish to travel to it in order to claim asylum'.²³³ He reasoned:

The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the state's frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and purpose of the treaty is to argue for the enlargement of the obligations which are to be found in the Convention.²³⁴

The good faith argument had been put to the court in much broader terms. It had been argued that the actions of the United Kingdom and the Czech Republic demonstrated a lack of good faith in relation both to the 1951 Convention, and to ICCPR 66, the 1965 International Convention for the Elimination of All Forms of Racial Discrimination, and ECHR 50.²³⁵ The court did not refer to these in its judgment, but dealt only with the issue of good faith in relation to *particular* non-arrival measures. Nevertheless, in certain contexts, such as physical interdiction, the principle of good faith may still serve to underline the illegality of State action, by delimiting the lawful *extent* of deterrence measures, given the possibility for *refoulement* or 'chain' *refoulement*.

In its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice stated that in the area of human rights law, of which refugee law is an integral part, treaties have 'a purely humanitarian and civilizing purpose'. In such treaties,

the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in ... convention[s] of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.²³⁶

While there is no provision in the 1951 Convention that expressly mandates States to process asylum seekers within their borders, a combination of provisions (no penalties for illegal entry, non-discrimination, *non-refoulement*, access to courts, and the status that contracting States owe to refugees) reinforces the object and purpose of the 1951 Convention as assuring to refugees 'the widest possible exercise of ... fundamental rights and freedoms'.²³⁷ States are responsible for refugees in their territory, as well as those whom they subject to enforcement action beyond their territorial jurisdiction. This responsibility entails ensuring that refugees are not returned in any manner to territories in which they face a real risk of persecution or other serious harm, *and*, if sent elsewhere, that

they have access to protection and durable solutions.

Furthermore, for States to seek to avoid their obligations by contracting them out to other States frustrates the goals of the multilateral treaty regime and is incompatible with the 1951 Convention's object and purpose.

The principle of good faith requires States to consider the use of reasonable alternatives proportionate to its policy objectives in international affairs, which are least likely to violate its international obligations.²³⁸ The broader international protection regime, comprising refugee law, human rights law, and more generally applicable rules informed by the principle of good faith, provides a normative and institutional framework for solutions. The very nature of the international protection regime is premised on States *not* acting unilaterally and in their own self-interest. Indeed, a State that sends out a message of unilateral disregard of the principles of international cooperation will inevitably lead to a disinclination on the part of other States to contribute to solutions.

6. Non-admission policies: the ‘safe’ country and the concept of ‘effective protection’

6.1 Jurisdictional issues: identifying the State responsible for determining a protection claim

The principle of access to a fair and efficient procedure for the determination of claims to asylum and refugee status has long been a cardinal principle in UNHCR's protection policy, and has been endorsed with equal consistency by the UN General Assembly.²³⁹

In practice, however, various devices may be employed to keep asylum seekers from the procedural door. In addition to the interception measures described above and in [Chapter 6](#), the notion of the ‘safe country’ (whether of origin or asylum) creates a further buffer zone between the countries from which asylum seekers have fled and the States in which they hope to find protection.

Debate over the right of access to procedures and the related question of responsibility to determine claims continues in various fora. The UNHCR Executive Committee in 1985, for example, examined the question of so-called irregular movements of refugees and asylum seekers, defined to include those who move, without first obtaining authorization, from countries in which they have already found protection in order to seek asylum or permanent resettlement elsewhere.²⁴⁰ Executive Committee Conclusion No. 58, finally adopted in 1989,

recognized that there might be compelling reasons for such onward movement, and emphasized that return should only be contemplated where the refugee was protected against *refoulement*, allowed to remain in the country in question, and treated in accordance with basic human rights standards pending a durable solution.

Since then, both the Executive Committee and the UN General Assembly have repeatedly endorsed the general principle of access to refugee procedures,²⁴¹ and the specific need for agreement on responsibility.²⁴² An increasing trend has been for States to emphasize that *non-refoulement* does not stand in the way of returns to ‘safe third countries’.²⁴³ Generally, however, States have accepted that ‘the fundamental criterion when considering resort to the notion (of safe third country), [is] protection against *refoulement*’.²⁴⁴

In 2015 and 2016, Turkey was host to the largest number of refugees under UNHCR’s mandate, including 2.7 million Syrian refugees.²⁴⁵ A dramatic increase in the number of refugees and migrants arriving in Europe in 2015, many of whom travelled from Turkey to Greece, resulted in more than two million asylum applications being lodged that year in 38 European countries (over half in EU Member States)—almost three times as many as in 2014.²⁴⁶

With growing concerns in a number of Member States about a refugee ‘crisis’, in March 2016 the ‘EU–Turkey statement’ was adopted.²⁴⁷ Relevantly, it provided that from 20 March 2016, all new ‘irregular migrants’ crossing from Turkey to Greece would be returned to Turkey ‘in full accordance with EU and international law, thus excluding any kind of collective expulsion’ (described as ‘a temporary and extraordinary measure which is necessary to end the human suffering and restore public order’). Asylum applications were to be processed individually by Greek authorities in accordance with the EU Procedures Directive (recast), in cooperation with UNHCR. Anyone who did not apply for asylum, or whose application was considered unfounded or inadmissible, would be returned to Turkey. For each Syrian so returned, another Syrian would be resettled from Turkey to the EU (capped at 72,000 places), with priority given to individuals who had not previously sought to enter the EU irregularly. The EU would help to accelerate the disbursement of three billion euros to assist refugees in Turkey, and EU Member States would lift visa requirements for Turkish citizens by the end of June 2016. Turkey, meanwhile, would take measures to prevent the development of new land or sea routes for irregular migration.

The significant substantive and procedural shortcomings of the arrangement

were strongly criticized, with its focus described as containment rather than protection.²⁴⁸ For example, its highly fast-tracked asylum procedure, incorporating flexible notions of the ‘safe third country’ and ‘first country of asylum’ concepts, were viewed as an attempt to circumvent legal concerns about Turkey’s ability to protect refugees in accordance with international law.²⁴⁹

As discussed in detail below, the Procedures Directive (recast) permits Member States to declare an asylum application inadmissible if a third State is considered to be a first country of asylum or a safe third country.²⁵⁰ However, this requires an individualized examination of each case and a detailed set of preconditions to be met. For the safe first country of asylum concept to apply, it must be clear that the refugee will be readmitted, granted a right of legal stay, and accorded standards of treatment commensurate with the Refugee Convention and human rights law.²⁵¹ Similarly, for the safe third country concept, an individual determination is required as to whether the person will be readmitted, granted access to a fair and efficient refugee status determination procedure, be permitted to remain, and be treated in accordance with international refugee and human rights law.²⁵² There must be a connection between the applicant and the third country, such that it would be reasonable for the applicant to go there.²⁵³

In general, these conditions are not satisfied in Turkey for Syrian asylum seekers returned there, especially since they are not eligible for refugee status within Turkey (as Turkey only applies the Convention to European refugees).²⁵⁴ Furthermore, in UNHCR’s opinion, transit through Turkey en route to Europe is not, of itself, a ‘sufficient’ connection (pursuant to recital (44) of the Procedures Directive (recast)) for return.²⁵⁵

6.2 The ‘safe country’ mechanism

Under international law, States are responsible for examining asylum claims made in their territory or jurisdiction. However, at a procedural level, a number of States deny access to national protection determination processes if an asylum seeker could have obtained effective protection elsewhere.²⁵⁶ The concept of the ‘safe country’ is a procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed or imagined to be secure.²⁵⁷ This technique encourages the use of accelerated procedures,²⁵⁸ and typically reduces or excludes rights of appeal.²⁵⁹ While there is no *necessary* connection between having had a previous opportunity to apply

for asylum/refugee status and thereafter being able to access the full range of refugee entitlements,²⁶⁰ this approach has been largely followed in practice, particularly among European States.²⁶¹ Transfers may occur pursuant to a formal multilateral or bilateral agreement,²⁶² or unilaterally, where protection is denied to those who, it is often assumed, could have sought it elsewhere.²⁶³ They are now a common, albeit legally fraught,²⁶⁴ part of State practice.²⁶⁵

States justify ‘safe country’ practices by arguing that an individual genuinely fleeing persecution would seek asylum in the first non-persecuting State, and that any ‘secondary’ movement is therefore for migration, rather than protection. This argument is flawed for a number of reasons. First, the blanket designation of States as ‘safe’ neglects to take into account the individual circumstances of the asylum seeker, which may in fact make the country unsafe for him or her (for example, by reason of membership of a minority group, or on account of the State taking a particularly narrow interpretation of an aspect of the refugee definition).²⁶⁶ As the House of Lords noted in this context, ‘[g]eneral rules cannot cater for every situation’;²⁶⁷ a country may be safe for some groups of asylum seekers but not for others. Secondly, international law does not impose a duty on an asylum seeker to seek protection in the first State in which effective protection might be available.²⁶⁸ Thirdly, international law would appear to recognize a right to at least a limited choice about where asylum is sought, especially where family members already reside in another State.²⁶⁹

However, although ‘safe country’ rules in national legislation are common, their effective implementation is another matter. Safe third country agreements are generally difficult to enforce for both practical and legal reasons, with very low numbers of returns.²⁷⁰ They have in fact ‘added new complexities’ to already overwhelmed asylum systems.²⁷¹ They may also have unintended consequences: a detailed 2013 study of the operation of the US–Canada Safe Third Country Agreement found that it had ‘prompted a rise in human smuggling across the Canada-U.S. border, making the border more dangerous and disorderly, and raising security concerns for Canada and the United States’.²⁷²

6.3 ‘Effective protection’

While the ‘safe country’²⁷³ concept arises in a number of different contexts—safe country of origin, safe first country of asylum, and safe third country—each raises the same fundamental concern: whether ‘effective protection’ is

available.²⁷⁴ From an international law perspective, the principal issue is the safety of the State to which the return of the asylum seeker is contemplated. Other relevant considerations include the procedural safeguards in place in the third State, and the connection between the receiving State and the asylum seeker.

In order for States to observe their *non-refoulement* and human rights obligations, a precondition to exercising the safe third country mechanism is that the third State can provide the individual with ‘effective protection’. A refugee enjoys fundamental human rights common to citizens and foreign nationals; where these are generally assured, where due process of law is acknowledged, and where measures of appeal and judicial review permit examination of the merits and the legality of administrative decisions, then the refugee may also be sufficiently protected.²⁷⁵

The term ‘effective protection’ is frequently invoked by States but lacks a clear and uniform definition. Recognizing that the safe country concept has become embedded in the practice of industrialized States, UNHCR’s approach has been to focus on the legal limitations on the transfer of asylum seekers to third States, and the need for strong procedural safeguards.²⁷⁶ While the legal framework in a particular State is important in determining whether or not it is ‘safe’, even more significant is what it does in practice.²⁷⁷ The simple ratification of human rights and refugee instruments does not equate to compliance with their standards.²⁷⁸ Further, respect for the principle of *non-refoulement* is a necessary element of effective protection, but is not of itself either conclusive or sufficient.²⁷⁹

UNHCR has indicated that ‘[u]nder certain circumstances and with appropriate guarantees in the individual case, the transfer of responsibility for assessing an asylum claim to another country may be an appropriate measure’,²⁸⁰ but cautions strongly against returns where there is no individual assessment of risk, but simply a list of countries deemed to be safe. ‘A country may be “safe” for asylum-seekers of a certain origin and “unsafe” for others of a different origin, also depending on the individual’s background and profile.’²⁸¹ Removal will constitute unlawful deportation—and may result in *refoulement* by the third State, for which the first State may be jointly liable²⁸²—unless it can be ascertained that each individual will be readmitted to the third country, will enjoy effective protection against *refoulement*, will have the possibility to seek and enjoy asylum, and will be treated in accordance with accepted international standards.²⁸³

In 2004, UNHCR's Director of International Protection clarified that protection could only be considered adequate,

if the risk of persecution, refoulement or torture was non-existent; if there was no actual risk to a person's life; if a genuinely accessible and durable solution was in prospect; if a person was not exposed to arbitrary expulsion and deprivation of liberty, and had an adequate and dignified means of subsistence; if family unity and integrity was preserved; and if specific protection needs (such as those arising from age or gender) were recognized and respected.²⁸⁴

She noted that States should not use the 'safe country' notion to shirk their international legal responsibilities towards asylum seekers or refugees, observing that the 1951 Convention 'was more concerned to ensure a certain standard of protection rather than to ensure that protection was available in a particular country'.²⁸⁵ The Human Rights Committee has expressed similar concerns about 'safe third countries'. In its view, effective protection in accordance with articles 6 and 7 ICCPR²⁸⁶ requires that refugee claims be assessed on an individual basis, and the application of 'safe third country' mechanisms may prevent this.²⁸⁶

As part of UNHCR's Global Consultations in 2001, the Lisbon Expert Roundtable found that protection is only 'effective' in a third State if the asylum seeker does not fear persecution there, is not at risk of being sent to another State in which effective protection would not be forthcoming, has access to means of subsistence sufficient to maintain an adequate standard of living, and has his or her fundamental human rights respected in accordance with international standards. Furthermore, the third State must have expressly agreed to admit the individual as an asylum seeker or refugee, comply with international refugee and human rights law in practice (not just in theory),²⁸⁷ grant access to fair and efficient determination procedures which include protection grounds that would be recognized in the State in which asylum was originally sought,²⁸⁸ take into account any special vulnerabilities of the individual, and maintain the privacy interests of the individual and his or her family.²⁸⁹ NGOs have suggested that the concept of 'effective protection' must encompass at least physical and material security, access to humanitarian assistance, access to secondary education and livelihood opportunities, timely access to durable solutions, a functioning judicial system, the rule of law, and respect for refugees' rights, including protection from *refoulement* and respect for their fundamental (including socio-economic) rights.²⁹⁰

At present, the most that can be said is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter. With respect to the ‘safe country’ notion, there must be substantive and procedural human rights guarantees.²⁹¹ Compliance with the principle of *non-refoulement* under article 33 of the 1951 Convention and human rights law more broadly is a key factor. *Non-refoulement* is most likely to be observed if there is access to a fair and effective procedure for the determination of claims to refugee status, in accordance with prevailing international standards.²⁹² However, formal effectiveness may be prejudiced by restrictions on access, for example, because of time limits, geographical limitations on the extent of obligations, policy reasons affecting particular groups, or legal reasons affecting certain classes, such as irregular entrants. In any case, actual return is likely to satisfy a best practice standard only if the receiving State is able to provide certain effective guarantees,²⁹³ including: (a) willingness to readmit asylum seekers; (b) acceptance of responsibility to determine claims to refugee status, notwithstanding departure from the country in question or the circumstances of initial entry; (c) the treatment of applicants during the determination process in accordance with generally accepted standards;²⁹⁴ and (d) some provision with respect to subsistence and human dignity issues, such as social assistance or access to the labour market in the interim, family unity, education of children, and so forth. Besides the question of fulfilment of obligations deriving from the 1951 Convention/1967 Protocol, a country’s human rights record will also be relevant. This may include both procedural and substantive standards, including questions of remedies, non-discriminatory or equivalent treatment with local nationals, and protection of fundamental human rights.²⁹⁵ The absence of such safeguards is a key reason why US President Trump’s ‘Asylum Cooperative Agreements’ (ACAs) with Guatemala,²⁹⁶ El Salvador,²⁹⁷ and Honduras,²⁹⁸ and the ‘Migrant Protection Protocols’ with Mexico,²⁹⁹ were so severely criticized.³⁰⁰ They did not comply with the minimum requirements for the United States to discharge its international legal responsibilities to those seeking refuge and protection. In February 2021, President Biden formally suspended the arrangements and began the process to terminate those with Guatemala, El Salvador, and Honduras, and to determine whether to terminate or modify the arrangement with Mexico.³⁰¹

In *M70*, the High Court of Australia considered the lawfulness of a bilateral

transfer agreement between Australia and Malaysia.³⁰² The Agreement provided that the next 800 asylum seekers to arrive in Australia without prior authorization would be transferred to Malaysia, without any individual consideration of their protection claims, and that, in exchange, 4,000 UNHCR-recognized refugees already in Malaysia would be resettled in Australia over a four-year period.³⁰³ The express objective was to deter asylum seekers from travelling by boat to Australia.

For Malaysia to be lawfully ‘declared’ as a safe country for transfer, section 198A(3) of the *Migration Act* 1958 (Cth) required that it provide access to effective asylum procedures; protection for asylum seekers pending the determination of their refugee claim; protection to those granted refugee status; and meet relevant human rights standards in providing that protection.³⁰⁴ The plaintiffs argued that these criteria could not be satisfied in Malaysia, since it was not a party to the 1951 Convention/1967 Protocol or key human rights treaties, nor did it have any relevant domestic law in place to protect refugees.³⁰⁵

By a 6:1 majority, the High Court ruled in the plaintiffs’ favour, finding that the lawful exercise of the Minister’s power to issue a declaration under section 198A(3) authorizing the asylum seekers’ removal to Malaysia depended on each of the four criteria being ‘provided as a matter of *legal obligation*’.³⁰⁶

All seven judges accepted that the purpose behind the statutory provision was to implement (at least partially) Australia’s obligations under the Refugee Convention.³⁰⁷ As such, the majority held that the term ‘protection’ in section 198A(3) encompassed not only the principle of *non-refoulement*, but also ‘other obligations’.³⁰⁸ While refraining from deciding precisely how far such obligations extended, they noted ‘that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments’,³⁰⁹ including access to courts of law,³¹⁰ freedom from discrimination,³¹¹ and treatment as least as favourable as that accorded to its nationals with respect to employment,³¹² education,³¹³ and religious freedom.³¹⁴ This was an important jurisprudential development going beyond comparable cases that had focused almost exclusively on the principle of *non-refoulement* as the restraining factor.³¹⁵

6.4 Safe country practices in the European Union

The Procedures Directive,³¹⁶ adopted as part of the first phase of the Common

European Asylum System established under the Amsterdam Treaty,³¹⁷ established a harmonized approach by the EU Member States to the minimum procedural standards for granting and withdrawing refugee status. It was the first supranational instrument to contain rules on the application of safe third country, safe country of origin, and country of first asylum notions.³¹⁸ The recast Procedures Directive, adopted in 2013 and in force from 21 July 2015, repealed the earlier Directive but left these rules largely unchanged.³¹⁹ It did, however, incorporate strengthened procedural safeguards.³²⁰

While the Directive does not require Member States to apply the safe country notions, a 2014 survey by the European Council on Refugees and Exiles (ECRE) found that Sweden and Italy were the only Member States not to do so. Some Member States had legislated only in respect of ‘safe country of origin’,³²¹ while others had legislated for both it and ‘safe third country’.³²² These wide distinctions call into question the utility of the notions, especially given the objective of a harmonized EU approach to assessing international protection needs.³²³ Indeed, in practice, it seems that beyond formal readmission agreements and the Dublin Regulation (both discussed below), the safe third country notion is little used.³²⁴

6.4.1 First country of asylum

Applications may be deemed inadmissible if applicants have come from a ‘first country of asylum’.³²⁵ This is defined in article 35 of the Procedures Directive (recast) as one in which an applicant was recognized as a refugee and can still avail him-or herself of that protection, or where he or she can otherwise enjoy ‘sufficient protection’, including the benefit of the principle of *non-refoulement*, if readmitted.³²⁶ According to Legomsky, ‘[t]he longer, the more meaningful, the more formal, and the more secure the person’s stay in the third country, the more likely it is that the country will be described as a “first country of asylum” rather than a “safe third country”’.³²⁷

The provisions on first country of asylum remain unchanged from the original Directive, apart from one significant addition: the applicant must now ‘be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances’.³²⁸ Presumably, this would need to be raised in the inadmissibility interview, and if the challenge were successful, then the applicant should be able to proceed to make a substantive claim.³²⁹ If unsuccessful, then that decision may be appealed but this does not have

automatic suspensive effect; applicants must apply to a court or tribunal to be allowed to remain pending the outcome.³³⁰

The term ‘sufficient protection’ is not defined and has been interpreted in very different ways by Member States.³³¹ According to Garlick, the drafters of the 2005 Directive deliberately used the term ‘sufficient protection’ rather than the well-established notion of ‘effective protection’, thus avoiding its requirements from being read into the instrument.³³²

In UNHCR’s view, the text, context, and object and purpose of the provision require protection in the first country of asylum to be effective and available in law and practice. There must be no risk of persecution or serious harm in that State; no risk of onward *refoulement*; compliance, in law and practice, with relevant international refugee and human rights standards; access to a right of legal stay; assistance for those with specific needs; and timely access to a durable solution.³³³

This notwithstanding, Member States have considerable discretion in how they interpret the term and studies show divergent understandings.³³⁴ It is important that such interpretations do not overlook the fact that secondary movement from a first country of asylum (as in the case of much Syrian onward movement) may be lawful where an individual no longer enjoys effective protection, cannot access a proper legal status, or does not have access to effective remedies.³³⁵ UNHCR has argued that States that lack the capacity to conduct refugee status determination themselves also lack the capacity to provide protection.³³⁶

6.4.2 Safe country of origin

The effect of safe country of origin provisions is to deny substantive consideration of protection claims made by nationals of particular States on the basis of a generic classification of those States as safe. Article 36 of the Procedures Directive (recast) provides that the safe country of origin concept may be applied if the applicant is a national (or, if stateless, a former habitual resident) of such a country, and has not provided ‘any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection’.

The CJEU invalidated the mechanism under the original Procedures Directive for a common EU list of safe countries of origin, and thus the recast version does not contain this.³³⁷ Member States may themselves designate safe countries of

origin, which must be ‘based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations’,³³⁸ and subject to regular review.³³⁹ They Member States are no longer permitted to retain designations based on lower standards than those set out in the Directive,³⁴⁰ nor to designate part of a country as safe. However, as a matter of primary EU law, EU Member States are assumed to be ‘safe’.³⁴¹

Annex I of the recast Directive provides that:

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

This requires consideration of the country’s relevant laws and regulations, and their application, as well as observance of international human rights law, respect for the principle of *non-refoulement*, and the existence of effective remedies against violations of human rights and freedoms.³⁴² The Preamble acknowledges that designating a country as ‘safe’ ‘cannot establish an absolute guarantee of safety for nationals of that country’, and by its very nature ‘can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country’.³⁴³ This is why it must be a rebuttable presumption.

Nonetheless, in practice the concept can result in procedural disadvantages and place a higher burden of proof on applicants.³⁴⁴ Applicants deemed to be from a safe country of origin can be subjected to an accelerated procedure (and/or one conducted at the border or in a transit zone),³⁴⁵ which carries a number of inherent risks, including return to the country of origin. The risk is heightened since appeals do not have automatic suspensive effect; applicants must apply to a court or tribunal to be allowed to remain.³⁴⁶ Costello and Hancox observe that ‘[i]t is difficult to see how in implementation it will not lead to breaches of Article 13 ECHR, especially in the context of accelerated procedures with short time-limits’.³⁴⁷ The European Court of Human Rights has held that provided a complaint is arguable,³⁴⁸ article 13 requires a remedy that is ‘effective’ in

practice as well as in law.³⁴⁹

Member States have widely divergent practices with respect to the safe country of origin concept. In 2010, only three had formal safe country lists (France, Germany, and the UK), with around 20 countries on each. Ghana was the only country common to the lists, although in the UK it was considered unsafe for women on account of the practice of female genital mutilation.³⁵⁰ Garlick rightly notes that ‘this illustrates the challenges around reaching agreement on what constitutes acceptable levels of “safety” in countries of origin’.³⁵¹

6.4.3 Safe third country

The safe third country concept assumes that an applicant could have sought protection elsewhere. Under the Procedures Directive, it may be applied where the authorities are satisfied that:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
- (c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.³⁵²

Paragraph (b) was not included in the original Directive and creates an additional safeguard, reflecting the recast Directive’s broadened scope (now also encompassing subsidiary protection).³⁵³

The applicant must have a connection to the third country, such that it is reasonable for him or her to go there.³⁵⁴ The Explanatory Memorandum to the original Directive indicated that the meaning of ‘connection’ was to be based on Executive Committee Conclusion No. 15 (1979), which identifies the presence of family members in the third State, or previous stay, as potentially relevant matters.³⁵⁵ However, the fact that this is left to the discretion of individual States

means that practice may be highly variable, and people may be removed to countries through which they have never even passed.³⁵⁶

Under the Directive, if a safe third country is identified for an applicant, then his or her protection claim can be declared inadmissible (and thus not subject to substantive evaluation).³⁵⁷ However, the applicant must be able to ‘challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances’, as well as the purposed ‘connection’.³⁵⁸ Any appeals automatically have suspensive effect.³⁵⁹ Member States must also ensure that an asylum seeker has access to a determination procedure if the third country to which return is contemplated refuses to readmit him or her.³⁶⁰

6.4.4 European safe country

Member States may decline to examine (at all, or in full) an application from someone who has entered ‘illegally’ from a ‘European safe third country’, namely one that has ratified and observes the Refugee Convention without any geographical limitations;³⁶¹ has in place an asylum procedure prescribed by law; and has ratified and observes ECHR 50, including standards relating to effective remedies.³⁶² These requirements are more exacting than for the standard ‘safe third country’ concept.³⁶³

Significantly, applicants now have the express right to challenge the application of the European safe country concept on the grounds that it is not safe for them personally,³⁶⁴ reflecting the CJEU’s decision in *NS*.³⁶⁵ In addition, although appeals in this context do not automatically have suspensive effect, this can be requested.³⁶⁶

Furthermore, whereas the original Directive required a decision by the European Council to apply the ‘super safe’ country concept, this has been removed by the recast version (because procedurally, it breached EU constitutional requirements).³⁶⁷ Now, any Member State can designate super safe countries.³⁶⁸ Member States must still provide for exceptions on humanitarian or political grounds, or for reasons of public international law.³⁶⁹ If the safe country refuses to readmit the asylum seeker, then the host Member State must ensure access to a determination procedure.³⁷⁰

Garlick notes that in practice, very few States appear to apply the European safe country concept, thus casting doubt on its utility. Nevertheless, ‘the opportunity was not taken in the recast process to delete the notion, leaving the

possibility in practice that it could be invoked with substantial ramifications in future'.³⁷¹

6.4.5 Dublin Regulation

The Dublin Regulation,³⁷² which superseded the Dublin and Schengen Conventions in 2003, establishes the criteria and mechanisms for determining which Member State (or other contracting party: Norway, Iceland, Switzerland, or Liechtenstein) has responsibility for examining an asylum application. In 2020, the European Commission proposed replacing the Dublin Regulation with a broader common framework—the Asylum and Migration Management Regulation.³⁷³ This would include a solidarity mechanism (primarily focused on relocation or return sponsorship, but also including ‘a specific process to address the specificities of disembarkations following search and rescue (SAR) operations’); provisions to strengthen the return of “irregular” migrants; and new rules on responsibilities for examining international protection applications ‘in order to contribute to reducing unauthorised movements in a proportionate and reasonable manner’.³⁷⁴ While ‘the basic rules for allocation of responsibility among the Member States preserves the hierarchy of criteria in Dublin III’,³⁷⁵ some concerns remain, including the fact that CJEU jurisprudence concerning unaccompanied children has not been taken into account.³⁷⁶

The ‘Dublin system’ is the oldest component of the European common asylum policy.³⁷⁷ Its expressed aim is to identify a *single* responsible State and to require it to determine the asylum claim, thereby reducing the likelihood of multiple, successive applications by asylum seekers, and eliminating asylum seekers ‘in orbit’. It is based on the ‘legal fiction’³⁷⁸ that all EU Member States provide uniform protection and are thus ‘safe’ countries. Responsibility under the Dublin Regulation is determined according to a hierarchy of criteria,³⁷⁹ including the presence of family members,³⁸⁰ the possession of a valid residence document or visa,³⁸¹ the first Member State entered irregularly,³⁸² a Member State where visa requirements were waived for the applicant,³⁸³ or the Member State where the application was first lodged.³⁸⁴

However, States retain the discretion to examine an asylum claim lodged by an applicant who could be removed pursuant to the Dublin III Regulation,³⁸⁵ or to send an asylum seeker to a safe third country other than a Member State.³⁸⁶ The Regulation’s operation is facilitated by mechanisms such as the Eurodac

Regulation, which collates and compares fingerprints of asylum applicants and irregular migrants in order to assist in establishing the Member State responsible for examining a particular application.³⁸⁷

Compared to its predecessor, Dublin II, the Dublin III Regulation has a wider scope (encompassing beneficiaries of subsidiary protection, as well as refugees); a more human rights-oriented Preamble; broader criteria relating to family ties; stronger procedural rights and safeguards against detention; better guarantees against *refoulement*; and a mechanism for ‘early warning, preparedness and crisis management’.³⁸⁸ Nevertheless, it still leaves ‘many of the old problems standing’,³⁸⁹ which the proposed Regulation on Asylum and Migration Management would seek to address.³⁹⁰ A review of Dublin II three years after its adoption revealed ‘intrinsic flaws’ and ‘a failure by states to properly implement it’.³⁹¹ Contrary to the Regulation, many applicants were being denied both access to an asylum procedure in the responsible State, and an effective opportunity to appeal against transfer. Similarly, a 2015 evaluation of the Dublin III Regulation found significant differences in how Member States interpreted and applied its criteria.³⁹² The widely different recognition rates in EU Member States led to its being dubbed a ‘protection lottery’.³⁹³ Indeed, as Maiani points out, ‘the common understanding is that the Dublin system “is not working as it should” and ... the evidence accumulated over twenty years seems to confirm this’.³⁹⁴ It is extremely inefficient, with only around three per cent of asylum seekers ever transferred, and it does not allocate responsibility in any statistically significant way. Since this means that the vast majority of claims are considered in the Member State in which they are lodged, it raises the question ‘whether it is worthwhile to use the Dublin criteria at all’.³⁹⁵

In 2015–16, the large number of asylum seekers arriving in Europe led to a virtual collapse of the Dublin system, exposing significant ‘weaknesses in [its] design and implementation’³⁹⁶ (as well as deficiencies in the CEAS for responsibility-sharing overall).³⁹⁷ Since the Dublin Regulation was not envisaged for mass influx situations, its relevance was ‘severely reduced’ and its objectives ‘undermined’ as some States suspended its application altogether.³⁹⁸ The Explanatory Memorandum to the proposed Regulation on Asylum and Migration Management notes that the current system is unsustainable,³⁹⁹ in part because the Dublin Regulation ‘was not designed to deal with situations of migratory pressure or a fair sharing of responsibility across the Member States’.⁴⁰⁰

Over time, the European Court of Human Rights has exposed ‘the continuing

abuse of the STC notion by EU Member States,⁴⁰¹ and provided important constraints on Dublin removals, subsequently bolstered by CJEU rulings as well.⁴⁰² Recitals (32) and (39) of the Dublin III Regulation make clear that Member States are bound by the case law of the European Court of Human Rights and article 4 of the EU Charter (which corresponds to article 3 ECHR 50), and for this reason the CJEU often refers to the human rights court's jurisprudence.⁴⁰³ Cases such as *TI*, *KRS*, *MSS*, and *Tarakhel* in the European Court of Human Rights, and *NS*, *CK*, and *Jawo* in the CJEU, have highlighted the flawed logic of assuming the inherent safety of each EU country Member State and have emphasized that States cannot rely automatically on safe country rules (resulting in the suspension in 2011 of Dublin transfers to Greece, for instance).⁴⁰⁴

Indeed, in *Ilias and Ahmed v Hungary*,⁴⁰⁵ the Grand Chamber of the European Court of Human Rights provided more detailed reasoning for this position. It began by noting that,

the content of the expelling State's duties under Article 3 [ECHR 50] differs depending on whether the receiving country is the asylum seeker's country of origin or a third country and, in the latter situation, on whether the expelling State has dealt with the merits of the asylum application or not. As a consequence, the Court's task is in principle different in all of the above-mentioned categories of cases, subject to the complaints raised by the applicant involved.⁴⁰⁶

In the former, the authorities must determine whether or not the protection claim is well founded and thus examine the conditions in the country of origin. By contrast, in the latter, 'the main issue before them is whether or not the individual will have access to an adequate asylum procedure in the receiving third country',⁴⁰⁷ which requires determining whether that country's asylum procedure 'affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.⁴⁰⁸ This is required even where the receiving State is an EU Member State.⁴⁰⁹ As Costello has noted, the theoretical aspirations of the CEAS, which 'presupposes sufficient similarities across the EU (and beyond)', are strikingly divergent from the 'diverse empirical reality'.⁴¹⁰ Indeed, the CJEU in *NS* recognized that despite the European asylum system being built on a principle of mutual confidence, it was not 'inconceivable that that system may, in practice,

experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights'.⁴¹¹ Similarly, in *Tarakhel*, the European Court of Human Rights clarified that the presumption of safety under Dublin can be rebutted if there are substantial grounds for believing that the individual concerned faces a real risk of being subjected to ill-treatment. The sending State must carry out 'a thorough and individualised examination of the situation of the person concerned', including 'in view of the overall situation with regard to the reception arrangements for asylum seekers . . . and the applicants' specific situation'.⁴¹³ This analysis relates both to the physical transfer, as well as to the conditions in the receiving Member States.⁴¹⁴

With respect to individual circumstances, the CJEU explained in *Jawo* that a Dublin transfer would be precluded if, on account of the indifference of State authorities, a person wholly dependent on State support 'would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty',⁴¹⁵ unable to 'meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live', and in a situation 'that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'.⁴¹⁶ Such 'extreme material poverty' would place the person 'in a situation of such gravity that it may be equated with inhuman or degrading treatment'.⁴¹⁷ This 'particularly high level of severity'⁴¹⁸ would only be relaxed where a person could show 'unique' and 'exceptional circumstances' on account of a 'particular vulnerability'.⁴¹⁹ The UN Human Rights Committee has also stressed the importance of taking individual circumstances and special vulnerabilities into account in this context.⁴²⁰

Finally, it should be noted that article 3(2) of the Dublin III Regulation precludes the transfer of an asylum seeker to the Member State designated as primarily responsible if 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union'.⁴²¹ Both the CJEU and the UK Supreme Court have clarified that this does not necessarily mean that inhuman or degrading conditions must result from 'systemic shortcomings' themselves:

It is self-evident that a violation of article 3 rights is not intrinsically dependent on the failure of a system. If this requirement is grafted on to the presumption it will unquestionably make its rebuttal more difficult. And it means that those who would suffer breach of their article 3 rights other than as a result of a systemic deficiency in the procedure and reception conditions provided for the asylum seeker will be unable to avail of those rights in order to prevent their enforced return to a listed country where such violation would occur. That this should be the result of the decision of CJEU in *NS* would be, as I have said, remarkable.⁴²²

6.5 The US–Canada Safe Third Country Agreement

Since 29 December 2004, the United States and Canada have had a bilateral safe third country agreement in place.⁴²³ It is based on the presumption that asylum seekers who cross between the countries at a Canadian or US land border ‘could have found effective protection’ in the other’s territory, and thus may be returned to whichever of the two countries they first entered.⁴²⁴ This is because both States have ratified the relevant international refugee law instruments,⁴²⁵ and have, in particular, ‘international legal obligations … under the principle of non-refoulement set forth in the Convention and Protocol, as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’.⁴²⁶ The Preamble reaffirms ‘their mutual obligations to promote and protect human rights and fundamental freedoms’, their desire to ‘uphold asylum as an indispensable instrument of the international protection of refugees’,⁴²⁷ and the Agreement’s objective to ‘enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing’. The Agreement contains procedural safeguards to ensure that asylum seekers are not sent on to any other State until their protection claim has been examined.⁴²⁸

There has been much concern that US asylum processes are more restrictive than those in Canada,⁴²⁹ applying narrower criteria, higher standards of proof, and less extensive procedural guarantees. For instance, procedural bars in the US ‘categorically exclude broad classes of refugee claimants on a non-reviewable basis and without individual consideration or balancing, in ways that directly contravene Canadian standards’,⁴³⁰ denying refugees the rights to which they are entitled under international (and Canadian) law.⁴³¹

In December 2005, the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches, in conjunction with an

asylum seeker, launched a challenge to the Safe Third Country Agreement in the Federal Court of Canada, claiming it was unconstitutional and in contravention of international law. The Federal Court found that the Agreement was *ultra vires* because it did not meet the safe third country requirements in section 102 of the Canadian Immigration and Refugee Protection Act; it was unreasonable to conclude that the US complied with its *non-refoulement* obligations under the Refugee Convention and CAT 84; there was no continuing review of the policies and practices of the US, contrary to the Act; and the Agreement was contrary to sections 7 (on equality) and 15 (life, liberty, and security of person) of the Canadian Charter of Rights and Freedoms.⁴³² The decision was overturned by the Federal Court of Appeal on the basis that the relevant question was not whether the US actually complied with international law, but only whether the factors set out in section 102 of the Immigration and Refugee Protection Act were duly considered when the US was designated as a safe country.⁴³³ The Inter-American Commission on Human Rights similarly found that Canada's 'direct back' policy to the US violated articles XXVII and XVIII of the American Declaration on Human Rights,

for failing to protect [the] right to seek asylum in a foreign territory, failing to conduct a basic, individualized assessment with respect to the risk of *refoulement*, and failing to provide effective access to judicial review of the application of the direct back policy.⁴³⁴

In its formal response to the decision, Canada stated that while it 'fully supports the important role mandated to the Commission and will always do its utmost to cooperate with its processes and decisions',⁴³⁵ in its view, 'the Commission's decisions are not binding under international law, as distinct from the human rights obligations themselves'. The government concluded that it had complied with the Commission's recommendations 'to the greatest extent possible in the circumstances of the case'.⁴³⁶

In mid-2017, Amnesty International Canada and the Canadian Council for Refugees again called on the Canadian government to immediately suspend the Agreement on the grounds that the US did not meet required international (or Canadian) legal standards for the protection of refugees and asylum seekers.⁴³⁷ When the government did not act, Amnesty, the Canadian Council for Refugees, and the Canadian Council of Churches, together with a Salvadoran asylum seeker, commenced litigation in the Federal Court challenging the US'

designation as a safe third country. The court found that returning asylum seekers to the US pursuant to the Agreement violated the right to ‘liberty and security of the person’ under section 7 of the Canadian Charter of Rights and Freedoms, given conditions of detention in the US. The effect of the judgment was suspended for six months to ‘allow time for Parliament to respond’⁴³⁸ but, on 15 April 2021, the Federal Court of Appeal allowed the appeal, finding in particular that the conclusion that section 7 of the Charter was infringed could not stand. The court nevertheless emphasized the importance of refugee protection and the need to assess the situation with ‘anxious scrutiny’.⁴³⁹

6.6 Readmission agreements

Except in limited circumstances, such as the return of ‘inadmissible’ passengers to the point where they began their journey of embarkation, States are under no obligation in international law to admit or readmit non-nationals.⁴⁴⁰ However, at times, asylum seekers are dealt with under general readmission agreements. These are typically bilateral arrangements that oblige States to readmit their own nationals, and increasingly also non-citizens, who have transited through the country.⁴⁴¹ Although they have come to underpin safe third country practices,⁴⁴² they are primarily border control mechanisms which focus on *all* irregular entrants, not just asylum seekers. Accordingly, they rarely make specific provision for asylum seekers and refugees, and do not necessarily require the receiving State to assess any asylum claim, let alone provide protection. They are simply an agreement to readmit individuals, and without more, may lead to breaches of the principle of *non-refoulement*.⁴⁴³ Costello observes, for instance, that the threshold requirements for ‘safe third country’ in article 38 of the recast Procedures Directive ‘would clearly not be met by some of the States with whom EU Member States (and the EU itself) have readmission agreements’.⁴⁴⁴ Both practice and principle suggest that inter-State agreements on responsibility, return, and procedural and substantive guarantees, including *non-refoulement*, are essential if the protection of refugees is to be effective. In *Sharifi*, the European Court of Human Rights held that asylum seekers could not be returned indiscriminately or collectively to another State (in that case, to Greece, pursuant to a 1999 readmission agreement between Italy and Greece) without the sending State ensuring that the receiving State had sufficient guarantees in its asylum policy (and applied in practice) to prevent asylum seekers from being sent back to their countries of origin without an adequate individual examination of their

claims.⁴⁴⁵

6.7 Extraterritorial processing

There is no single definition of ‘extraterritorial processing’ (sometimes also called ‘external’, ‘offshore’, ‘transit’, ‘third country’, or ‘regional’ processing).⁴⁴⁶ It encapsulates ‘any process for screening or assessing asylum claims carried out beyond a state’s traditional geographic boundaries’, and is often coupled with maritime interdiction.⁴⁴⁷

Although States sometimes offer humanitarian explanations for such schemes, such as saving lives by preventing people from making dangerous journeys, extraterritorial processing is essentially about States controlling access to territory and attempting to keep asylum seekers geographically distant from potential asylum States (and domestic legal safeguards) through ‘constrained territorial constructions of jurisdiction to avoid responsibilities’.⁴⁴⁸ While in theory, protection-oriented extraterritorial processing arrangements could contribute to greater responsibility-sharing and protection closer to people’s countries of origin,⁴⁴⁹ such objectives are difficult to achieve when the focus is on deterring movement, and there is an absence of political will to share responsibilities equitably.

E processing is exemplified by the US practice of processing interdicted Haitian and Cuban asylum seekers at Guantánamo Bay,⁴⁵⁰ and by Australia’s offshore processing regime in the Pacific States of Nauru and Papua New Guinea. In the US context, asylum seekers are pre-screened at sea, and the few who meet the credible fear test are transferred to Guantánamo Bay for full status determination.⁴⁵¹ Those found to be refugees are generally denied settlement in the US and must be resettled elsewhere pursuant to a bilateral agreement.⁴⁵²

Between 2001–08 and from 2012 onwards, Australia has used offshore processing in Nauru and Papua New Guinea as a means of deterring asylum seekers from arriving by boat.⁴⁵³ Since July 2013, anyone sent offshore who is found to have a protection need has been denied settlement in Australia,⁴⁵⁴ even if they have family members or other ties there. Experts have consistently documented concerns about the conditions of offshore processing, including the risk of *refoulement*, serious human rights violations (including with respect to physical and mental health),⁴⁵⁵ the lack of durable solutions, and coerced repatriation or resettlement.⁴⁵⁶ As Hathaway has observed, ‘while the duty of *non-refoulement* does not require that all refugees be admitted to the territory of

the intercepting state, neither does it allow willful blindness to the foreseeable consequences of taking refugees to countries that do not have an adequate procedure to identify and protect refugees'.⁴⁵⁷

Since the mid-1990s, European States have perennially considered the creation of 'regional' and 'transit' processing centres.⁴⁵⁸ 'Regional' centres are intended as 'safe' processing areas or zones in regions close to asylum seekers' countries of origin to which people can flee and remain until either return home or resettlement elsewhere is possible.⁴⁵⁹ 'Transit' centres are envisaged as processing centres located in countries just outside the borders of the EU to which asylum seekers arriving in, or intercepted en route to, EU Member States could be transferred for processing.⁴⁶⁰ Discussions about extraterritorial processing of this kind resurfaced in 2015 when large numbers of people crossed the Mediterranean in search of protection;⁴⁶¹ both practical and legal concerns about reconciling such an approach with EU Member States' obligations under international and EU law have thus far prevented their development.⁴⁶² As a result, some States have pursued bilateral partnerships instead (for example, Italy and Libya; Spain and Morocco, Senegal, Mauretania, and Cape Verde) to try to stop asylum seekers and migrants departing regions of origin in the first place.⁴⁶³ The European Court of Human Rights has ruled that certain practices pursued in this connection are unlawful, such as pushbacks of asylum seekers at sea.⁴⁶⁴

6.7.1 Legal concerns

For any externalized or regional processing scheme to be lawful, the human rights and protection needs of all asylum seekers, refugees, and migrants must be respected. This includes ensuring that there are adequate refugee status determination procedures in place to identify people at risk of persecution or other serious harm, and that the conditions of treatment in the processing centres accord with international human rights standards. If asylum seekers are to be transferred to processing centres, then individual determinations must occur prior to removal to ensure that they are not at risk of persecution or serious harm in the country where the centre is located (and are not at risk of being sent on from there to a place where they risk such ill-treatment).

UNHCR acknowledges that extraterritorial processing might be acceptable when used 'as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space'.⁴⁶⁵ It concedes that processing in North Africa and the Middle East may be a necessary measure to

help prevent loss of life at sea, provided that certain legal safeguards are put in place.⁴⁶⁶ For instance, it could be an effective approach to assist people from countries whose nationals are regularly found to need international protection.⁴⁶⁷

As a matter of international law, States cannot absolve themselves of legal responsibility simply by transferring asylum seekers elsewhere. Any State involved in such processing arrangements retains joint and several responsibility for ensuring that they are implemented in accordance with its international, regional, and national legal obligations.⁴⁶⁸ As UNHCR has noted, international law requires at a minimum that asylum seekers:

- be admitted to the country in which the centre is located;
- be protected against *refoulement*;
- have access to legal assistance;
- have access to a fair and impartial status determination procedure;
- have access to a fair and impartial appeals process;
- have the right to remain while appeals take place;
- have the right to family unity respected;
- have access to durable solutions; and
- be treated in accordance with accepted international standards.⁴⁶⁹

The European Court of Human Rights has made clear that States' *non-refoulement* obligations apply wherever their officials act, whether inside a State's territory or outside it, including on the high seas.⁴⁷⁰ This obligation means that States must not expose individuals to a real risk of being persecuted, tortured, arbitrarily deprived of life, or exposed to cruel, inhuman or degrading treatment or punishment—either by sending them directly to the country in which such harm is feared, or to any other country where they might be at risk (including at risk of removal to the place where harm is feared). It means that States cannot lawfully send an individual to other territories for processing unless it can be shown, on a case-by-case basis, that the particular territory is 'safe'⁴⁷¹ and that minimum standards of treatment are observed. In effect, this may require a separate procedure to examine the legality of a decision to transfer an asylum seeker to a processing centre,⁴⁷² which may, in turn, undercut any deterrence message that a regional scheme might be designed to send.⁴⁷³ It may also be very time-consuming and resource intensive.⁴⁷⁴

7. Standards of treatment for asylum seekers

The 1951 Convention does not expressly enumerate the rights of asylum seekers who have not yet been recognized as refugees.⁴⁷⁵ Certain rights, however, must inevitably attach until status is determined for the system of protection envisaged by the Convention to operate effectively. Thus, asylum seekers must not be returned, sent back, or sent on to States or territories in which they may be at risk, until it has been finally determined that they are not refugees or otherwise in need of international protection. UNHCR has described the gradations of treatment in the Convention as ‘a useful yardstick in the context of defining reception standards for asylum-seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic rights’.⁴⁷⁶

Additionally, international and regional human rights instruments and norms elaborate standards of treatment for all people within a State’s territory or jurisdiction, and emphasize the principle of non-discrimination.⁴⁷⁷ While human rights entitlements may in some respects be more extensive than the treatment for refugees envisaged by the Convention, they are frequently difficult to access.⁴⁷⁸

At a minimum, treatment should conform with standards set down by various Executive Committee Conclusions. For example, Conclusion No. 93 (2002) requires, *inter alia*, that asylum seekers have access to assistance for basic support needs, such as food, clothing, accommodation, medical care, and respect for privacy; that reception arrangements are sensitive to gender and age, in particular the educational, psychological, recreational, and other special needs of children, and the specific needs of victims of sexual abuse and exploitation, trauma and torture; and that family groups be housed together. Executive Committee Conclusion No. 8 (1977) stipulates, *inter alia*, that recognized refugees be issued with documentation certifying that status and that those not recognized as refugees have a reasonable time to appeal. Numerous Conclusions emphasize that UNHCR should be given access to asylum seekers, and asylum seekers should be entitled to have access to UNHCR.⁴⁷⁹ Above all, treatment must not be inhuman or degrading.⁴⁸⁰

In the EU, the Reception Conditions Directive (recast) sets out the minimum standards of treatment owed by Member States to asylum seekers.⁴⁸¹ It makes

clear that in applying the Directive, Member States ‘are bound by obligations under instruments of international law’ with respect to the treatment of those falling within the Directive’s scope, and, in particular, that they ‘should seek to ensure full compliance with the principles of the best interests of the child and of family unity’ in accordance with international and regional instruments.⁴⁸²

8. Detention

That States have the competence to detain non-nationals pending removal or pending decisions on their entry is confirmed in judicial decisions and in practice.⁴⁸³ From an international law perspective, therefore, the issue is not whether the power is recognized, but whether its exercise or duration is limited in the case of refugees and asylum seekers by operation of law or principle.

The 1951 Convention explicitly acknowledges that States retain the power to restrict the freedom of movement of refugees, for example, in exceptional circumstances, in the interests of national security, or if necessary after illegal entry.⁴⁸⁴ Such actions must, however, be consistent with the article 3 non-discrimination provision.⁴⁸⁵ While traditionally article 31’s non-penalization provision⁴⁸⁶ was considered to be of limited application, the term ‘penalties’ is increasingly recognized as going beyond criminalization to include administrative penalties, such as detention, and certain restrictions on social, economic, and residence rights in cases where basic safeguards are lacking.⁴⁸⁷

The 1951 Conference of Plenipotentiaries discussed the possibility of detention ‘for a few days’ to verify identity.⁴⁸⁸ Article 31(2) seems to imply that thereafter, States may only impose restrictions on movement which are ‘necessary’, for example, on security grounds or in the special circumstances of a mass influx, although restrictions are generally to be applied only until status is regularized or admission is obtained into another country.⁴⁸⁹

Apart from the few days for investigation, it may be argued that the drafters of the 1951 Convention intended that further detention would need to be justified as necessary under article 31(2), or exceptional under article 9.⁴⁹⁰ This receives some support from article 32 on the expulsion of lawfully resident refugees, which limits the grounds and calls for certain procedural guarantees. In addition, a refugee under order of expulsion is to be allowed a reasonable period within which to seek legal entry into another country, although States do retain discretion to apply ‘such internal measures as they may deem necessary’.⁴⁹¹ In

short, a number of limitations on the detention of refugees can be inferred from the provisions of the 1951 Convention, and references to ‘necessary’ measures of detention imply an objective standard, subject to independent review.⁴⁹²

If the 1951 Convention and 1967 Protocol offer only limited protection against detention, human rights law goes further.⁴⁹³ Although State practice recognizes the power to detain in the immigration context, human rights treaties affirm that no one shall be subject to *arbitrary* arrest or detention.⁴⁹⁴ The first line of protection thus requires that all detention must be in accordance with and authorized by law; the second, that detention should be reviewed as to its legality, proportionality, and necessity, according to the standard of what is reasonable and necessary in a democratic society.⁴⁹⁵ This requires an individualized assessment for detention beyond a ‘brief initial period’ to document entry, record claims, and resolve any issues of identity.⁴⁹⁶ Mandatory detention beyond this ‘brief initial period’ will necessarily be arbitrary.⁴⁹⁷ The length of detention can also be a relevant consideration;⁴⁹⁸ indefinite detention is, by definition, arbitrary and cannot be justified by an inability to expel an individual ‘because of statelessness or other obstacles’.⁴⁹⁹

Detention will also be arbitrary if domestic law does not provide an effective review procedure⁵⁰⁰ and periodic re-evaluation of the basis for detention.⁵⁰¹ Article 9(4) ICCPR 66 entrenches the principle of effective review in international human rights law, namely the right of any person deprived of liberty to bring proceedings before a court to determine the lawfulness of his or her detention—and the right to be released in the event that it is unlawful.⁵⁰² UNHCR considers that a failure to consider alternatives to detention may also render detention arbitrary.⁵⁰³

‘Arbitrary’ embraces not only what is illegal, but also what is unjust.⁵⁰⁴ The *conditions* of detention may put in question a State’s compliance with generally accepted standards of treatment, including the prohibition on cruel, inhuman, or degrading treatment⁵⁰⁵ and the general recognition given to basic procedural rights and guarantees.⁵⁰⁶ Asylum seekers should not be detained in a general prison population,⁵⁰⁷ and States are obliged under international human rights law to provide detainees with medical care.⁵⁰⁸ Special duties of protection are owed to the family and to children,⁵⁰⁹ and to those with disabilities.⁵¹⁰ The particular circumstances of other asylum seekers also need to be considered.⁵¹¹

The detention of refugees and asylum seekers was considered by the Executive Committee at its 37th session in 1986, where the debate in the Sub-Committee of

the Whole on International Protection was long, often heated, and divided between those anxious to ensure that detention remained an exception and those who sought the widest powers in controlling movement and entry.⁵¹² The Working Group's conclusions were duly adopted,⁵¹³ and although not as progressive as some had hoped for, and by no means as committed to detention as exception (which had been UNHCR's goal), they nevertheless accept the principle that 'detention should normally be avoided'. Nevertheless, the Executive Committee expressly recognized that,

if necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.⁵¹⁴

It also noted that 'fair and expeditious procedures' for determining refugee status are an important protection against prolonged detention, and that 'detention measures taken in respect of refugees and asylum seekers should be subject to judicial or administrative review'.⁵¹⁵

Further study of the issue took place in the context of UNHCR's Global Consultations on International Protection, and with particular reference to article 31 of the Convention.⁵¹⁶ The conclusions adopted following a meeting on the topic recalled that the Executive Committee had several times acknowledged that refugees often have justifiable reasons for illegal entry, but that the implementation of article 31 requires positive steps, including identification of refugees at the earliest possibility. It was again emphasized that only such restrictions be applied to refugees entering illegally as are strictly necessary *in the individual case*. Moreover, article 31 benefits not only those who come directly from their country of origin, but also those who have briefly transited through other countries, or who have been unable to find effective protection in the first country or countries of refuge.⁵¹⁷ With regard to article 31(2), the exceptional nature of detention was stressed, and appropriate standards set out for the application of restrictions under this provision.⁵¹⁸

In 2012, UNHCR issued its Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.⁵¹⁹ The Guidelines provide, inter alia, that '[d]etention must not be

arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances', and that alternatives to detention must be considered.⁵²⁰ UNHCR's Guidelines were followed by its 2014–19 'Beyond Detention' Global Strategy, which sought to 'make the detention of asylum-seekers an exceptional rather than routine practice'.⁵²¹ In the EU, the recast Reception Conditions Directive provides that a Member State 'shall not hold a person in detention for the sole reason' that he or she is seeking international protection.⁵²²

The detention of children was addressed by the Executive Committee in its 2007 Conclusion on Children at Risk. The Conclusion noted that '[i]n recognition that detention can affect the physical and mental well-being of children and heighten their vulnerability, States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child'.⁵²³ Detention was also recognized as a factor that 'put children in a situation of heightened risk'.⁵²⁴

In 2017, a Joint General Comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child went further, stating that '[e]very child, at all times, has a fundamental right to liberty and freedom from immigration detention'.⁵²⁵ It noted that the possibility of 'detention as a measure of last resort', set out in article 37(b) CRC 89,⁵²⁶ does not extend to immigration detention, 'as it would conflict with the principle of the best interests of the child and the right to development'.⁵²⁷ The UN Special Rapporteur on Torture has also rejected the immigration detention of children, stating that 'it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children'.⁵²⁸ UNHCR considers that children 'should in principle not be detained at all', with particular reference to unaccompanied and separated children.⁵²⁹

Detention is a matter of substance rather than form. It can take place 'at land and sea borders, in the "international zones" at airports, on islands, on boats, as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially'.⁵³⁰ In *Ilias and Ahmed v Hungary*, the Grand Chamber of the European Court of Human Rights found that the confinement of asylum seekers

for over three weeks in a transit zone on the border between Hungary and Serbia did not, on balance, ‘point to a situation of *de facto* deprivation of liberty and it was possible for the asylum seekers, without a direct threat for their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come from’.⁵³¹ In its detailed analysis of the meaning of ‘deprived of his liberty’ in article 5 ECHR 50, the court emphasized the need to consider ‘a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question’, in light of the individual’s specific situation.⁵³² It stated that the difference between deprivation and restriction of liberty ‘is one of degree or intensity, and not one of nature or substance’.⁵³³ The factors to be taken into account include:

- (i) the applicants’ individual situation and their choices, (ii) the applicable legal regime of the respective country and its purpose, (iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and (iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants.⁵³⁴

In a later decision, however, the CJEU found that the asylum seekers did not have an ‘effective possibility’ of leaving the transit zone for Serbia,⁵³⁵ and that being held in the transit zone did amount to detention⁵³⁶ because it was ‘a coercive measure that deprive[d] that applicant of his or her freedom of movement and isolate[d] him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter’.⁵³⁷ It also held that detention is only permissible following ‘a reasoned decision’ that has examined its necessity and proportionality, with the possibility for judicial review.⁵³⁸

8.1 Detention and mass influx

In the case of a mass influx, the principles contained in article 31 of the 1951 Convention remain applicable. In practice, however, States have often used closed or restricted camps, either initially as an interim solution, or ostensibly pending repatriation or third country resettlement; as experience shows, such measures tend to become permanent or long-term.⁵³⁹ One commentator in 1951 considered that article 26 on freedom of movement would not be violated in

‘special situations where refugees have to be accommodated in special camps or in special areas even if this does not apply to aliens generally’.⁵⁴⁰ This is a common response in situations of large-scale influx, and it is often justified by reference to national security, community welfare, and even ‘humane deterrence’. Both case-by-case determination of refugee status and case-by-case review of confinement may indeed be unrealistic, and there *may* also exist good reasons—racial, cultural, religious, economic—why alternatives to detention cannot be used in any particular context; but the conditional nature of these statements should not be overlooked.

The Executive Committee’s 1981 Conclusions on the protection of asylum seekers in situations of mass influx makes basic provision for the conditions of detention,⁵⁴¹ while the European Court of Human Rights has held that States parties are not absolved of their obligations under ECHR 50 if their capacity is stretched by the mass arrival of asylum seekers and migrants.⁵⁴² Other international standards, as applicable to individuals as to large groups, include the prohibition on forced or compulsory labour. At the 1951 Conference, the practice of labour contract and group settlement schemes was defended, under which refugees who were admitted were required to remain in a particular job for a particular time.⁵⁴³ Today, however, objections would likely be based on a variety of treaty provisions.⁵⁴⁴

9. Conclusion

The plight of the refugee in search of asylum has been a dominant theme on the international agenda since the late 1970s, as is evident from repeated appeals by the Executive Committee, the General Assembly, intergovernmental organizations, and other concerned bodies. At one level, State practice still permits only one conclusion: the individual has no right to be granted asylum. The right itself is in the form of a discretionary power—the State has discretion whether to exercise its right, as to whom it will favour, and, consistently with its obligations generally under international law, as to the form and content of the asylum to be granted. Save in so far as treaty or other rules confine its discretion, for example, by requiring the extradition of war criminals, the State remains free to grant asylum to refugees as defined by international law or to any other person or group it deems fit. It is likewise free to prescribe the conditions under which asylum is to be enjoyed. It may thus accord the refugee the right to permanent or

temporary residence, it may permit or decline the right to work, or confine refugees to camps, dependent on international assistance pending some future solution, such as repatriation or resettlement. Refugees may also be subject to measures falling short of *refoulement*, which nevertheless prevent them from effectively making a claim to status or asylum, or in securing admission to a particular country.

After 1951, many States in fact adopted the refugee definition as the criterion for the grant of asylum and, until the compelling effect of human rights obligations made itself clear, as the sole criterion for the grant of the specific, limited, but fundamental protection of *non-refoulement*. Likewise, in the practice of many States party to the 1951 Convention/1967 Protocol, the recognized refugee, the person with a well-founded fear of persecution, is not only effectively entitled to asylum in the sense of residence, but is also protected against return to the country in which he or she runs the risk of persecution or other relevant harm.

There is nevertheless a certain discontinuity in the protection regime established by the 1951 Convention/1967 Protocol and general international law, and between the status of refugee and a solution to the problem of the refugee. Refugees benefit from *non-refoulement* and refugee status is often, but not necessarily, the sufficient condition for the grant of permanent or durable asylum. But there is no *necessary* connection between *non-refoulement* and admission or asylum. In international law, as well as in national practice, the discretion to grant asylum and the obligation to abide by the principle of *non-refoulement* remain divided, even as they are linked by the common definitional standards of well-founded fear or a real risk of other serious violations of human rights.

The ideal of asylum as an obligation on States to accord lasting solutions, with or without a correlative right of the individual, continues to be resisted by many States. Asylum remains an institution that operates between subjects of international law. Moreover, in an era of mass exodus, and of actual or perceived threats to national security, States are still not prepared to accept an obligation without determinable content or dimension. Experience shows that efforts to secure agreement on such a divisive issue are more likely to produce equivocation, qualification, and exception, that can tend only to dilute the rules and principles already established in State practice.⁵⁴⁵ But asylum as lasting solution, though a preferred sense, represents one aspect only. State practice is not solely concerned with permanent protection, and the concept of asylum at large cannot be analysed adequately apart from the concept of refuge and the

normative principle of *non-refoulement*. States are obliged to protect refugees, and consequently they are obliged to abide by *non-refoulement* through time. That time is not and cannot be determined by any principle of international law, but likewise the duty to accord *non-refoulement* through time cannot be separated in practice from that other complex duty which recognizes the responsibility of the community of States in finding durable solutions.⁵⁴⁶

So far as a State's actions may expose an individual to the risk of violation of his or her human rights, its responsibility is duty-driven, rather than strictly correlative to any individual right. The duty not to return refugees to persecution or to a situation of danger to life or limb is owed to the international community of States which, for many purposes, is represented by UNHCR. The international community is likewise entitled to require of individual States, not only that they accord to refugees the benefit of *non-refoulement* through time, but also the opportunity of finding a lasting solution to their plight. The degree of protection required is that commensurate with the occasion, and given the present level of development of international law, certain exceptions in favour of the State remain. The area continues to be governed by discretion, rather than duty, but analysis reveals that discretion is not only confined by principle, but also structured in the light of other legally relevant considerations, including international solidarity, burden-sharing, and the right of functional protection enjoyed by UNHCR.

Freedom to grant or to refuse permanent asylum remains, but save in exceptional (and now almost notional) circumstances, States do not enjoy the right to return refugees to persecution or other serious harm. Protection against the immediate eventuality is the responsibility of the country of first refuge. So far as a State is required to grant that protection, the minimum content of which is *non-refoulement* through time, it is required also to treat the refugee in accordance with such standards as will permit an appropriate solution, whether voluntary repatriation, local integration, or resettlement in another country. Whereas there was some support in the past for the overall primary responsibility falling on the first country of refuge,⁵⁴⁷ the experience of recent times, with so many States declining to allow refugees to regularize their status or otherwise to remain within their borders, has served to emphasize the importance of the international dimension to responsibility-sharing.

¹ See generally Reale, E., ‘Le droit d’asile’ (1938-I) *Hague Recueil* 473; Koziebrodski, L. B., *Le droit d’asile* (1962); Reville, A. ‘*L’abjuratio regni*: histoire d’une institution anglaise’ (1892) *Revue historique* 1; Trenholme, N. M., *The Right of Sanctuary in England: A Study of Institutional History* (1903); Kimminich, O., *Der internationale Rechtsstatus des Flüchtlings* (1962) 65–98; Sinha, S. P., *Asylum and International Law* (1971); Grahl-Madsen, A., ‘The European Tradition of Asylum and the Development of Refugee Law’, in Macalister-Smith, P. & Alfredsson, G., eds., *The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen* (2001); Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. 2 (1972); Garcia-Mora, M. R., *International Law and Asylum as a Human Right* (1956); Bau, I., *This Ground is Holy* (1985) 124–71; Price, M., *Rethinking Asylum: History, Purpose, and Limits* (2010); Gibney, M. J. & Hansen, R., eds., *Immigration and Asylum: from 1900 to the Present*, 3 vols. (2005).

² A comparative analysis of national constitutions in the late 1940s showed that several provided asylum on account of persecution: ECOSOC, Commission on Human Rights, Drafting Committee, International Bill of Rights: UN doc. E/CN.4/AC.1/3/Add.1 (11 Jun. 1947) 283–4; United Nations, *A Study of Statelessness*: UN doc. E/1112, E/1112/Add.1 (Aug. 1949) fn 220. For more recent sources, see den Heijer, M., ‘Article 18’, in Peers, S., Hervey, T., & Kenner, J., eds., *EU Charter of Fundamental Rights: A Commentary* (2014) para. 18.22; Worster, W. T., ‘The Contemporary International Law Status of the Right to Receive Asylum’ (2014) 26 *IJRL* 477, 488 fn 87. A constitutional right to asylum is most common in States with a French, Spanish, or Portuguese legal tradition: Gil-Bazo, M.-T. & Nogueira, M. B. B., ‘Asylum in the Practice of Latin American and African States’ *UNHCR New Issues in Refugee Research*, Research Paper No. 249 (2013) 2. While Gil-Bazo & Nogueira argue that this constitutional right reflects ‘the value of this institution as one of the underlying principles of legal orders worldwide’ which ‘informs international law itself’, the fact remains that no international jurisdiction has carried this reasoning into a judgment.

³ Reale (ⁿ 1) 499–550, 544–54, locates the beginning of this development in the mid-eighteenth century, with its hardening into an institution after the events in Europe of 1848–49. For an examination of its evolution, and, in particular, the bifurcation of asylum into extradition and refugee law, see Bashford, A. & McAdam, J., ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309.

⁴ von Wolff, C., *Jus Gentium Methodo Scientifica Pertractatum* (1764) s. 147.

⁵ *Ibid.*, s. 148; see also Vattel, E., *The Law of Nations*, Chitty, J., ed. (1834), I, Ch. XIX, paras. 229–30; Grotius, H., *De Jure Belli et Pacis* (1646).

⁶ On States’ powers over entry and exclusion, see generally Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978); also, Hailbronner, K., ‘The Right to Asylum and the Future of Asylum Procedures in the European Community’ (1990) 2 *IJRL* 341.

⁷ Moore, J. B., *Digest of International Law*, vol. 2 (1906) 757.

⁸ Hackworth, G. H., *Digest of International Law*, vol. 2 (1941) 622.

⁹ Morgenstern, F., ‘The Right of Asylum’ (1949) 26 *BYIL* 327. See also Koziebrodski ([n 1](#)) 24, 79–81; Simpson, J. H., *The Refugee Problem* (1939) 230: ‘Asylum is a privilege conferred by the State. It is not a condition inherent in the individual’; Arboleda, E. & Hoy, I., ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’ (1993) 5 *IJRL* 66.

¹⁰ Cf. the definition adopted by the Institute of International Law at its 1950 Bath Session: ‘Asylum is the protection which a State grants on its territory or in some other place under the control of its organs to a person who comes to seek it’: (1950) 43(1) *Annuaire de l’Institut de droit international* 167, art. 1.

¹¹ See Inter-American Court of Human Rights, *Advisory Opinion OC-25/18 of 30 May 2018 requested by the Republic of Ecuador: The Institution of Asylum and Its Recognition as a Human Rights in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in relation to Article 1(a) of the American Convention on Human Rights)*. See further [Ch. 6](#), s. 1.2.1.

¹² See, for example, *R (on the application of ‘B’) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643: actions of consular officials abroad may be subject to ECHR 50 (though extraterritoriality is not expressly mentioned). On seeking asylum in diplomatic premises, see: Cole, C. V., ‘Is There Safe Refuge in Canadian Missions Abroad?’ (1997) 9 *IJRL* 654; Noll, G., ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17 *IJRL* 542; Ogg, K., ‘Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates’ (2014) 33(4) *RSQ* 81 (who suggests that jurisprudence since [Noll’s 2005](#) article provides grounds to argue that diplomatic missions must in certain circumstances consider asylum claims and, if the requirements are met, grant protection. She bases her thesis largely on the extraterritorial application of certain human rights treaties, but does not cite any case law that directly supports her contention).

¹³ Many States do not accept the institution of diplomatic asylum, or do so only in very limited cases. Despite some support, a Uruguayan proposal to extend the right of asylum in the Universal Declaration of Human Rights to diplomatic asylum in embassies and legations, based on State practice in Latin America, was rejected: UN doc. A/C.3/268, reproduced in UN doc. A/C.3/285/Rev.1 in UNGAOR [Part 1](#) (3rd Session, 1948) ‘Annexes’, 25. The Pakistani representative regarded this concept of extraterritoriality as having ‘dangerous implications’: UNGAOR [Part 1](#) (3rd Session, 1948) ‘Summary Records of Meetings’, 121st Meeting (3 Nov. 1948) 337 (Mr Shahi, Pakistan). See also debate in the International Law Commission (ILC) in 1949: *Yearbook of the International Law Commission*, paras. 49, 87–8; debate on the draft Declaration on the Right of Asylum in 1966: UN doc. A/6570, para. 11; Moore ([n 7](#)) 755 ff.; Hackworth ([n 8](#)) 623 ff.; Whiteman, M. M., *Digest of International Law*, vol. 6 (1968) 445 ff.; McNair, A., ‘Extradition and Exterritorial Asylum’ (1951) 28 *BYIL* 172; 7 *BDIL* 905–23. In 1974, on an Australian initiative, the General Assembly requested the

Secretary-General to prepare and circulate a report on the practice of diplomatic asylum and invited Member States to make known their views: UNGA res. 3321 (XXIX) (14 Dec. 1974). The report (UN doc. A/10139) confirmed the regional nature of the practice; of 25 States which made known their views, only seven favoured drawing up an international convention on the matter. Further consideration of the subject was postponed indefinitely: UNGA res. 3497(XXX) (15 Dec. 1975). Cf. Riveles, S., ‘Diplomatic Asylum as a Human Right: The Case of the Durban Six’ (1989) 11 *HRQ* 139; Noll ([n 12](#)).

¹⁴ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep. 266, 274–5. See further Goodwin-Gill, G. S., ‘Asylum (Colombia v. Peru) 1949 and Request for Interpretation of the Judgment of 20 November 1950 in the *Asylum Case (Colombia v. Peru)* 1950’, in Wojcikiewicz Almeida, P. & Sorel, J.-M., eds., *Latin America and the International Court of Justice: Contributions to International Law* (2017).

¹⁵ *Asylum Case* ([n 14](#)) 274. In this and the *Haya de la Torre Case (Colombia v Peru)* [1951] ICJ Rep. 71, the court was concerned, among others, with interpretation of the 1928 Havana Convention on Asylum, in force between Colombia and Peru, which embodied the right to grant asylum in embassies to political offenders in urgent cases. Colombia’s claim that it was entitled to qualify the offence in question as political and also to determine the urgency of the case was rejected by the court, as was its further claim that the territorial State was bound to allow the asylee to leave. Nevertheless, the court agreed that the offence was political, but disagreed on the issue of urgency. The resulting stalemate, in which Colombia was not bound to hand over the fugitive, notwithstanding the improper grant of asylum, and Peru was not bound to allow safe passage, was not covered by the Havana Convention or by any regional custom; the parties were urged to reach a friendly settlement.

¹⁶ On which, see [Ch. 4](#), s. 4.2.1.1.

¹⁷ Note, however, that a US proposal to limit art. 14 UDHR 48 to ‘temporary asylum’ was rejected: UN doc. E/CN.4/AC.1/SR.37 (18 May 1948) 14.

¹⁸ UNHCR, ‘UNHCR Statement on the Right to Asylum, UNHCR’s Supervisory Responsibility and the Duty of States to Cooperate with UNHCR in the Exercise of Its Supervisory Responsibility (Issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the Administrative Court of Sofia lodged on 18 October 2011—*Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees* (C-528/11))’ (Aug. 2012) para. 2.1.2.

¹⁹ See den Heijer ([n 2](#)) para. 18.06, who argues that this is why the European Charter includes two separate provisions, one on asylum (art. 18) and one on the principle of *non-refoulement* (art. 19). In Joined Cases C-57/09 and C-101/09 *B and D* (CJEU, Grand Chamber, 9 Nov. 2010) para. 121, the Court of Justice of the European Union (CJEU) stated that ‘Member States may grant a right of asylum under their national law to a person who is excluded from refugee status’, thus interpreting the concept of asylum as any form of protection that a State chooses to grant to an individual.

²⁰ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1098 (28 Jun. 2011)

para. 3. According to UNHCR, it includes, *inter alia*: '(i) access of asylum-seekers to fair and effective processes for determining status and protection needs, consistent with the 1951 Convention and its 1967 Protocol; (ii) the need to admit refugees to the territories of States; (iii) the need for rapid, unimpeded and safe UNHCR access to persons of concern; (iv) the need to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention; (v) the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards; (vi) the responsibility of host States to safeguard the civilian and peaceful nature of asylum; and (vii) the duty of refugees and asylum-seekers to respect and abide by the laws of host States': UNHCR Statement ([n 18](#)) para. 2.1.3, referring to Executive Committee Conclusion No. 82 (XLVIII) (1997) para. (d).

[21](#) Gil-Bazo argues that since the failed 1977 UN Conference on Territorial Asylum, the weight of English language scholarship has focused on specific categories of beneficiaries of asylum (for example, refugees), rather than on the broader institution of asylum. There remains, however, a 'lively debate' on the institution of asylum in the non-English literature, especially in Spanish: Gil-Bazo, M.-T., 'Asylum as a General Principle of International Law' (2015) 27 *IJRL* 3, 14. She suggests that the difference in approach may stem in part from the multiple concepts of 'law' in French and Spanish (*derecho/droit; ley/loi*) which do not have an English equivalent, and that this conception may also influence how English language scholars understand the content of international law (see 14–17).

[22](#) See [Ch. 5](#), s. 5.2.

[23](#) See, for example, Gammeltoft-Hansen, T. & Gammeltoft-Hansen, H., 'The Right to Seek—Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 *EJML* 439, 446; *John Doe v Canada*, Inter-American Commission of Human Rights, Report No. 78/11, Case No. 12.586 (21 Jul. 2011) para. 92; see also s. 4.1 below.

[24](#) Lauterpacht, H., *International Law and Human Rights* (1950) 421; see further text to [n 43](#). As Kimminich ([n 1](#)) 81 succinctly puts it: 'Das Recht, Asyl zu suchen, bedeutet nichts anderes als das Recht, sich auf die Flucht zu begeben.'

[25](#) Discussions took place in the Third Committee of the General Assembly, 3rd Session, 3 November 1948: see UN doc. A/C.3/SR.121, 328 (Mr Cassin, France), supported by Bolivia, 329, Mexico, 333 (note that 'opposite' should read 'apposite'); Belgium, 334; Pakistan, 338; opposed by the United Kingdom, 330; The Netherlands, 331; United States, 334; Philippines, 335; Lebanon, 336; Australia, 338; USSR, 342; some support in principle: India, 335; Brazil, 340. France's suggestion that the United Nations itself should be empowered to secure asylum was also opposed: UN doc. A/C.3/244 (1948). See also the Uruguayan proposal and Pakistan comment ([n 13](#)). For further detail on this debate, see Bashford and McAdam ([n 3](#)) 343–9; Gammeltoft-Hansen & Gammeltoft-Hansen ([n 23](#)); for further detail on the treatment of 'asylum' in international instruments and acts, see Goodwin-Gill, G. S., 'Declaration on Territorial Asylum: UN Audio-Visual Library <http://legal.un.org/avl/ha/dta/dta.html>'.

[26](#) UN doc. A/C.3/285/Rev.1, in UNGAOR [Part 1](#) (3rd Session, 1948) 'Annexes', 24

(emphasis added). This reflected the approach of the 1948 American Declaration of the Rights and Duties of Man, the first international instrument to include the right to asylum (art. XXVII), adopted a few months earlier.

²⁷ UN doc. A/C.3/253, reproduced in UN doc. A/C.3/285/Rev.1, UNGAOR Part 1 (3rd Session, 1948) ‘Annexes’, 24.

²⁸ UN doc. A/C.3/SR.121 (3 Nov. 1948) 330 (Mrs Corbet, United Kingdom) referring to amendment in UN doc. A/C.3/253 (1948). This contrasts with the position in the 1905 Aliens Act (5 Edw VII c 13) s. 1(3)(d) analysed in Bashford and McAdam (ⁿ 3).

²⁹ UN doc. A/C.3/SR.121 (3 Nov. 1948) 330–1 (Mrs Corbet, United Kingdom). While the United Kingdom was very supportive of the Universal Declaration, it was keen to avoid language that might be interpreted as imposing obligations on States. It proposed ‘to make minor changes in the articles concerning the right to asylum, the right of equal pay, and the right to work. Article 21 concerning the right to work they now feel may be interpreted to mean that Governments are required to find work for everyone’: Letter from R. A. D. Ford to Escott Reid (13 Sep. 1948) NAC RG 25, vol. 3699, File 5475-DG-2-40, cited in Schabas, W. A., ‘Canada and the Adoption of the Universal Declaration of Human Rights’ (1998) 43 *McGill Law Journal* 403, 417.

³⁰ UN doc. A/C.3/SR.122 (4 Nov. 1948) 345 (Mr Saint-Lot, Haiti), 345 (Miss Zuloaga, Venezuela), 346 (Mr Contoumas, Greece).

³¹ UN doc. A/C.3/SR.121 (3 Nov. 1948) 330 (Mrs Corbet, United Kingdom). Similarly, the Saudi Arabian delegate (Mr Baroody) stated that while every persecuted person should be able to enjoy the right of asylum, ‘[t]hat did not mean ... that everyone had the right to obtain asylum in the country of his choice ... Such a principle would be a flagrant violation of the sovereignty of the State concerned’: 331. See also the remarks of the Venezuelan delegate (Mr Plaza) 332; Indian delegate (Mr Habib) 335.

³² UN doc. A/C.3/SR.121(3 Nov. 1948) 330 (Mrs Corbet, United Kingdom).

³³ Ibid., 335 (Mr Habib, India); 340 (Mrs Corbet, United Kingdom); see also support by the Australian delegation (Mr Watt) 338.

³⁴ Ibid., 331 (Mrs Corbet, United Kingdom).

³⁵ Ibid., 338 (Mr Watt, Australia).

³⁶ UN doc. A/C.3/SR.122(4 Nov. 1948) 342 (Mr Cassin, France).

³⁷ Ibid., 347 (Mr Cassin, France).

³⁸ Ibid., 343 (Mr Pavlov, USSR).

³⁹ UN doc. A/C.3/SR.121(3 Nov. 1948) 336 (Mr Azkoul, Lebanon).

⁴⁰ Ibid., 335 (Mr Azkoul, Lebanon).

⁴¹ Ibid., 340 (Mr de Athayde, Brazil).

⁴² Ibid., 337 (Mr Shahi, Pakistan).

⁴³ Lauterpacht (ⁿ 24) 422. Lauterpacht drafted his own International Bill of Rights, which he submitted to the Brussels Conference of the International Law Association (ILA) in 1948.

In a revised draft, he proposed in art. 10 that: ‘Within the limits of public security and economic capacity of the State, there shall be full and effective recognition of the right of asylum for political offenders and for fugitives from persecution.’ *Ibid.*, 345–6. See also Lauterpacht, H., ‘The Universal Declaration of Human Rights’ (1948) 25 *BYIL* 354.

⁴⁴ UN doc. E/600 (1947) para. 48, as cited in Weis, P., ‘Human Rights and Refugees’ (1971) 1 *Israel Yearbook on Human Rights* 35, 38.

⁴⁵ It was said to be ‘the complement of the right of peoples to self-determination and of the right to life; and its guarantee against extradition in certain instances was a proper concomitant of the right against arbitrary expulsion’: UN Commission on Human Rights, *Report of the 8th Session* (1952): UN doc. E/2256, para. 202.

⁴⁶ UN doc. E/CN.4/L.190/Rev.2 (2 Jun. 1952).

⁴⁷ UN doc. E/CN.4/L.184 (28 May 1952).

⁴⁸ ‘The High Contracting Parties shall strive to take steps, individually and in concert with the other High Contracting Parties and with the United Nations, to ensure the effective granting of this right’: UN doc. E/CN.4/L.191 (2 Jun. 1952).

⁴⁹ UN Commission on Human Rights (ⁿ 45) para. 203.

⁵⁰ Ibid. France’s amendment was rejected by nine votes to three with six abstentions; the USSR’s proposal was rejected by 10 votes to five with three abstentions; and the joint proposal was rejected by 10 votes to four with four abstentions: *ibid.*, para. 204. This was despite interventions by the UN High Commissioner for Refugees and UNHCR’s Chief Legal Adviser: Holborn, L. W., *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972*, vol. 1 (1975) 228.

⁵¹ UNGA res. 428(V) (14 Dec. 1950); see also UNGA res. 430(V) of the same date, urgently appealing to States to assist the IRO in its resettlement efforts.

⁵² *Ad hoc* Committee on Statelessness and Related Problems, Memorandum by the Secretary-General, UN doc. E/AC.32/2 (3 Jan. 1950) 22, preliminary draft convention, art. 3: ‘1. In pursuance of Article 14 of the Universal Declaration ... the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution ... 2. [They] shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum ... They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.’ The Committee decided that the convention should not deal with the right of asylum; see comments by the US delegate, Louis Henkin, in the first session of the *Ad hoc* Committee: UN doc. E/AC.32/SR.20 (10 Feb. 1950) paras. 15, 44, 54–6; also UN doc. E/AC.32/SR.21 (2 Feb. 1950) paras. 12, 16, 26. See Weis, P., ‘Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees’ (1953) 30 *BYIL* 478, 481.

⁵³ For discussion in the 1951 Conference on asylum as a right and not a duty of the State, see Colombia, UN doc. A/CONF.2/SR.13 (10 Jul. 1950) 12; United Kingdom, *ibid.*, 14. Cf. France, ‘the right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it’: *ibid.*, 13. ECOSOC’s

instructions to the *Ad hoc* Committee on Statelessness and Related Problems were to assist it in implementing the principles established in arts. 14 and 15 UDHR 48: *Ad hoc* Committee on Statelessness and Related Problems, First Session, ‘Summary Record of the 1st Meeting’ New York (16 Jan. 1950) UN doc. E/AC.32/SR.1 (23 Jan. 1950) para. 4 (Secretariat).

⁵⁴ ECOSOC, *Official Records*, 22nd Session (1956) Supp., paras. 109–12. Other States objected, citing issues of sovereignty and domestic jurisdiction; see UN doc. E/CN.4/781 (1959) 3 (Czechoslovakia); *ibid.*, 10–11 (United Kingdom).

⁵⁵ UNGA res. 1400(XIV) (21 Sep. 1959). The ILC had been tentatively involved with the issue some ten years earlier, in debate on an article proposed for inclusion in a draft declaration on the rights and duties of States: *Yearbook of the International Law Commission* (1949) 125, paras. 49 ff. The proposed article, providing that ‘[e]very State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences which the State according asylum deems to have a political character’, was ultimately not adopted, because it was considered too complex an issue to be dealt with in a single article: UN doc. A/CN.4/SR.20 (1949). During debate, it was said that ‘[t]he duty corresponding to the right of asylum was not that of granting asylum whenever it was requested, but that of respect for the asylum granted on the part of the State of which the refugee was a national. That State should in no case consider the granting of asylum as an unfriendly act against it.’: ILC, First Session, ‘Summary Record of the 16th Meeting’ (5 May 1949): UN doc. A/CN.4/SR.16, 16 (Mr Yepes).

⁵⁶ UN doc. A/CN.4/245 (1971). In 1972, the ILA adopted texts for draft conventions on diplomatic and territorial asylum: ILA, *Report of the 55th Session* (1972) 109–207.

⁵⁷ UNGA res. 2312(XXII) (14 Dec. 1967). For a detailed account of the background, see Goodwin-Gill (ⁿ 26); Weis, P., ‘The United Nations Declaration on Territorial Asylum’ (1969) 7 *CanYIL* 92; Taylor, S. & Neumann, K., ‘Australia and the 1967 Declaration on Territorial Asylum: A Case Study of the Making of International Refugee and Human Rights Law’ (2018) 30 *IJRL* 8; Taylor, S. & Boyd, J., ‘The Temporary Refuge Initiative: A Close Look at Australia’s Attempt to Reshape International Refugee Law’ (2020) 42 *SydLR* 251. The 1967 Protocol relating to the Status of Refugees was limited to updating the refugee definition and does not deal with the question of asylum.

⁵⁸ Art. 1.

⁵⁹ See UN docs. A/C.6/SR. 983–9 (1967); *Report of the Sixth Committee*: UN doc. A/6912 (1967) paras. 64–5; see also the Preamble to the 1967 Declaration, adopted by UNGA res. 2312(XXII) (14 Dec. 1967).

⁶⁰ UN doc. A/8712 (1973) appx., Annex 1 (emphasis added). This and other drafts are collected in Grahl-Madsen, A., *Territorial Asylum* (1980), Annexes KK ff.

⁶¹ UN doc. A/C.3/SR.1956 (21 Nov. 1972) paras. 5, 23; UN doc. A/C.3/SR.1957 (22 Nov. 1972) para. 25.

⁶² UN doc. A/9612/Add.3 (1974) Annex. Of 91 States that made known their views, 76 favoured elaboration of a convention on territorial asylum. See also UN docs.

A/C.3/SR.2098–101 and SR.2103, paras. 44–60 (1974).

⁶³ UNGA res. 3272(XXIX) (9 Jan. 1975).

⁶⁴ UN doc. A/10177 and Corr. 1 (1975); Grahl-Madsen ([n 60](#)) Annex RR; also UN doc. A/C.3/SR.2161–4 (1975).

⁶⁵ Emphasis added. Cf. the draft prepared by the ILA at its 55th Conference in 1972, under which States would ‘undertake to grant refuge in their territories to all those who are seeking asylum’, save where danger to the security of the country or to the safety and welfare of the community was apprehended (art. 1(b)). Art. 3, however, proposed that ‘[a] grant of asylum does not imply any right of permanent immigration’: ILA, *Report of 55th Session* (1972); text also in Grahl-Madsen ([n 60](#)) Annex LL.

⁶⁶ Art. 4 did provide for provisional admission pending consideration of a request for asylum, but meeting the qualifications still gave no entitlement to the grant of asylum.

⁶⁷ UNGA res. 3456(XXX) (9 Dec. 1975).

⁶⁸ Text in Grahl-Madsen ([n 60](#)) Annex TT.

⁶⁹ ‘Towards an Asylum Convention’ Report of the Nansen Symposium (1977); text of draft convention proposed by Grahl-Madsen & Melander, also in Grahl-Madsen ([n 60](#)) Annex UU.

⁷⁰ See, generally, Grahl-Madsen ([n 60](#)); Weis, P., ‘The Draft Convention on Territorial Asylum’ (1979) 50 *BYIL* 176; Weis ([n 44](#)).

⁷¹ UN doc. A/CONF.78/DC.1 (20 Jan. 1977). For full text of the articles considered by the Committee of the Whole and by the Drafting Committee, see *Report of the United Nations Conference on Territorial Asylum*: UN doc. A/CONF.78/12 (21 Apr. 1977).

⁷² *Report* ([n 71](#)) para. 25; also *Report* of the UNHCR to ECOSOC: UN doc. E/5987 (Jun. 1977) paras. 10–16.

⁷³ UN doc. A/C.3732/SR.49 (Nov. 1977) paras. 16–19.

⁷⁴ See generally UNHCR, *The State of the World’s Refugees* (1993) 26–9, 117–20; ‘Focus on the Comprehensive Plan of Action’ (1993) 5 *IJRL* 507.

⁷⁵ The various measures adopted since the entry into force of the Treaty of Amsterdam and the Tampere Conclusions in 1999 are discussed throughout this work.

⁷⁶ Vienna Declaration and Programme of Action, UN World Conference on Human Rights: UN doc. A/CONF.157/23 (12 Jul. 1993) para. 23.

⁷⁷ Sub-Commission on Human Rights, Res. 2000/20 on ‘The Right to Seek and Enjoy Asylum’ (18 Aug. 2000).

⁷⁸ Sub-Commission on Human Rights, Res. 2001/16 on ‘International Protection for Refugees and Displaced Persons’ (16 Aug. 2001); Sub-Commission on Human Rights, Res. 2002/23 on ‘International Protection for Refugees’ (14 Aug. 2002).

⁷⁹ See, for example, UNGA res. 62/124 (18 Dec. 2007) para. 24; 63/148 (18 Dec. 2008) para. 24; 64/127 (18 Dec. 2009) para. 29; 65/194 (21 Dec. 2010) para. 30; 66/133 (19 Dec. 2011) para. 28; 67/149 (20 Dec. 2012) para. 31; 68/141 (18 Dec. 2013) para. 34; 69/152 (18

Dec. 2014) para. 36; 70/135 (17 Dec. 2015) para. 27; 71/172 (19 Dec. 2016) para. 28.

⁸⁰ Executive Committee Conclusions No. 52 (1988), No. 71 (1993), No. 75 (1994), No. 77 (1995), No. 82 (1997), No. 85 (1998), No. 94 (2002), No. 97 (2003), No. 101 (2004), No. 103 (2005), No. 108 (2008).

⁸¹ See Executive Committee Conclusion No. 82 on Safeguarding Asylum (1997) para. (d), stressing the importance of the principle of *non-refoulement*, irrespective of whether persons have been formally granted refugee status; access to fair and effective procedures for determining status and protection needs; the need to admit refugees to State territories; the need to grant UNHCR rapid, unimpeded, and safe access to persons of concern; scrupulous application of the exclusion clauses; the duty to treat refugees and asylum seekers in accordance with international human rights and refugee law standards; States' responsibility to ensure the civil nature of asylum by separating refugees from armed elements; and the obligation of refugees and asylum seekers to abide by the laws of host States. The 2001 Declaration of States Parties calls on States to 'take measures to strengthen asylum and render protection more effective', and to 'continue their efforts aimed at ensuring the integrity of the asylum institution': Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (13 Dec. 2001): UN doc. HCR/MMSP/2001/09 (16 Jan. 2002) paras. 6 and 7, respectively.

⁸² UNGA res. 71/1, 'New York Declaration for Refugees and Migrants' (19 Sep. 2016) para. 67.

⁸³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep. 422. On exclusion and status, see also Ch. 7, s. 7.1. On the separate, but related, matter of providing asylum to witnesses who give evidence in international criminal trials, see Yabasun, D. & Holvoet, M., 'Seeking Asylum before the International Criminal Court: Another Challenge for a Court in Need of Credibility' (2013) 13 *International Criminal Law Review* 725.

⁸⁴ Inter-American Court of Human Rights (n 11) para. 88.: 'Until the 1954 Conventions, the term "asylum" was used exclusively to refer to the specific form of "diplomatic asylum", also known as "political asylum", relating to that granted by States in embassies, legations, warships and military camps or aircraft'. See, for example, 1889 Montevideo Treaty on Penal Law, OAS *Official Records* OEA/Ser.X/1, Treaty Series 34, revised by the 1940 Montevideo Treaty on International Penal Law; 1928 Havana Convention on Asylum, OAS *Official Records*, OEA/Ser.X/I, Treaty Series 34; 1933 Montevideo Convention on Political Asylum (adopted 26 December 1933, entered into force 28 March 1935) OASTS 34; 1939 Montevideo Treaty on Asylum and Political Refuge (adopted 4 August 1939); 1954 Caracas Convention on Diplomatic Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 18; 1954 Caracas Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 19. See generally Fischel de Andrade, J., 'Regional Refugee Regimes: Latin America', in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021).

⁸⁵ Arts. 1–4.

⁸⁶ That is, asylum granted ‘in legations, war vessels, and military camps or aircraft, to persons being sought for political offenses’: 1954 Caracas Convention on Diplomatic Asylum, art. 1.

⁸⁷ Ibid., arts. 2, 4.

⁸⁸ Ibid., art. 17. On diplomatic asylum, see Ch. 6, s. 1.2.1.

⁸⁹ Art. XXVII; see Inter-American Court of Human Rights ([n 11](#)) para. 112.

⁹⁰ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art. 22(7). See also earlier treaties, such as the 1902 Convention on the Rights of Aliens, the 1928 Convention on the Status of Aliens, the 1928 Convention on Asylum, and the 1933 Convention on Political Asylum, cited in Gil-Bazo & Nogueira ([n 2](#)) 8. See also the American Declaration of the Rights and Duties of Man, art. 27: ‘Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements’, applied in *John Doe v Canada* ([n 23](#)) para. 128. The provision was recognized as having binding force for the OAS Member States: res. 23/81, Case 2141 (United States) (6 Mar. 1981); published in *Annual Report of the Inter-American Commission on Human Rights 1980–1981*, OEA/Ser.L/V/II.54 Doc. 9 rev. 1 (16 Oct. 1981) para. 16; Inter-American Court of Human Rights, *Advisory Opinion OC-10/89 on the Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights requested by the Government of the Republic of Colombia* (14 Jul. 1989) Series A. No. 10.

⁹¹ *Haitian Centre for Human Rights v United States*, Case 10.675, Inter-American Commission on Human Rights (13 Mar. 1997) paras. 151–4. This analysis comes from den Heijer ([n 2](#)) para 18.26 fn 51.

⁹² *Advisory Opinion OC-25/18 of 30 May 2018* ([n 11](#)).

⁹³ Gil-Bazo & Nogueira ([n 2](#)) 9–11.

⁹⁴ African Charter on Human and Peoples’ Rights (adopted 17 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art. 12(3). See generally Sharpe, M., ‘Regional Refugee Regimes: Africa’, in Costello, Foster, & McAdam ([n 84](#)).

⁹⁵ *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l’Homme v Rwanda*, 27/89-46/90-49/91-99/93, African Commission on Human and Peoples’ Rights (Oct. 1996) para. 31.

⁹⁶ Art. II(4) OAU 69. The OAU has been succeeded by the African Union (AU).

⁹⁷ Gil-Bazo & Nogueira ([n 2](#)) 13.

⁹⁸ Charter of Fundamental Rights of the European Union, 2000/C 364/01. The French, Greek, Italian, Portuguese, Romanian, and Spanish versions refer to a right of asylum (‘droit d’asile’, ‘derecho de asilo’, ‘diritto di asilo’, etc.); the English and Dutch versions, for

instance, refer to the right *to* asylum; and in some other languages there is no preposition (for example, German, Hungarian) or relevant distinction between ‘of’ and ‘to’ (Bulgarian): Gil-Bazo, M.-T., ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27(3) *RSQ* 33, 41. For a detailed analysis of the history, sources, and potential scope of the provision, see den Heijer (n 2). Moreno-Lax notes that until 2000, Europe and Asia were the only regions not to have acknowledged a right to asylum in any legal form: Moreno-Lax, V., *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2017) 365. See also Gil-Bazo, M.-T. & Guild, E., ‘The Right to Asylum’, in Costello, Foster, & McAdam (n 84).

⁹⁹ See Gil-Bazo (n 98) 46. For an overview of its development, content, and scope, see Moreno-Lax (n 98) 368 ff.

¹⁰⁰ See art. 51(2): ‘This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.’ Art. 52(3) provides that the Charter respects ECHR 50, its Protocols, and the case law of the European Court of Human Rights. The Preamble explains that the Charter ‘reaffirms’ existing rights. This approach is also reflected in the drafting documents: den Heijer (n 2) para. 18.26.

¹⁰¹ Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016) 49.

¹⁰² Gil-Bazo (n 98) 46.

¹⁰³ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (CJEU, Grand Chamber, 21 Dec. 2011); Case C-528/11 *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet* (CJEU, Fourth Chamber, 30 May 2013). Gil-Bazo contends that the constitutional traditions of many Member States guarantee the right to be granted asylum, leading her to conclude that the Charter entrenches a subjective and enforceable individual right to asylum: Gil-Bazo (n 98) 47. While this probably overstates the case, Hailbronner and Gogolin go too far the other way, arguing that the express reference to the Refugee Convention makes ‘clear’ that article 18 ‘is not intended to grant an individual right of asylum beyond the rights derived from the non-refoulement provision of Art. 33 Geneva Refugee Convention’: Hailbronner, K. & Gogolin, J., ‘Asylum, Territorial’ *Max Planck Encyclopedia of Public International Law* (Sep. 2013) para. 36.

¹⁰⁴ UNHCR Statement (n 18) para. 2.2.9 (fns omitted). This content is derived from EU Member States’ obligations under international and EU law. For UNHCR’s assessment of its content in the international law context, see para. 2.1.3, extracted at n 20 above.

¹⁰⁵ Moreno-Lax (n 98) 393.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 368.

¹⁰⁸ For instance, Gil-Bazo & Nogueira (n 2) 6 conclude that: ‘The right to asylum is today a human right of individuals guaranteed by international instruments of regional scope, which coexists with the already established right of states to grant it. Today, two thirds of the States parties to the 1951 Refugee Convention and/or its Protocol are also bound by an

obligation under international law (of regional scope) to grant asylum. In other words, by virtue of international human rights law, asylum is no longer merely a matter of state discretion’.

¹⁰⁹ UNGA resolutions simply affirm the right to seek asylum, and do not explain the meaning of the concept: UNGA res. 50/152 (21 Dec. 1995) para. 4; 51/75 (12 Dec. 1996) para. 3; 52/103 (9 Feb. 1998) para. 5; 53/125 (12 Feb. 1999) para. 5; 54/146 (17 Dec. 1999) para. 6; 55/74 (4 Dec. 2000) para. 6.

¹¹⁰ See, generally, Vernant, J., *The Refugee in the Post-War World* (1953); Holborn, L., *The International Refugee Organization* (1956).

¹¹¹ See, for example, UNGA res. 430(V) (14 Dec. 1950), urgently appealing to all States to assist the IRO with resettlement; UNGA res. 538(VI) (2 Feb. 1952), appealing especially to States interested in migration.

¹¹² UNGA res. 1166(XII) (26 Nov. 1957) para. 2, reaffirming the basic approach set out in para. 1 of the UNHCR Statute; also UNGA res. 1285(XIII) (5 Dec. 1958), on special efforts to be made in the context of World Refugee Year.

¹¹³ UNGA res. 832(IX) (21 Oct. 1954): ‘Considering that, while the ultimate responsibility for ... refugees ... falls in fact upon the countries of residence, certain of these countries have to face particularly heavy burdens as a result of their geographical situation, and some complementary aid has been shown to be necessary’.

¹¹⁴ UNGA res. 1167(XII) (26 Nov. 1957), recognizing the heavy burden placed on the government of Hong Kong by the massive influx of Chinese refugees, and noting that the problem is such ‘as to be of concern to the international community’.

¹¹⁵ For general analysis, see Hathaway, J. C., *The Rights of Refugees under International Law* (2nd edn, 2021) 313–37. For analysis of the ‘process of legal and policy transfer’ of measures adopted in the US and Australia to limit the arrival of asylum seekers, see Ghezelbash, D., *Refugee Lost: Asylum Law in an Interdependent World* (2018). On the influence of EU asylum law, see Lambert, H., McAdam, J., & Fullerton, M., eds., *The Global Reach of European Refugee Law* (2013).

¹¹⁶ See, for example, Ghezelbash (ⁿ 115); Moreno-Lax, V., ‘Protection at Sea and the Denial of Asylum’, in Costello, Foster, & McAdam (ⁿ 84); Gammeltoft-Hansen, T. & Tan, N. F., ‘Extraterritorial Migration Control and Deterrence’, in Costello, Foster, & McAdam (ⁿ 84); Schoenholtz, A. I., Ramji-Nogales, J., & Schrag, P. G., *The End of Asylum* (2021) Ch. 4; Mitsilegas, V., Moreno-Lax, V., & Vavoula, N., eds., *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020); McAdam, J. & Purcell, K., ‘Refugee Protection in the Howard Years: Obstructing the Right to Seek Asylum’ (2008) 27 *AustYBIL* 87; Guild, E., ‘The Complex Relationship of Asylum and Border Controls in the European Union’, in Chetail, V., De Bruycker, P., & Maiani, F., eds., *Reforming the Common European Asylum System* (2016); Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011) 125–36; Gammeltoft-Hansen, T., ‘International Cooperation on Migration Control: Towards a Research Agenda

for Refugee Law' (2018) 20 *EJML* 373.

¹¹⁷ Moreno-Lax ([n 98](#)) 2. She argues (at 4) that '[t]he outcome is a situation of non-differentiation in relation to other migrants prior to arrival that entails that, when fighting irregular flows, their movement is also affected.'

¹¹⁸ See, for example, the UK pre-clearance procedures in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2004] UKHL 55, [2005] 2 AC 1.

¹¹⁹ On good faith in international law, see s. 5.3 below. In relation to good faith and the right to seek asylum, see: Lauterpacht ([n 24](#)) 346.

¹²⁰ Guiraudon, V., 'Before the EU Border: Remote Control of the "Huddled Masses"', in Groenendijk, K., Guild, E., & Minderhoud, P., eds., *In Search of Europe's Borders* (2003) 194.

¹²¹ See [Ch. 6](#), s. 1.1.2.

¹²² See *Roma Rights* ([n 118](#)); although see discussion below, with respect to the protection afforded by ECHR 50 and CRC 89; Noll ([n 12](#)).

¹²³ UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Austria': UN doc. CCPR/C/79/Add.103 (19 Nov. 1998) para. 11. The Human Rights Committee has also requested States to 'include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country': Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)': UN doc. CCPR/C/21/Rev.1/Add.9 (1999) para. 10.

¹²⁴ *Lichtensztein v Uruguay*, Comm. No. 77/1980, UN doc. A/38/40 (31 Mar. 1983) para. 8.3; *Montero v Uruguay*, Comm. No. 106/1981, UN doc. A/38/40 (31 Mar. 1983) 186, para. 9.4; *Nuñez v Uruguay*, Comm No. 108/1981, UN doc. A/38/40 (22 Jul. 1983) paras. 9.2 and 9.3. See [Ch. 6](#), s. 1.1.

¹²⁵ *Roma Rights* ([n 118](#)) para. 28.

¹²⁶ See discussion in Schachter, O., *International Law in Theory and Practice* (1991) 336–41.

¹²⁷ Noll, G., *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000) 357–62 argues that neither the UDHR 48 generally, nor art. 14 specifically, amounts to binding international law. See also Lambert, H., 'Customary Refugee Law', in Costello, Foster, & McAdam ([n 84](#)) 254–56, who concludes (at 256) that: 'a customary right to be granted/receive asylum remains contested, despite scholars beginning to test the norm against the requirements of State practice and *opinio juris*.'

¹²⁸ UNHCR Executive Committee Standing Committee (18th Meeting), 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach': EC/50/SC/CRP.17 (9 Jun. 2000) para. 10. For analysis of interception vis-à-vis the principle of *non-refoulement*, see [Ch. 6](#) (for example, s. 1.1.2).

¹²⁹ Executive Committee Standing Committee ([n 128](#)) para. 13. Whereas ‘airline liaison officers’ support carriers with passenger screening, ‘immigration liaison officers’ undertake wider-ranging activities, including collecting information and advising host State authorities: den Heijer, M., *Europe and Extraterritorial Asylum* (2012) 177 fn 50; for comparative analysis in Australia, Canada, and the UK, see UK Refugee Council, *Remote Controls* (2008); Mountz, A., *Seeking Asylum: Human Smuggling and Bureaucracy at the Border* (2010).

¹³⁰ Executive Committee Conclusion No. 97 (2003). See also references in [n 116](#) above.

¹³¹ For a historical overview and account of State practice, see Ryan, B. & Mitsilegas, V., eds., *Extraterritorial Immigration Control: Legal Challenges* (2010) 22–35.

¹³² Since 1999, the European Union has spent millions of euros on increasing and strengthening border patrols and maritime surveillance, including the use of satellites to detect people crossing borders, and biometric and fingerprinting equipment to track their movement once they arrive in the European Union: European Council on Refugees and Exiles (ECRE), ‘Broken Promises—Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999—Brussels 2004’ (Jun. 2004) 15. See Council Regulation (EC) No. 2725/ 2000 of 11 December 2000, concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1; Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement regulation (EC) No. 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2002] OJ L62/1; Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L180/1; Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast) COM(2016) 272 final (now superseded by European Commission Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation

(EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final (23 Sep. 2020), which would repeal and replace Regulation (EU) No. 604/2013).

¹³³ Türk, V., ‘Forced Migration and Security’ (2003) 15 *IJRL* 113, 115; special issue on terrorism and refugee protection (2010) 29(4) *RSQ*; Gilbert, G., ‘Running Scared Since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation’, in Simeon, J. C., ed., *Critical Issues in International Refugee Law: Strategies Toward Interpretive Harmony* (2010); Saul, B., ‘“Fair Shake of the Sauce Bottle”: Fairer ASIO Security Assessments of Refugees’ (2012) 37 *Alternative Law Journal* 221; Saul, B., ‘Protecting Refugees in the Global “War on Terror”’, in Hathaway, J. C., ed., *Human Rights and Refugee Law*, vol II (2013); Gilbert, G., ‘Terrorism and International Refugee Law’, in Saul, B., ed., *Research Handbook on International Law and Terrorism* (2014). Cf. references to asylum, and to the need for State measures taken to combat terrorism to be consistent with their other obligations under international law, including international refugee law, in the following Security Council resolutions on terrorism adopted after 11 September 2001: SC res. 1373 (28 Sep. 2001); SC res. 1624 (14 Sep. 2005). See also, however, Executive Committee Conclusion No. 94 (2002) on the civilian and humanitarian character of asylum.

¹³⁴ For a general overview, see Schloenhardt, A., ‘Smuggling of Migrants and Refugees’ and Briddick, C. & Stoyanova, V., ‘Human Trafficking and Refugees’, in Costello, Foster, and McAdam ([n 84](#)).

¹³⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507, arts. 16, 18(7), 18(8), 19(1); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, arts. 12(b), 6, 7, 14(1).

¹³⁶ *Report on Pre-ExCom Consultations with Non-Governmental Organisations* (Geneva, 24–26 Sep. 2003) Annex IX (2 Oct. 2003): ‘Particularly when interception occurs in the territory of a State that is not party to the Convention or that lacks fair and effective asylum procedures, the intercepting State must accept responsibility for the protection of the person.’ NGOs called for UNHCR to elaborate Guidelines on Safeguards for Interception Measures, as stated in the *Agenda for Protection* (3rd edn., 2003) Goal 2, Objective 1.

¹³⁷ Brouwer, A. & Kumin, J., ‘Interception and Asylum: When Migration Control and Human Rights Collide’ (2003) 21(4) *Refugee* 6, 18.

¹³⁸ Executive Committee Standing Committee ([n 128](#)) para. 20.

¹³⁹ See also [Ch. 6](#), s. 1.1.

¹⁴⁰ This is addressed in [Ch. 6](#) in the context of the principle of *non-refoulement*. See also Gammeltoft-Hansen, T. & Hathaway, J. C., ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235, 244 ff.

¹⁴¹ *R v Uxbridge Magistrates’ Court, ex parte Adimi* [2001] QB 667, para. 3.

¹⁴² Office of the High Commissioner for Human Rights, in cooperation with the Global Alliance Against Traffic in Women, ‘Expert Consultation on Human Rights at International Borders: Exploring Gaps in Policy and Practice’ Background Paper (22–23 Mar. 2012) 4 <http://www.ohchr.org/Documents/Issues/Migration/Events/HumanRightsatInternationalBordersExploringGapsinPolicyandPracticeBackgroundPaper.pdf>; see also International Organization for Migration, Missing Migrants Project <https://missingmigrants.iom.int/latest-global-figures>; Australian Border Deaths Database (Monash University) <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>.

¹⁴³ Sometimes carrier sanctions legislation will provide that it is to operate without prejudice to the State’s international obligations; see, for example, Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45; Immigration and Refugee Protection Act, s. 148 (Canada).

¹⁴⁴ See art. 5, ‘Conduct of persons or entities exercising elements of governmental authority’, in the ILC’s ‘Articles on the Responsibility of States for Internationally Wrongful Acts’: UNGA res. 56/83 (12 Dec. 2001) Annex. The ILC’s commentary to art. 5 specifically mentions as an example of attribution the situation where ‘[p]rivate or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine.’ See Crawford, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 100.

¹⁴⁵ Art. 8, ‘Conduct directed or controlled by a State’; see also the cases cited in the Commentary thereto: Crawford (ⁿ 144) 110 fn 161.

¹⁴⁶ Moreno-Lax, V., ‘Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’ (2008) 10 *EJML* 315; Gammeltoft-Hansen (ⁿ 116) 134; Gammeltoft-Hansen & Gammeltoft-Hansen (ⁿ 23) 448–50, who argue that there is ‘little doubt that the function of the EU visa is, at least in part, to deny refugees access to EU territory’ (449). See also Sianni, A., ‘Interception Practices in Europe and Their Implications’ (2003) 21(4) *Refugee* 25, 26; Noll (ⁿ 12) 567–70. For details on the EU visa regime, including ‘white’ lists and ‘black’ lists, see Costello (ⁿ 101) 91–3; den Heijer (ⁿ 129) 172–4. For a history of visas, see Torpey, J., *The Invention of the Passport: Surveillance, Citizenship and the State* (2000); for an overview of their application historically and now, see Ryan, B., ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’, in Ryan & Mitsilegas (ⁿ 131) 4–14.

¹⁴⁷ Although note comments by the House of Lords in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5.

¹⁴⁸ Gammeltoft-Hansen (ⁿ 116) 134. A wider approach is taken in the Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi*, who argues that all border control activities, including visa regimes and pre-clearance measures, ‘constitute forms of exercise of the State

function of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out': *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, 76 (see also 70); see also discussion in Costello (n 101) 244–5.

¹⁴⁹ Brouwer & Kumin (n 137) 8.

¹⁵⁰ For example, during the exodus of refugees from Bosnia-Herzegovina in 1992, Finland and the Benelux States introduced visa requirements for Bosnians: Argent, T., 'Croatia's Crucible: Providing Asylum for Refugees from Bosnia and Herzegovina', United States Committee for Refugees, Issues Paper (Oct. 1992) 17; see also Amnesty International, 'Former Yugoslavia: Recommended Actions relating to Bosnia-Herzegovina: Gross Abuses of Basic Human Rights' (AI Index EUR 48/26/92) 4–5. Brouwer & Kumin (n 137) 6 fn 16 cite Citizenship and Immigration Canada statistics pertaining to the introduction of visas for Hungarians and Zimbabweans in December 2001, which had a dramatic effect on the reduction of asylum claims. In the case of Hungarians, numbers fell from 4,163 in 2001 to almost zero in 2002.

¹⁵¹ Morrison, J. & Crosland, B., 'The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy' UNHCR *New Issues in Refugee Research*, Working Paper No. 39 (2001) 28.

¹⁵² Coleman, N., 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *EJML* 23, 30. Sweden's imposition of a visa requirement for Bosnians in June 1993 unequivocally resulted in a significant fall in asylum applications: from 25,100 asylum requests filed with the Swedish Immigration Board in 1993, to 2,649 in 1994: Noll (n 127) 5.

¹⁵³ Council of Europe & UNHCR, 'Proceedings: Roundtable Process on Carriers' Liability: Second Expert Meeting on Carriers' Liability, Topic B: Respect of the Humanitarian Dimension' Brussels (24 Jun. 2002) 3, cited in Brouwer & Kumin (n 137) endnote 17.

¹⁵⁴ For discussion of protected entry procedures, see Ch. 10, s. 2.4; see also Higgins, C., *Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees* (Kaldor Centre for International Refugee Law, Policy Brief 8, Nov. 2019). Visas are issued to refugees and others accepted for *resettlement* to enable them to travel and enter the destination country lawfully; see, for example, the variety of offshore humanitarian visas issued by Australia: Migration Regulations 1994 (Cth) Sch. 1, 1402. Brazil instituted a visa enabling Syrian asylum seekers to travel safely to Brazil to have their protection claim assessed there: Jubilut, L. L., de Andrade, C. S. M., & de Lima Madureira, A., 'Humanitarian Visas: Building on Brazil's Experience' (2016) 53 *FMR* 76; Italy established the 'humanitarian corridors' programme to allow Syrian asylum seekers to travel to Italy to claim asylum: Squire, V., 'Flights to Italy for Refugees Offer a Humanitarian Way Forward for Europe' *The Conversation* (6 Oct. 2016) <https://theconversation.com/flights-to-italy-for-refugees-offer-a-humanitarian-way-forward-for-europe-66451>; Mallardo, A., 'Humanitarian Corridors: A Tool to Respond to Refugees' Crises' *Border Criminologies* blog (3 May 2017) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder->

¹⁵⁵ See UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants: Report of the Secretary-General*: UN doc. A/70/59 (21 Apr. 2016), paras. 28–32.

¹⁵⁶ ECRE, ‘The ECRE Tampere Dossier’ (Jun. 2000) 12.

¹⁵⁷ ECRE ([n 132](#)) 17; Clayton, J. & Holland, H., ‘Over One Million Sea Arrivals reach Europe in 2015’ *UNHCR News* (30 Dec. 2015) <http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> (84 per cent of asylum seekers entering the EU in 2015 came from the top 10 refugee-producing countries).

¹⁵⁸ Between 1987 and 2012, the UK fined 125,436 people attempting to travel with inappropriate or insufficient documentation: UK Home Office and Immigration Enforcement, ‘The Number of Cases and Fines since the Introduction of Carrier Sanctions from 1987 to 2012’, FOI release 30000 (30 Jan. 2014). Carrier sanctions were introduced into modern UK legislation in 1987, but they were included in the Aliens Act 1905, ss. 1(5), 7 and in the US 1882 Immigration Act, s. 4.

¹⁵⁹ See, for example, Council Regulation (EC) No. 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network [2004] OJ L64/1. See generally den Heijer ([n 129](#)) 177–9. For a historical overview and examples from State practice, see Ryan ([n 146](#)) 14–22. On juxtaposed controls, see Clayton, G., ‘The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control’, in Ryan & Mitsilegas ([n 131](#)). Gammeltoft-Hansen and Hathaway describe practices like these involving more than one State as ‘cooperative deterrence’: Gammeltoft-Hansen & Hathaway ([n 140](#)); Gammeltoft-Hansen ([n 116](#)).

¹⁶⁰ See, for example, Council Directive 2001/51/EC ([n 143](#)). On carrier sanctions in international law, see, for example, Feller, E., ‘Carrier Sanctions and International Law’ (1989) 1 *IJRL* 48; Nicholson, F., ‘Implementation of the Immigration (Carriers’ Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?’ (1997) 46 *ICLQ* 586, 610–23 (who also provides a very detailed explanation of how carrier sanctions operate in practice); Rodenhäuser, T., ‘Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control’ (2014) 26 *IJRL* 223; Kritzman-Amir, T., ‘Privatization and Delegation of State Authority in Asylum Systems’ (2011) 5 *Law and Ethics of Human Rights* 195; Gammeltoft-Hansen ([n 116](#)) Ch. 5. On carrier sanctions in the EU, see, for example, Costello ([n 101](#)) 93; den Heijer ([n 129](#)) 174–7; Moreno-Lax, V., ‘(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law’, in Maes, M., Foblets, M.-C., & De Bruycker, P., eds., *The External Dimensions of EU Asylum and Immigration Policy* (2011); Moreno-Lax ([n 146](#)); Scholten, S. & Minderhoud, P., ‘Regulating Immigration Control: Carrier Sanctions in the Netherlands’ (2008) 10 *EJML* 123. Carrier sanctions are not confined to industrialized States: see Feller, *ibid*, 50–2.

¹⁶¹ Such schemes have been described as an arbitrary form of burden-sharing which cannot

be properly monitored by UNHCR and others due to the circumstances and locations in which interceptions occur: UNHCR Global Consultations on International Protection, ‘NGO Background Paper on the Refugee and Migration Interface’ (28–29 Jun. 2001) in (2003) 22 *RSQ* 373, 380.

¹⁶² Guild, E. and others, ‘The 2015 Refugee Crisis in the European Union’ CEPS Policy Brief No. 332 (Sep. 2015) 4 : ‘left with no means of legal access, refugees are pushed into illegality, obliged to turn to smugglers (or fall prey to traffickers) to reach the EU via unsafe routes’. See further Moreno-Lax ([n 98](#)).

¹⁶³ Gallagher, A. T. & David, F., *The International Law of Migrant Smuggling* (2014) 510.

¹⁶⁴ *Ibid.*

¹⁶⁵ In late 2015, Sweden introduced measures for persons entering from Denmark (for the first time since the 1950s): Government Offices of Sweden, ‘Questions and Answers: Act and Ordinance on Identity Checks in the event of Serious Danger to Public Order or Domestic Security in the Country’ (17 Jun. 2016).

¹⁶⁶ UNHCR Regional Representation for Northern Europe, ‘UNHCR Observations on Amendments to the Danish Aliens Act as set out in Lovforslag nr. L 62: Lov om ændring af udlændingeloven(*Håndtering af flygtninge- og migrantsituationen*)’ (Jan. 2016) para. 21.

¹⁶⁷ Executive Committee Standing Committee ([n 128](#)) paras. 17–18. See also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/898 (3 Jul. 1998) para. 16.

¹⁶⁸ See den Heijer ([n 129](#)) 175.

¹⁶⁹ Note the European Commission’s Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 (23 Sep. 2020), which ‘establishes the screening at the external borders of the Member States of all third-country nationals who have crossed the external border in an unauthorised manner, of those who have applied for international protection during border checks without fulfilling entry conditions, as well as those disembarked after a search and rescue operation, before they are referred to the appropriate procedure’ (art. 1).

¹⁷⁰ Gammeltoft-Hansen & Gammeltoft-Hansen ([n 23](#)) 451; Rodenhäuser ([n 160](#)) 223. On State responsibility, see [Ch. 6](#), s. 1.3.

¹⁷¹ See ECRE, *Defending Refugees’ Access to Protection in Europe* (Dec. 2007) 28; Brouwer & Kumin ([n 137](#)) 10. Council Directive 2001/51/EC ([n 143](#)) recital (3) states that carrier sanctions should not prejudice States’ obligations under the Refugee Convention, but does not ensure *non-refoulement* or provide access to remedies for asylum seekers who have been refused permission to travel at their point of departure or are obliged to return to a country where they may face violations of their rights.

¹⁷² Taylor, S., ‘Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?’, in McAdam, J., ed., *Forced Migration, Human Rights and Security* (2008) 100–1.

¹⁷³ UNODC Model Law against the Smuggling of Migrants. The model law was developed

to assist States in implementing the United Nations Convention against Transnational Organized Crime and its Protocols (on smuggling and trafficking).

¹⁷⁴ Executive Committee Standing Committee ([n 128](#)) paras. 17–18. See also UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/898 (3 Jul. 1998) para. 16.

¹⁷⁵ *Roma Rights* ([n 118](#)) para. 4.

¹⁷⁶ On which, see Kesby, A., ‘The Shifting and Multiple Border and International Law’ (2007) 27 *OJLS* 101. Frances argues that there are now multiple borders, which may be experienced in different locations for different people. In his view, ‘[t]he border for some may be experienced within a foreign State’s territory at the port of entry, whereas for others it may be experienced in a transit country or even within the individual’s own country’: Frances, A. J., ‘Removing Barriers to Protection at the Exported Border: Visas, Carrier Sanctions, and International Obligation’, in Farrall, J. & Rubenstein, K., eds., *Sanctions, Accountability and Governance in a Globalised World* (2009) 379. While this may be so, it is what international law says that counts.

¹⁷⁷ *Roma Rights* ([n 118](#)) para. 18 (Lord Bingham), para. 48 (Lord Hope), para. 72 (Lady Hale), para. 106 (Lord Carswell).

¹⁷⁸ 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 26. For UNHCR’s Written Submissions in the case, see (2005) 17 *IJRL* 427.

¹⁷⁹ *Roma Rights* ([n 118](#)) para. 19; see also paras. 63–4 (Lord Hope).

¹⁸⁰ Ibid., para. 26 (Lord Bingham); see also para. 43 (Lord Steyn). Interestingly, a representative of the Air Transport Association of Canada described the threat of carrier sanctions, which effectively require airline personnel to pre-screen passengers, as transporting the border to the embarkation point: Canadian Council for Refugees, ‘Interdiction and Refugee Protection: Bridging the Gap’, International Workshop, Ottawa (29 May 2003) 16. Others have described visa regimes and carrier sanctions as having ‘pushed back’ the border to countries of origin: see House of Lords Select Committee on the European Union, *Proposals for a European Border Guard* (Session 2002–03, 29th Report) para. 13.

¹⁸¹ *Roma Rights* ([n 118](#)) para. 20.

¹⁸² Ibid., para. 26. For background discussion, see paras. 22 ff.

¹⁸³ See further [Ch. 5](#), s 2.3.

¹⁸⁴ *Roma Rights* ([n 118](#)) para. 21, referring to *Sale v Haitian Centers Council* 509 US 155 (1993). See further [Ch. 6](#), s. 1.1.

¹⁸⁵ *Roma Rights* ([n 118](#)) paras. 104–5 (Lady Hale), paras. 10, 31 (Lord Bingham), paras. 38, 47 (Lord Steyn), para. 48 (Lord Hope), paras. 106, 114 (Lord Carswell).

¹⁸⁶ Ibid., para. 34 (Lord Steyn); see also paras. 85, 92, 93 (Lady Hale).

¹⁸⁷ Ibid., para. 98 (Lady Hale) paras. 38, 47 (Lord Steyn); see also UNHCR’s submissions ([n 178](#)) 440–5.

¹⁸⁸ The United States has applied different standards of screening to boats intercepted in the Caribbean, depending on the nationality of those on board (for example, Cuban, Haitian, Chinese, and so on). Differential treatment raises serious questions about access to protection and solutions, and may contravene the non-discrimination principle under international human rights treaties and customary international law. See generally Dastyari, A., *United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay* (2015); Dastyari, A. & Ghezelbash, D., ‘Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures’ (2020) 32 *IJRL* 1, 16–19, 24–6; Legomsky, S. H., ‘The USA and the Caribbean Interdiction Program’ (2006) 18 *IJRL* 677. In one of his last acts as US President, President Obama abolished the so-called ‘wet foot/dry foot’ policy relating to Cubans in January 2017.

¹⁸⁹ Goodwin-Gill, G. S., ‘State Responsibility and the “Good Faith” Obligation in International Law’, in Fitzmaurice, M. & Sarooshi, D., eds., *Issues of State Responsibility before International Judicial Institutions* (2004) 96–100.

¹⁹⁰ Whether the actions of airline employees refusing embarkation to passengers lacking the requisite immigration documents for fear of incurring carrier sanctions imposed by potential receiving States can be attributed to those States, and whether those actions in turn constitute violations of specific international obligations, will be more difficult to establish. The conduct in question and the underlying laws and policies may better be considered as evincing a lack of good faith to implement treaty obligations.

¹⁹¹ There is no principled reason for applying a higher threshold than States would apply if the individual had already reached their territory; indeed, given that they are still present in the territory in which ill-treatment is feared, one could argue that the risk of such treatment is even more immediate.

¹⁹² *Soering v United Kingdom* (1989) 11 EHRR 439, paras. 86, 88, 90; *Al-Saadoon & Mufdhi v United Kingdom*, App. No. 61498/08 (30 Jun. 2009—Admissibility Decision; 2 Mar. 2010—Judgment (Final, 4 Oct. 2010)).

¹⁹³ See also *Prosecutor v Furundzija* (International Criminal Tribunal for the Former Yugoslavia, 10 Dec. 1998) Case No. IT-95-17/1-T 10, para. 148, endorsed by Lord Bingham in *A (No. 2) v Secretary of State for the Home Department* [2006] 2 AC 221, para. 33, stating inter alia that ‘States are obliged not only to prohibit and punish torture, but also to forestall its occurrence’; UN Committee against Torture, ‘General Comment No. 2: Implementation of Article 2 by States Parties’: UN doc. CAT/C/GC/2 (24 Jan. 2008) para. 19.

¹⁹⁴ *Roma Rights* (n 118) para. 28.

¹⁹⁵ Ibid., para. 28.

¹⁹⁶ See discussion of ‘good faith’ at s. 5.3.

¹⁹⁷ The drafting debates appear to accept that any individual in search of asylum would have an opportunity to request it; see, for example, UN doc. A/C.3/SR.121 (3 Nov. 1948) 330–1 (Mrs Corbet, United Kingdom).

¹⁹⁸ Some scholars go so far as to argue that ‘the aggregate right to leave to seek asylum’ is

a ‘*lex specialis* of absolute character to the general and qualified right to leave … [which] implies that restrictions on that right which result in a violation of other protected fundamental rights must automatically be construed as disproportionate to the aim pursued’: den Heijer ([n 129](#)) 157 (fn omitted); see Moreno-Lax ([n 146](#)) 356. However, in our view, this goes much too far.

[199](#) UDHR 48, art. 13(1); ICCPR 66, art. 12; ECHR 50 Protocol 4, art. 2; ACHR 69, art. 22; ACHPR 81, art. 12(2); ArabCHR, art. 27. The right also appears in other contexts: see, for example, ICERD 65, art. 5; 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, art. 2; 1977 European Convention on the Status of Migrant Workers, art. 4(1); CRC 89, art. 10(2); 1985 UN Declaration on the Rights of Non-Nationals, art. 5(2); 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 8; Convention of the Rights of Persons with Disabilities, art. 18(1)(c). See also Declaration on the Right to Leave and the Right to Return, adopted by the Uppsala Colloquium (1972); Strasbourg Declaration on the Right to Leave and Return, adopted by the Meeting of Experts in Strasbourg (1986). For an analysis of the history and content of the right, see McAdam, J., ‘The Right to Leave Any Country: An Intellectual History of Freedom of Movement in International Law’ (2011) 12 *Melbourne Journal of International Law* 27; for the history, and detailed analysis of the right in treaty and customary international law, see Chetail, V., ‘The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law’, in Chetail, V. & Bauloz, C., eds., *Research Handbook on International Law and Migration* (2014) 10–27. For a detailed analysis of its application in the context of the right to seek asylum, see Moreno-Lax ([n 98](#)) 340 ff. See also ‘The Michigan Guidelines on Refugee Freedom of Movement’ (2018) 39 *Michigan Journal of International Law* 5.

[200](#) Botswana has made a reservation to art. 12(3) ICCPR 66 to ‘the extent that the provisions are compatible with Section 14 of the Constitution of the Republic of Botswana relating to the imposition of restrictions reasonably required in certain exceptional instances’. Austria and Italy have formally objected to this.

[201](#) See Goodwin-Gill, G. S., ‘The Right to Leave, the Right to Return and the Question of the Right to Remain’, in Gowlland-Debbas, V., ed., *The Problem of Refugees in the Light of Contemporary International Law Issues* (1995) 96.

[202](#) UN doc. A/2929 (1955). For further examples of restrictions, see Human Rights Committee, ‘Initial Report: Tajikistan’: UN doc. CCPR/C/TJK/2001/4 (11 Apr. 2005) para. 159; ‘Third Periodic Report: Netherlands’: UN doc. CCPR/C/NET/99/3 (25 Aug. 2000) paras. 84, 609; ‘Third Periodic Report: Netherlands (Addendum)’: UN doc. CCPR/C/NET/99/3/Add.1 (21 May 2001) para. 48; ‘Fourth Periodic Report: Yugoslavia’: UN doc. CCPR/C/YUG/99/4 (28 Jun. 1999) para. 220 (where the right to leave may be denied to prevent the spread of contagious diseases, pursuant to art. 30 of the Yugoslavian Constitution); ‘Initial Report: Israel (Addendum)’: UN doc. CCPR/C/81/Add.13 (2 Jun. 1998) para. 378.

[203](#) It is doubtful that a State’s imposition of a visa requirement could itself constitute a

breach of article 12 ICCPR 66, since ‘it is far from clear that a state can be said to exercise jurisdiction by the simple issuance of policies intended to apply extraterritorially, but which are wholly implemented by third parties operating inside the sovereign territory of another state’: Hathaway ([n 115](#)) 354 (fn omitted). Each case will, however, turn on the specific facts, depending *inter alia* on whether the third parties are under the control, or exercise authority on behalf of, the other State. See also [Ch. 6](#), s. 1.3.

[204](#) *Peltonen v Finland*, App. No. 19583/92 (20 Feb. 1995) para. 31 (inadmissible); *KS v Finland*, App. No. 21228/93 (24 May 1995) (inadmissible); *Baumann v France*, App. No. 33592/96 (22 May 2001) para. 61; *Napijalo v Croatia*, App. No. 66485/01 (13 Nov. 2003) para. 68. See also Hannum, H., *The Right to Leave and Return in International Law and Practice* (1987). During the drafting of the UDHR 48/ICCPR 66, it was proposed that the relevant provision be worded: ‘Individuals shall have the right to leave their own country and to acquire the nationality of any country willing to grant it’, implying not only admission to another country, but also a sense of permanence: cited in Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*: UN doc. E/CN.4/SUB.2/1988/35 (20 Jun. 1988) para. 39. This would seem to be more akin to a right of emigration: see [n 206](#) below.

[205](#) Human Rights Committee ([n 123](#)) paras. 14, 16, 17. See further Boutkevitch, V., ‘Working Paper on the Right to Freedom of Movement and Related Issues’: UN doc. E/CN.4/Sub.2/1997/22 (19 Jul. 1997) 20. The European case law affirms that restrictive measures must be based on the personal conduct of the individual concerned and not go beyond what is necessary to meet their objective: *Stamose v Bulgaria*, App. No. 29713/05 (27 Nov. 2012); Case C-430/10 *Hristo Gaydarov v Direktor na Glavna direktsia ‘Ohranitelna politsia’ pri Ministerstvo na vatreshnite raboti* (CJEU, 11 Nov. 2011); Case C-434/10 *Petar Aladzhov v Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* (CJEU, 17 Nov. 2011). For analysis of judgments by the European Court of Human Rights, see Council of Europe Commissioner for Human Rights, *The Right to Leave a Country*, Issue Paper, (Oct. 2013) 16–21.

[206](#) However, den Heijer ([n 129](#)) 148–9 cautions against ‘construing immigration restrictions [imposed by potential *destination* countries] as infringements of the right to leave’, noting that ‘one must not confuse the right to leave with a right to emigrate’ (the latter implying permanence).

[207](#) Hofmann, R., *Die Ausreisefreiheit nach Völkerrecht und staatlichem Recht* (1988) 315, as referred to in Hailbronner, K., ‘Comments On: The Right to Leave, the Right to Return and the Question of a Right to Remain’, in Gowlland-Debbas ([n 201](#)) 112. See also, CSCE, ‘Document of the Copenhagen Meeting of the Second Conference on the Human Dimension’ (1990) s. 9.5: restrictions on the right to leave ‘will have the character of very rare exceptions’. Text in Brownlie, I. & Goodwin-Gill, G. S., *Basic Documents on Human Rights* (5th edn., 2006) 849.

[208](#) Human Rights Committee ([n 123](#)) para. 9; *Olo Bahamonde v Equatorial Guinea*, UN doc. CCPR/C/49/D/468/1991 (20 Oct. 1993); *El Dernawi v Libyan Arab Jamahiriya*, UN

doc. CCPR/C/90/D/1143/2002 (20 Jul. 2007); *Vidal Martins v Uruguay*, Comm. No. 57/1979 (23 Mar. 1982); in the European Court of Human Rights, see *Napijalo v Croatia*, App. No. 66485/01 (13 Nov. 2003) para. 69: ‘a measure by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement’. See also Chetail, V., ‘Freedom of Movement and Transnational Migrations: A Human Rights Perspective’, in Aleinikoff, T. A. & Chetail, V., eds., *Migration and International Legal Norms* (2003) 55.

²⁰⁹ Human Rights Committee ([n 123](#)) para. 20. In the view of the Committee, art. 12 ICCPR 66 ‘permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence’. The right to return to one’s State is expressly limited to nationals in ECHR 50, ACHR 69, and ArabCHR. Elsewhere, it is generally argued that the right extends to nationals and permanent residents: see Chetail ([n 208](#)) for additional references.

²¹⁰ It depends, of course, on how one chooses to characterize the operation of the principle. Generally, States will allow asylum seekers to enter their territory (in fact) while their protection needs are assessed, even though they may not be admitted as a matter of law. It is the principle of *non-refoulement* that ultimately means that those with a protection need cannot be removed, and so, in a circuitous sense, it is this principle that secures ‘entry’. Austria amended its Aliens Act in 2002 to provide that refusal of entry, expulsion, or deportation are unlawful if they would lead to a violation of art. 2 or 3 ECHR 50 or of Protocol 6. Edwards argues that the right to leave any country and the right to seek asylum ‘are two sides of the same coin in the refugee context’, and that ‘it would make a nonsense of the 1951 Convention’ if it were not intended to permit an asylum seeker to enter a State ‘at least for the purposes of refugee status determination, especially where an individual has reached a country’s territory, such as its territorial seas or a waiting zone in an international airport’: Edwards, A., ‘Human Rights, Refugees, and the Right “to Enjoy” Asylum’ (2005) 17 *IJRL* 293, 302.

²¹¹ Sub-Commission on Prevention of Discrimination and Protection of Minorities ([n 204](#)) paras. 30–1.

²¹² *Roma Rights* ([n 118](#)) para. 26 (Lord Bingham) (emphasis added).

²¹³ To paraphrase a former ILC Rapporteur on State Responsibility, a ‘primary’ rule of international law forbids the ‘abusive’ exercise of rights of control over the movement of persons, which rights will be violated if certain limits are exceeded in the course of their exercise, or if they are exercised with the (sole) intention of harming others. Cf. Ago, R., ‘Second Report on State Responsibility’: UN doc. A/CN.4/233, *Yearbook of the International Law Commission* (1970) vol. II, 191, 193.

²¹⁴ See [Ch. 7](#).

²¹⁵ App. No. 39473/98 (11 Jan. 2001) (inadmissible).

²¹⁶ *Hirsi* ([n 148](#)); see generally s. 6.7; [Ch. 6](#), s 1.1.1. There, the court distinguished *Xhavara*

v Italy and Albania, albeit ‘somewhat artificially’: den Heijer, M., ‘Reflections on Refoulement and Collective Expulsion in the Hirsi Case’ (2013) 25 *IJRL* 265, 283.

²¹⁷ This section should be read in conjunction with Ch. 5, s. 5.1.

²¹⁸ For discussion of ‘good cause’, see Ch. 5, s. 5.1. The CJEU has ruled that it does not have jurisdiction to interpret article 31 of the Refugee Convention: Case C-481/13 *Qurbani* (17 Jul. 2014).

²¹⁹ As Lord Bingham observed in *R v Asfaw* [2008] UKHL 31, para. 9, one aim of art. 31 was ‘to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution. It was recognised in 1950, and has since become even clearer, that those fleeing from persecution or threatened persecution in countries where persecution of minorities is practised may have to resort to deceptions of various kinds (possession and use of false papers, forgery, misrepresentation, etc) in order to make good their escape.’ See also Lord Hope, para. 57: ‘[article 31] was designed to protect refugees from punishment who resort to the use of false documents while they are still in flight to obtain entry to the country of refuge.’

²²⁰ The protection of art. 31 thus extends to asylum seekers travelling on false documents: *Adimi* (n 141); *Asfaw* (n 219). See also Chetail (n 199) 40–1.

²²¹ *Asfaw* (n 219) para. 26 (Lord Bingham); paras. 56, 59 (Lord Hope), para. 118 (Lord Carswell), and authorities cited there, including UNHCR Memorandum submitted to the House of Commons Select Committee (1 Dec. 2005) para. 13, cited in *Asfaw*, para. 21; Goodwin-Gill, G. S., ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in Feller, E., Türk, V., & Nicholson, F, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 216, 218; UNHCR ‘Summary Conclusions: Article 31 of the 1951 Convention: Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001’, in Feller, Türk, & Nicholson, *ibid.*, 255. Executive Committee Conclusion No. 97 (2003) para. (a)(vi) notes that intercepted persons should not ‘incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met’.

²²² Migrant Smuggling Protocol (n 135) art. 19(1); Trafficking Protocol (n 135) art. 14(1).

²²³ 1969 Vienna Convention on the Law of Treaties, arts. 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA res 2625 (XXV) (24 Oct. 1970) para. 3. See Goodwin-Gill (n 189) esp. 85–8. See also UNHCR’s submissions in the *Roma Rights Case*: UNHCR ‘Written Case’ (n 187) paras. 24–38. The House of Lords rejected the issue of good faith on the basis that the 1951 Convention did not apply, as the individuals concerned had not yet left their country of origin: *Roma Rights* (n 118) para. 64 (Lord Hope).

²²⁴ *Yearbook of the International Law Commission* (1964) vol. I (Summary Records of the

16th Session) 727th Meeting (20 May 1964) 70.

²²⁵ UNHCR ‘Written Case’ (n 187) para. 32.

²²⁶ Brownlie, I., *Principles of Public International Law* (6th edn., 2003) 425–30, 444; Crawford (n 144) 84.

²²⁷ 1969 Vienna Convention on the Law of Treaties, art. 31(1).

²²⁸ *Nuclear Tests (Australia v France)* [1974] ICJ Rep. 253, 268, para. 46. In *Roma Rights*, Lord Hope distinguished this from an autonomous source of obligation, stating that it operates instead as ‘an underlying principle of an explanatory and legitimating rather than an active or creative nature’: *Roma Rights* (n 118) para. 60 (Lord Hope) referring to MacQueen, H. L., ‘Delict, Contract, and the Bill of Rights: A Perspective from the United Kingdom’ (2004) 121 *South African Law Journal* 359, 382.

²²⁹ See further Goodwin-Gill, G. S., ‘The Search for the One, True Meaning ...’, in Goodwin-Gill, G. S. & Lambert, H., eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010) 216–17, referring to *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep. 3, 48, para. 93.

²³⁰ For example, in *Roma Rights* (n 118) the Czech Republic was obliged to allow its citizens to leave its territory by virtue of art. 2 Protocol 4 ECHR 50, and the UK had accepted a duty to protect freedom of movement and non-discrimination in the application of the law: ICCPR 66, arts. 12, 26 (although the UK has entered a reservation to art. 12 (4), reserving its right to ‘continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time’).

²³¹ See Long, K., ‘In Search of Sanctuary: Border Closures, “Safe” Zones and Refugee Protection’ (2014) 26 *JRS* 458.

²³² *Roma Rights* (n 118) paras. 60, 62.

²³³ Ibid., para. 64.

²³⁴ Ibid. See further analysis in McAdam, J., ‘Interpretation of the 1951 Convention’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 93–5.

²³⁵ See UNHCR ‘Written Case’ (n 187) paras. 24–38.

²³⁶ *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep. 15, 23.

²³⁷ 1951 Convention, Preamble.

²³⁸ Goodwin-Gill (n 223) 98.

²³⁹ See, for example, the 1988 statement by UN High Commissioner for Refugees, Jean-Pierre Hocké: ‘UNHCR’s concern was that fair and efficient asylum procedures guaranteeing full access by those in search of asylum should be the undisputed basis for all future developments’: UN doc. A/AC.96/SR.425, para. 66; full text annexed to *Report of the 39th Session*: UN doc. A/AC.96/721 (1988). Also, UNGA res. 48/116 (20 Dec. 1993) para. 4;

UNGA res. 49/169 (23 Dec. 1994)—the latter calling for access to procedures, ‘or, as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted ... protection, while not diminishing the protection afforded to refugees under the terms of the 1951 Convention, the 1967 Protocol and relevant regional instruments’: para. 5.

²⁴⁰ UNHCR, ‘Irregular Movements of Asylum Seekers and Refugees’: EC/SCP/40/ Rev.1 (1985); *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/671 (Oct. 1985); *Report of the 36th Session of the Executive Committee*: UN doc. A/AC.96/673 (Oct. 1985) paras. 77–82. Adoption of the Conclusion was delayed until 1989, owing to German reservations.

²⁴¹ See, for example, UNGA res. 49/169 (23 Dec. 1995) para. 5, reiterating ‘the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status’.

²⁴² See, for example, Executive Committee General Conclusion on International Protection No. 71 (1993) *Report of the 44th Session*: UN doc. A/AC.96/821 (1993) paras. 19(k), (l), recognizing ‘the advisability of concluding agreements among States directly concerned ... to provide for the protection of refugees through the adoption of common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum ... and for granting the protection required,’ and emphasizing ‘that such procedures, measures and agreements must include safeguards adequate to ensure ... that persons in need of international protection are identified and that refugees are not subject to *refoulement*'; Executive Committee Conclusion No. 85 (1998) para. (p); Executive Committee Conclusion No. 90 (2001) para. (k); Executive Committee Conclusion No. 93 (2002) para. (c).

²⁴³ UN doc. A/AC.96/SR.430 (1988) para. 53 (Mr Wrench, United Kingdom). This interpretation was reiterated the following year; see UN doc. A/AC.96/SR.442 (1989) para. 51. For the history of the ‘safe country’ concept, see the second edition of this work, 333–44; see further sections 6.2, 6.4.3, 6.5 below.

²⁴⁴ *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/781 (9 Oct. 1991) para. 34; *Canadian Council for Refugees v The Queen* 2007 FC 1262, para. 136 (the subsequent appeal was not material to this aspect of the case); see further Foster, M., ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25(2) *Refugee* 64, 66; see discussion in Australian context in *Plaintiff M70/2011 and Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; text to ⁿ 302 below. The notion of ‘internal flight alternative’ raises similar questions relating to the availability of protection, though in a quite different context. See Ch. 3, s. 5.6.1.

²⁴⁵ UNHCR, ‘Overview of UNHCR’s Operations in Europe’ (2 Mar. 2016) 1; UNHCR, ‘Update on UNHCR’s Operations in Europe’ (1 Mar. 2017) 1.

²⁴⁶ UNHCR, ‘Overview of UNHCR’s Operations in Europe’ (ⁿ 245) 1. The main countries of origin were the Syrian Arab Republic (675,700), Afghanistan (406,300), and Iraq

(253,600).

²⁴⁷ See EU–Turkey Statement (18 Mar. 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

The General Court of the European Union declared that it had no jurisdiction to decide challenges to the ‘statement’, which had not been adopted by any of the EU institutions: Cases T-192/16, T-193/16, and T-257-16 *NF, NG and NM v European Council* (28 Feb. 2017).

²⁴⁸ Costello, C., ‘It Need Not Be Like This’ (2016) 51 *FMR* 12, 13.

²⁴⁹ Guild, E., Costello, C., & Moreno-Lax, V., *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece: Study* (European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, European Union, 2017) 49–50.

²⁵⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/ 60 (Procedures Directive (recast)), arts. 33(1), 33(2)(b)–(c), 35, 38; see also requirements noted in UNHCR, ‘Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey as part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept’ (23 Mar. 2016) 7.

²⁵¹ UNHCR (ⁿ 250) 1; UNHCR, ‘Summary Conclusions on the Concept of “Effective Protection” in the context of Secondary Movements of Refugees and Asylum-Seekers’, Lisbon Expert Roundtable (9–10 Dec. 2002) (Feb. 2003).

²⁵² UNHCR (ⁿ 250) 2.

²⁵³ Procedures Directive (recast), art. 38(2)(a), recital (44).

²⁵⁴ See Turkey: Temporary Protection Regulation (22 Oct. 2014).

²⁵⁵ UNHCR (ⁿ 250) 6.

²⁵⁶ For an overview of the practice’s history, see Moreno-Lax, V., ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’, in Goodwin-Gill, G. S. & Weckel, P., eds., *Migration and Refugee Protection in the 21st Century: International Legal Aspects* (2015); Freier, L. F., Karageorgiou, E., & Ogg, K., ‘The Evolution of Safe Third Country Law and Practice’, in Costello, Foster, & McAdam (ⁿ 84); Byrne, R., Noll, G. & Vedsted-Hansen, J., ‘**Understanding Refugee Law in an Enlarged European Union**’ (2004) 15 *EJIL* 355, esp 359–62, 370–5. See also discussions in the context of the European Council, EU–Turkey Statement (ⁿ 247). Although the safe third country notion more typically forms part of the practice of industrialized States, it does sometimes occur elsewhere. For an overview of State practice in parts of Africa, see Sharpe, M., ‘The Impact of European Refugee Law on the Regional, Sub-Regional and National Planes in Africa’, in Lambert, McAdam, & Fullerton (ⁿ 115) 197–8. See also Human Rights Watch, *Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala* (2002) 168–75, in relation to safe third country policies in Kenya and Uganda.

²⁵⁷ For a detailed examination of the human rights implications of such policies, see Goodwin-Gill, G. S., ‘The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam’, in Guild, E. & Harlow, C., eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (2001).

²⁵⁸ Procedures Directive (recast) art. 31(8)(b) permits the ‘safe country of origin’ concept to be used for this purpose; see also Case C-175/11 *HID and BA v Refugee Applications Commissioner and others* (CJEU, 31 Jan. 2013) para.73. Of claims considered in accelerated procedures, 90 per cent are rejected: European Asylum Support Office (EASO), *Annual Report on the Situation of Asylum in the European Union 2015* (2016) 96. Accelerated procedures were initially introduced as a means of dealing quickly with ‘manifestly unfounded’ claims, but they are increasingly used to curtail procedural rights (which, in turn, can significantly affect an asylum seeker’s ability to present his or her protection claim). Accelerated procedures necessarily truncate examination of the merits of the claim, and, on the assumption that claims are unfounded, may contain an inherent bias towards rejection. UNHCR’s Executive Committee regards accelerated procedures as inappropriate unless the claim is ‘clearly fraudulent’ or not related to the criteria in the 1951 Convention: Executive Committee Conclusion No. 30 (1983). See further Guild, Costello, & Moreno-Lax ([n 249](#)) 49–50; Kirk, L., ‘Accelerated Asylum Procedures in the United Kingdom and Australia: “Fast Track” to *Refoulement*?’ in Stevens, D. & O’Sullivan, M., eds., *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (2017); Kenny, M. A. & Procter, N., ‘The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers’ (2016) 23 *Psychiatry, Psychology and Law* 62; Reneman, M., ‘Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy’ (2013) 25 *IJRL* 717.

²⁵⁹ UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’: EC/GC/01/12 (31 May 2001) para. 12; *R v Secretary of State for the Home Department, ex parte Thangarasa and R v Secretary of State for the Home Department, ex parte Yogathas* [2002] UKHL 36, para. 58 (Lord Hope), para.74 (Lord Hutton) (accelerated procedures are lawful but require rigorous individual assessments); *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 (rules on Detained Fast-Track were ‘structurally unfair and unjust’ (para. 45) on account of the very short time limits imposed on detained asylum seekers, among other things); *TN (Vietnam) and US (Pakistan) R (on the Applications of) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin) (further findings on unfairness of Detained Fast-Track process).

²⁶⁰ Transfers from Australia to Papua New Guinea and Nauru occur without there being any connection between the individual and those States: Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues (signed and entered into force 3 August 2013); Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru,

and related issues (signed and entered into force 29 August 2012); Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues (signed and entered into force 6 August 2013); Regional Resettlement Arrangement between Australia and Papua New Guinea (signed and entered into force 19 July 2013); Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues (signed and entered into force 8 September 2012). For analysis, see Gleeson, M., ‘Protection Deficit: The Failure of Australia’s Offshore Processing Arrangements to Guarantee “Protection Elsewhere” in the Pacific’ (2019) 31 *IJRL* 415.

²⁶¹ See the discussion of the Dublin Regulation at s. 6.4.5.

²⁶² In the EU, bilateral readmission agreements are common (see, for example, Council Decision of 14 April 2014 on the Conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of Persons Residing without Authorisation (2014/252/EU) [2014] OJ L134/1). For concerns about the Greek–Turkey readmission agreement, see, for example, Apap, J., Carrera, S., & Kiriisci, K., ‘Turkey in the European Area of Freedom, Security and Justice’ (CEPS EU–Turkey Working Papers No. 3, 2004) 22–3. See s. 6.6 below. See also Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (2004) (US–Canada Safe Third Country Agreement) (and discussion at s. 6.5 below); Australian agreements ([n 260](#)).

²⁶³ See, for example, Australia’s Migration Act 1958 (Cth), s. 36(3), which excludes from protection a person ‘who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national’; Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31 (Dublin III Regulation), art. 3(3), which provides that ‘[a]ny Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU’; Procedures Directive (recast), arts. 33(2)(c), 38, 39; and the Immigration and Refugee Protection Act, 2001, c. 27 (Canada), s. 101(1)(e), which notes that ‘[a] claim is ineligible to be referred to the Refugee Protection Division if ... the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence’. The United States is designated under the Immigration and Refugee Protection Regulations SOR/2002-227 (Canada), s. 159.3, subject to certain exceptions (see, for example, s. 159.2 of the Regulations, noting that s. 101(1)(e) of the Act does not apply to ‘a stateless person who

comes directly or indirectly to Canada from a designated country that is their country of former habitual residence’, and s. 159.6, noting that s. 101(1)(e) of the Act does not apply if a claimant establishes under s. 100(4) of the Act that he or she is charged with, or has been convicted of, ‘an offence that is punishable with the death penalty’ in the United States or another country). See also the Immigration Act 2009 (New Zealand), ss. 130–31 regarding individuals recognized as protected persons under CAT 84 and ICCPR 66 (noting that ‘a person must not be recognised as a protected person in New Zealand under [the relevant Convention] if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence’). From 2018 onwards, the Trump Administration created various bars to asylum, including the so-called ‘Migrant Protection Protocols’ or ‘Remain in Mexico’ programme, the denial of eligibility for anyone who entered the US across the southern border without first applying for protection, and broad prohibitions on asylum based on certain low-level offences. The combined effect was to make it almost impossible for anyone to claim asylum successfully. As a result of litigation, most restrictions were put on hold, including those relating to transit: see *East Bay Sanctuary Covenant v Barr*, District Court, Northern District of California (16 Feb. 2021) <https://www.aclu.org/cases/east-bay-v-barr>. On other proceedings, see *Pangea Legal Services v DHS*, District Court, Northern District of California (24 Nov. 2020); *Innovation Law Lab v Wolf*, US Supreme Court, No. 19-1212 (19 Oct. 2020); see further <https://cgrs.uchastings.edu/>; https://nipnlg.org/our_lit/impact/2020_02Nov_lit-pangea-v-dhs.html.

²⁶⁴ For a detailed analysis of the scholarship, see Moreno-Lax ([n 256](#)). She notes (at 675) that: ‘“Safe third country” returns are hence more likely to be conducive to burden-shifting than burden-sharing. Their immediate result is not the diminution of the global numbers of asylum seekers, but the displacement of the responsibility to provide international protection, which, in the absence of specific guarantees, may lead to further orbiting and refoulement, feed legal uncertainty, and potentially defeat the purpose of the 1951 Convention.’

²⁶⁵ See the third edition of this work, [Ch. 7](#), s. 6.5. for discussion of examples from State practice.

²⁶⁶ UNHCR ([n 259](#)) paras. 12–18 for discussion of best practice; Lisbon Expert Roundtable ([n 251](#)) para. 9; Foster, M., ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) 28 *Michigan Journal of International Law* 223, 278 ff.; ‘The Michigan Guidelines on Protection Elsewhere’ (2007) 28 *Michigan Journal of International Law* 207, paras. 12–16; UN Human Rights Committee, ‘Concluding Observations on Estonia’ (15 Apr. 2003): UN doc. CCPR/CO/77/EST, para.13; Lisbon Expert Roundtable ([n 251](#)) para. 9; House of Lords Select Committee on the European Union ([n 180](#)) para. 66; Senate Legal and Constitutional Affairs References Committee, *Inquiry into Australia’s Arrangement with Malaysia in Relation to Asylum Seekers* (2011) paras. 3.34, 3.36, 4.9; *John Doe v Canada* ([n 23](#)) paras. 107–12, 128; *MSS v Belgium and Greece* (2011) 53 EHRR 2, para. 354; *NS* ([n 103](#)) paras. 100–6; *Yogathas* ([n 259](#)); decisions cited in UNHCR, ‘UNHCR Information Note on National Practice in the Application of Article 3(2)

of the Dublin II Regulation in particular in the context of intended transfers to Greece' (16 Jun. 2010) 4.

²⁶⁷ House of Lords EU Committee ([n 266](#)) para. 66.

²⁶⁸ As Newman J stated in *Adimi* ([n 141](#)) para. 69: 'The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a readily accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea. There have been distinctive and differing state responses to requests for asylum. Thus there exists a rational basis for exercising choice where to seek asylum. I am unable to accept that to recognise it is to legitimise forum shopping.'

²⁶⁹ For example, Executive Committee Conclusion No. 15 (1979). Hathaway & Neve suggest that asylum seekers have a right to choose where to seek protection, but do not substantiate this as a matter of law: Hathaway, J. C. & Neve, R. A., 'Fundamental Justice and the Deflection of Refugees from Canada' (1996) 34 *Osgoode Hall Law Journal* 213. Hathaway notes that 'protection elsewhere' rules 'constrain the traditional prerogative of refugees to decide where they wish to seek protection': Hathaway ([n 115](#)) 366, suggesting a dilution of the Executive Committee's earlier position that an asylum seeker's intentions with respect to where he or she wishes to claim asylum should be taken into account as far as possible (Executive Committee Conclusion No. 15 (1979) para. (h)(iii)), to a point where UNHCR now encourages States to consider concluding readmission agreements (see, for example, UNHCR ([n 259](#)) para. 18). However, this may reflect a practical response to unilateral decisions to return individuals to third States, rather than a shift in principle. Against the existence of such a right, see Melander, G., *Refugees in Orbit* (1978) 2; Lambert, H., *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995) 91, 98. Vedsted-Hansen argues that 'there is neither a strict "direct flight" requirement, nor any legally protected right of individual choice.' He argues that focusing on whether there is an individual right to choose an asylum country may be the wrong approach, since the 'combined focus on refugee law and standards of human rights law represents a considerable challenge to contemporary developments in the European refugee protection system', which mitigate what the State may do: Vedsted-Hansen, J., 'Non-Admission Policies and the Right to Protection: Refugees' Choice versus States' Exclusion?', in Nicholson, F. & Twomey, P., eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 287.

²⁷⁰ Fratzke, S., 'International Experience Suggests Safe Third-Country Agreement Would Not Solve the US–Mexico Border Crisis' *MPI Commentaries* (Jun. 2019).

²⁷¹ *Ibid.*

²⁷² Arbel, E. & Brenner, A., 'Bordering on Failure: Canada–U.S. Border Policy and the Politics of Exclusion' Harvard Immigration and Refugee Law Clinic (2013) 1

<https://harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf>.

²⁷³ Though noting the conceptual and theoretical distinctions between the three practices, we use the term ‘safe country’ to encompass the underlying basis of all three mechanisms. Similarly, Legomsky analyses the first country of asylum and safe third country concepts together because ‘in actual practice the two strategies occupy two points on the same continuum’: Legomsky, S. H., ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *IJRL* 567. Functionally, the concepts differ: the ‘safe country of origin’ concept is intended to show that an asylum claim is unfounded because the applicant comes from a safe country; the ‘safe third country’ concept relates not to the merits of the claim, but rather the assumption that protection can be enjoyed elsewhere: Costello, C., ‘Safe Country? Says Who’ (2016) 28 *IJRL* 601, 604–5, referring to Foster ([n 266](#)).

²⁷⁴ Whichever formulation is used, ‘there is no principled reason why the legal analysis should change. In each case the question is whether a state party to the Refugee Convention can, consistently with its Convention obligations, transfer a refugee to another state’: Foster ([n 266](#)) 230; see also Legomsky ([n 273](#)) 570–1, Lisbon Expert Roundtable ([n 251](#)) para. 10; UNHCR ([n 259](#)) para. 10. See also Executive Committee Conclusion No. 85 (1998); Executive Committee Conclusion No. 87 (1999). Conclusion No. 85 provides that the host country must treat the asylum seeker in accordance with accepted international standards, ensure protection against *refoulement*, and provide the asylum seeker with the possibility to seek and enjoy asylum.

²⁷⁵ For a fuller discussion of what ‘effective protection’ should encompass, see Foster ([n 266](#)); Lisbon Expert Roundtable ([n 251](#)); Legomsky ([n 273](#)); van Selm, J., *Access to Procedures: ‘Safe Third Countries’, ‘Safe Countries of Origin’ and ‘Time Limits’* (UNHCR & Carnegie Endowment for International Peace, Background Paper for Third Track of Global Consultations, 2001).

²⁷⁶ Statement by Ms Erika Feller, Director, Department of International Protection, at the 55th session of the Executive Committee of the High Commissioner’s Programme, Geneva (7 Oct. 2004). See Executive Committee Conclusion No. 87 (1999) para. (j): ‘notions such as “safe country of origin”, “internal flight alternative” and “safe third country”, should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*’. By contrast, ECRE is opposed to the concept because of the risk that it will ‘substantially dilute the only purpose of the asylum procedure, establishing whether the applicant is in need of international protection, by relying on general presumptions as regards the respect of human rights in the country concerned. Even where such presumption is rebuttable, this is often very difficult to do in practice as *de facto* the burden of proof is often entirely placed on the applicant’. The International Commission of Jurists has suggested that the ‘safe country of origin’ concept should be dispensed with altogether. See [ECRE, ‘Information Note on Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting

and withdrawing international protection (recast)' (Dec. 2014) 40; International Commission of Jurists, *Compromising Rights and Procedures: ICJ Observations on the 2011 Recast Proposal of the Procedure Directive* (Sep. 2011) para. 74.

²⁷⁷ *Yogathas* (n 259) para. 9 (Lord Bingham); *NS* (n 103) para. 103: 'the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions.'

²⁷⁸ See Executive Committee Conclusion No. 57 (1989); Executive Committee Conclusion No. 71 (1993) para. (c); Executive Committee Conclusion No. 74 (1994) para. (d); Executive Committee Conclusion No. 77 (1995) para. (d); Executive Committee Conclusion No. 79 (1996) paras. (c)–(d); Executive Committee Conclusion No. 85 (1998) para. (e); Executive Committee Conclusion No. 87 (1999) para. (e); Executive Committee Conclusion No. 95 (2003) para. (d); Executive Committee Conclusion No. 99 (2004) para. (c); *MSS* (n 266) paras. 353–4; *M70* (n 244) para. 67 (French CJ), para. 245 (Kiefel J); Michigan Guidelines (n 266) para. 3.

²⁷⁹ Executive Committee Conclusion No. 15 (1979); *M70* (n 244) paras. 117–19 (Gummow, Hayne, Crennan, & Bell JJ) and discussion further below. Prior to *M70*, the High Court of Australia had observed in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 222 CLR 161, para. 31, that the 1951 Convention contains requirements beyond art. 33, implying that 'more than mere compliance with Article 33 is required in order to effect a lawful transfer': Foster (n 244) 67 (see also 66–9); Foster, M., 'The Implications of the Failed "Malaysia Solution": The Australian High Court and Refugee Responsibility Sharing' (2012) 13 *Melbourne Journal of International Law* 395, 415–19. See discussion of Australian jurisprudence on 'effective protection' in the third edition of this work, 403–4.

²⁸⁰ UNHCR, 'Note on International Protection': UN doc. A/AC.96/975 (2 Jul. 2003) para. 12; Lisbon Expert Roundtable (n 251) para. 12; see also n 266.

²⁸¹ UNHCR, 'Note on International Protection': UN doc. A/AC.96/914 (7 Jul. 1999) para. 20; House of Lords EU Committee (n 266).

²⁸² See Ch. 6, s. 1.3.

²⁸³ UNHCR, 'Note on International Protection': UN doc. A/AC.96/914 (7 Jul. 1999) para. 19.

²⁸⁴ UN doc. A/AC.96/SR.585 (2004) (Ms Feller, UNHCR) para. 28.

²⁸⁵ Ibid. UNHCR has documented cases of *refoulement* as the result of applying the 'safe third country' mechanism: UNHCR, 'Note on International Protection': UN doc. A/AC.96/898 (3 Jul. 1998) para. 14.

²⁸⁶ Report of the Human Rights Committee, vol. 1 (2002–03) UNGAOR (58th Session) Supp. No. 40: UN doc. A/58/40, 'Estonia', para. 79(13).

²⁸⁷ In particular, the third State must be a party to the 1951 Convention and/or 1967 Protocol and comply with those instruments, or at least demonstrate that it has developed a practice akin to what those instruments require: Lisbon Expert Roundtable (n 251) para.

15(e); Michigan Guidelines ([n 266](#)) paras. 2–3.

[288](#) This is particularly important in light of the States that provide complementary protection.

[289](#) Lisbon Expert Roundtable ([n 251](#)) para. 15. See also Legomsky's seven elements of 'effective protection': Legomsky ([n 273](#)) 629–64.

[290](#) *Report on Pre-ExCom Consultations* ([n 136](#)) Annex IX (2 Oct. 2003).

[291](#) Executive Committee Conclusion No. 85 (1998); Executive Committee Conclusion No. 87 (1999). The EU–Turkey statement raises serious issues in these respects: see discussion in text to [n 247](#) above.

[292](#) Lisbon Expert Roundtable ([n 251](#)) para. 15 f.; Michigan Guidelines ([n 266](#)) 211, para. 4; MSS ([n 266](#)) para. 342; *M70* ([n 244](#)) para. 125 (Gummow, Hayne, Crennan, & Bell JJ).

[293](#) Political assurances are insufficient to guarantee respect for international obligations: MSS ([n 266](#)) para. 353: 'the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'. See also Michigan Guidelines ([n 266](#)) para. 3; *M70* ([n 244](#)) para. 29 (French CJ).

[294](#) Ideally, such standards will deal with detention or other restrictions on liberty, the length of proceedings, the availability of interpreters, legal advice, access to UNHCR, etc.

[295](#) See analysis of EU Procedures Directive in s. 6.4.

[296](#) Memorandum of Cooperation between the Department of Homeland Security of the United States of America and the Ministry of Government of the Republic of Guatemala on Security Activities that Make it Possible to Address Irregular Migration, 84 Fed. Reg. 64,095 (signed 26 July 2019, entered into force 15 November 2019). On the agreements with Guatemala, Honduras, and El Salvador, see generally US Department of Homeland Security, 'Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador' (no date) https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf. A Democratic Staff Report for the Committee on Foreign Relations of the US Senate found that the 'ACAs appear to violate U.S. law and international obligations by sending asylum seekers and refugees to countries where their lives or freedom would be threatened'; that the 'Trump administration radically distorted the intent and meaning of the "safe third country" provision in U.S. law, constructing the ACAs to function as a broad bar to asylum rather than an exception to the right to seek asylum'; and that '[a]sylum seekers transferred from the United States to Guatemala under the ACA were subjected to degrading treatment and effectively coerced to return to their home countries of Honduras or El Salvador, where many feared persecution and harm'. Furthermore, none of the 945 asylum seekers transferred to Guatemala was granted asylum: Democratic Staff Report for the Committee on Foreign Relations of the US Senate, *Cruelty, Coercion, and Legal Contortions: The Trump Administration's Unsafe Asylum Cooperative Agreements with*

Guatemala, Honduras, and El Salvador (18 Jan. 2021) 4. For an excellent overview, see Schoenholtz, Ramji-Nogales, & Schrag ([n 116](#)) Ch. 4; also Anker, D., ‘Regional Refugee Regimes: North America’, in Costello, Foster, & McAdam ([n 84](#)).

[297](#) Agreement between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 83,597 (20 September 2019). This did not enter into effect.

[298](#) Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 25,462 (25 September 2019). This did not enter into effect.

[299](#) See Migration Protection Protocols (known as the ‘Remain in Mexico’ policy) <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Joint Declaration and Supplementary Agreement between the United States of America and Mexico (7 June 2019); Secretary of Homeland Security, ‘Policy Guidance for Implementation of the Migrant Protection Protocols’ (25 Jan. 2019).

[300](#) See eg Human Rights Watch, *Deportation with a Layover: Failure of Protection under the US–Guatemala Asylum Cooperative Agreement* (19 May 2020); Kanno-Youngs, Z. & Malkin, E., ‘US Agreement with El Salvador Seeks to Divert Asylum Seekers’ *New York Times* (20 Sep. 2019) <https://www.nytimes.com/2019/09/20/us/politics/us-asylum-el-salvador.html>.

[301](#) Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (2 Feb. 2021).

[302](#) *M70* ([n 244](#)); Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 Jul. 2011). For analysis, see Foster ([n 279](#)); Wood, T. & McAdam, J., ‘Australian Asylum Policy All at Sea: Shifting Boats, Rights and Responsibility’ (2012) 61 *ICLQ* 274.

[303](#) Australia–Malaysia Arrangement ([n 302](#)) cl 5.

[304](#) Following *M70* ([n 244](#)) s. 198A was repealed to provide a highly discretionary framework for designation. Section 198AA(d) now provides that ‘the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.’ The ‘only condition’ relevant to the exercise of the Minister’s power is ‘that the Minister thinks that it is in the national interest to designate the country to be a regional processing country’ (s. 198AB(2)). In considering the ‘national interest’, the Minister must have regard to whether the country has given Australia assurances—which do not have to be legally binding—that it will not engage in *refoulement* (pursuant to the Refugee Convention; human rights-based *refoulement* is not mentioned) and transferred persons will be subject to an assessment as to whether they meet the refugee definition.

[305](#) See also Hofmann, R. & Löhr, T., ‘Introduction to Chapter V: Requirements for

Refugee Determination Procedures’, in Zimmermann ([n 234](#)) 1112, who argue that any safe third country must be a party to the Refugee Convention and other relevant human rights treaties.

[306](#) *M70* ([n 244](#)) para. 116 (Gummow, Hayne, Crennan, & Bell JJ) (emphasis added), paras. 64–6 (French CJ), para. 244 (Kiefel J). The legal obligation could stem from either international law or domestic law: paras. 124–5 (Gummow, Hayne, Crennan, & Bell JJ). On the extent to which *practice* within the State should be taken into account, see para. 67 (French CJ), para. 112 (Gummow, Hayne, Crennan, & Bell JJ), para. 245 (Kiefel J).

[307](#) See *ibid.*, paras. 212, 218, 237 (Kiefel J), paras. 10, 98 (French CJ). They drew heavily on *Plaintiff M61/2010E and Plaintiff M69/2010 v Commonwealth of Australia* [2010] HCA 41, (2010) 243 CLR 319, para. 27, where the court held that ‘the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia’s international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.’

[308](#) *M70* ([n 244](#)) para. 117 (Gummow, Hayne, Crennan, & Bell JJ).

[309](#) *Ibid.*

[310](#) 1951 Convention, art. 16(1).

[311](#) *Ibid.*, art. 3.

[312](#) *Ibid.*, art. 17(1).

[313](#) *Ibid.*, art. 22(1).

[314](#) *Ibid.*, art. 4.

[315](#) For analysis of what the court considered ‘protection’ under the 1951 Convention encompassed, see Foster ([n 302](#)) 21–5. For instance, the Federal Court of Canada had stated: ‘What is of concern is whether these individuals are protected from risk, not whether they have the full panoply of rights provided for under the 1951 Convention’: *Wangden v Canada (Minister of Citizenship and Immigration)* 2008 FC 1230, para 72. For specific safeguards in relation to children, see UNHCR, ‘Guidelines on Assessing and Determining the Best Interests of the Child’ (Nov. 2018), replacing ‘Guidelines on Determining the Best Interests of the Child’ (May 2008).

[316](#) Procedures Directive (recast). The recast version applies both to claims for refugee status and subsidiary protection.

[317](#) Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts [1997] OJ C340, 1 (signed 2 October 1997, entered into force 1 May 1999). The Schengen *acquis*, consisting of the Schengen Agreement, the Schengen Convention, the Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention, and decisions and declarations adopted by the Schengen Executive Committee, is annexed to and forms an integral part of the Treaty

of Amsterdam. It is binding in international law. For details of the Schengen instruments, see Noll ([n 127](#)) 123–6. The binding legislative tools of art. 251 of the Treaty establishing the European Community (consolidated version) [2002] OJ C325, 33(directives, decisions, and regulations) and the jurisdiction of the Court of Justice of the European Union CJEU are now engaged. All asylum provisions are contained in Title IV: ‘Visas, asylum, immigration and other policies related to freedom of movement of persons’.

[318](#) First country of asylum (art. 35); safe country of origin (art. 36 and Annex II); safe third country (art. 38); European safe third country (art. 39). For analysis of the original Directive, see European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status* COM(2010) 465 final (8 Sep. 2010); UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice—Detailed Research on Key Asylum Procedures Directive Provisions* (2010) 297 ff.; Zwaan, K., ed., *The Procedures Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (2008). For analysis, see Costello, C., ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7 *EJML* 35; Gil-Bazo, M.-T., ‘The Practice of Mediterranean States in the context of the European Union’s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited’ (2006) 18 *IJRL* 571; Moreno-Lax ([n 256](#)).

[319](#) See arts. 35, 38–39 (recast) recitals (46)–(48); see also art. 3(3) of the Dublin III Regulation. For detailed analysis of the original Procedures Directive, see the third edition of this work, [Ch. 7](#), s. 6.4.

[320](#) For example, Member States are no longer permitted to derogate from the criteria for considering a country of origin as ‘safe’; they must take a variety of information sources into account and they must periodically review country designations. In relation to safe third countries, an additional criterion has been added in art. 38(1)(b) (‘risk of serious harm’), and applicants’ ability to challenge the application of the safe third country concept has been enhanced. See ECRE ([n 276](#)) 42–5.

[321](#) Namely, Belgium, France, and Ireland: ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System—Annual Report 2013/14* (2014) 49. A For a very detailed comparative study on EU Member States’ use of the ‘safe country of origin’ concept, see Engelmann, C., ‘Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)’ (2014) 16 *EJML* 277. For a history of the concept’s evolution and application in Europe, see Hunt, M., ‘The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future’ (2014) 26 *IJRL* 500.

[322](#) Austria, Bulgaria, Cyprus, Germany, Greece, Hungary, Malta, the Netherlands: ECRE ([n 321](#)) 49; see also. UNHCR, *Improving Asylum Procedures* ([n 318](#)) 300, 303.

[323](#) ECRE ([n 321](#)) 53.

³²⁴ Research by UNHCR in 2010 revealed that of 12 EU Member States examined, only two applied the safe third country concept in law and practice. The UK had applied it to the US and Canada, while Spain applied it on a case-by-case basis to some Latin American and African States (although in conjunction with other grounds): *UNHCR, Improving Asylum Procedures* (n 318) 300. The UK's instruction also mentions Switzerland as a non-Dublin State to which removal may be possible: UK Visas and Immigration, 'Asylum Policy Guidance on Safe Third Country Cases' (15 Nov. 2013).

³²⁵ Procedures Directive (recast) art. 33(2)(b).

³²⁶ Ibid., art. 35; Procedures Directive (original) art. 26. 'If readmission does not occur, it is implicit that the applicant should have a right to a substantive claim examination in the relevant Member State': Garlick, M., 'Asylum Procedures', in Peers, S. and others eds., *EU Immigration and Asylum Law (Text and Commentary)* (2nd rev edn, vol. 3, 2015) 264. For a brief overview of the history of this concept, see Kjaerum, M., 'The Concept of First Country of Asylum' (1992) 4 *IJRL* 514, 515.

³²⁷ Legomsky (n 273) 571.

³²⁸ Procedures Directive (recast) art. 35.

³²⁹ Garlick (n 326) 262.

³³⁰ Procedures Directive (recast) art. 46(6)(b).

³³¹ See examples in European Commission (n 318) 10–11.

³³² Garlick (n 326) 265, referring inter alia to the Lisbon Expert Roundtable (n 251).

³³³ UNHCR (n 250) 3–4 (fns omitted).

³³⁴ European Commission (n 318) discussed in Garlick (n 326) 266. UNHCR believes that the appropriate course of action would be for a national court to make a reference to the CJEU on its interpretation: UNHCR (n 250) 4.

³³⁵ See, for example, Executive Committee Conclusion No. 58 (1989) para. (f).

³³⁶ UNHCR, 'Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)' (10 Feb. 2005) 35. Garlick (n 326) 266 notes that recital (46) of the Procedures Directive (recast) requires Member States to take account of 'relevant UNHCR guidelines' in applying the first country of asylum concept.

³³⁷ Case C-133/06 *European Parliament v Council of the European Union* [2008] ECR I-3189 in relation to the Procedures Directive (original) art. 29; see also NS (n 103). Hathaway & Foster described this list mechanism as 'a nationality-based exclusion from the scope of [Refugee Convention] protection obligations ... unlikely to survive scrutiny under Art. 3's duty of non-discrimination on the basis of "country of origin" ': Hathaway, J. C. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014) 128 (fn omitted). No agreement was ever reached on which countries should be included. The US and Japan were considered but rejected because of their use of the death penalty: Garlick (n 326) 273–4. However, in 2015

the European Commission sought to revive the mechanism as part of a series of measures addressed at halting the numbers of asylum requests being made in the EU: Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM(2015) 452 (9 Sep. 2015). See also European Parliament, ‘Safe Countries of Origin: Proposed Common EU List’ Briefing, EU Legislation in Progress (8 Oct. 2015) <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf>; Costello, C. & Mouzourakis, M., ‘The Common European Asylum System: Where Did It All Go Wrong?’, in Fletcher, M., Herlin-Karnell, E., & Matera, C., eds., *The European Union as an Area of Freedom, Security and Justice* (2016).

³³⁸ Procedures Directive (recast) art. 37(3), recital (48). For discussion of a range of national court decisions (Belgium, France, Germany, and the UK) striking down the designation of particular countries of origin as ‘safe’, see Costello ([n 266](#)) (including for procedural defects).

³³⁹ Procedures Directive (recast) art. 37(2).

³⁴⁰ Cf. Procedures Directive (original). art. 30(1).

³⁴¹ This is entrenched in the Aznar Protocol to the Amsterdam Treaty, and requires protection claims by EU citizens to be treated as manifestly unfounded or inadmissible: Garlick ([n 326](#)) 273. See also Guild, E. & Zwaan, K., ‘Does Europe Still Create Refugees?’ (2014) 40 *Queens Law Journal* 141.

³⁴² By implication, art. 7(2) of Council Directive 2011/95/EC of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 suggests that an asylum seeker’s country of origin will generally be safe where the State (or parties or organizations, including international organizations, controlling all or part of it) ‘take[s] reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection’. See also MSS ([n 266](#)) para. 298: ‘The Court’s primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.’

³⁴³ Procedures Directive (recast) recital (42).

³⁴⁴ ECRC ([n 321](#)) 48. The equivalent practice in Canada (‘designated country of origin’) was struck down as being contrary to the equality guarantee in s. 15 of the Canadian Charter of Rights and Freedoms, because it served ‘to further marginalize, prejudice, and stereotype refugee claimants’ from countries designated as ‘safe’ and ‘non-refugee producing’: *YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration*

2015 FC 892, para.124.

³⁴⁵ Procedures Directive (recast) art. 31(8); *HID* ([n 258](#)) paras. 73–5, noting, however (at 74) that an accelerated procedure must not deprive individuals of the guarantees required by art. 23 of the Procedures Directive (original). See also C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* (CJEU, Grand Chamber, 17 Dec. 2020), which found inter alia that Hungary had failed to fulfil its obligations under EU law by requiring applications for international protection from persons arriving from Serbia to be made in two transit zones (while also drastically limiting the number of people able to enter those transit zones daily).

³⁴⁶ Procedures Directive (recast) art. 46(6).

³⁴⁷ Costello, C. & Hancox, E., ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’, in Chetail, De Bruycker, & Maiani ([n 116](#)) 433; Procedures Directive (recast) art. 31(8).

³⁴⁸ *Chahal v United Kingdom* (1996) 23 EHRR 413, para. 147; *Čonka v Belgium* [2002] ECHR 14, para. 76.

³⁴⁹ *Čonka v Belgium* ([n 348](#)) paras. 75, 79; *Jabari v Turkey* [2000] ECHR 369, para. 50.

³⁵⁰ European Commission ([n 318](#)) s. 5.2.5; UNHCR, *Improving Asylum Procedures* ([n 318](#)) 334 ff.

³⁵¹ Garlick ([n 326](#)) 274.

³⁵² Procedures Directive (recast) art. 38(1).

³⁵³ Ibid., art. 1.

³⁵⁴ Ibid., art. 38(2)(a), recital (44).

³⁵⁵ Explanatory Memorandum, COM/2000/0578 final, 20.

³⁵⁶ See, for example, Australia’s arrangements with Nauru and Papua New Guinea ([n 260](#)).

³⁵⁷ Procedures Directive (recast) arts. 33(2)(c), 38. For children, it must also be in their best interests: art. 25(6)(c), which presumably relates to cases where a child has parents or carers in the ‘safe third country’, according to Garlick ([n 326](#)) 249. Previously, safe third country cases could be accelerated (see original art. 23(4)(c)(ii)) but this is no longer permitted.

³⁵⁸ Procedures Directive (recast) art. 38(2)(c) reflecting NS ([n 103](#)) paras. 100–1.

³⁵⁹ Procedures Directive (recast) art. 46(5).

³⁶⁰ Ibid., art. 38(4); Procedures Directive (original) art. 27(4).

³⁶¹ This necessarily excludes Turkey.

³⁶² Procedures Directive (recast) art. 39(2).

³⁶³ In the context of the Dublin Regulation, the CJEU has stated that presumptions of safety are not appropriate: NS ([n 103](#)) para. 103. Garlick ([n 326](#)) 271 argues that there is an ‘apparent inconsistency with Article 31 of the Geneva Convention, which precludes the application of penalties to refugees entering an asylum country unlawfully’.

³⁶⁴ Procedures Directive (recast) art. 39(3).

³⁶⁵ NS ([n 103](#)) paras. 100–1.

³⁶⁶ Procedures Directive (recast) art. 46(6)(d). According to Garlick ([n 326](#)) 270, ‘it remains problematic in principle, and potentially in practice, for a number of reasons’.

³⁶⁷ Compare Procedures Directive (recast) recital (45) with Procedures Directive (original) recital (24). See also Case C-133/06 ([n 337](#)).

³⁶⁸ Procedures Directive (recast) art. 39(7). See critique by Costello ([n 101](#)) 254.

³⁶⁹ Procedures Directive (recast) art. 39(4); Procedures Directive (original) art. 36(4).

³⁷⁰ Procedures Directive (recast) art. 39(6); Procedures Directive (original) art. 36(6).

³⁷¹ Garlick ([n 326](#)) 272, referring to ECRE, ‘Information Note on the Asylum Procedures Directive (2005/85/EC)’ (26 Oct. 2006) <http://www.ecre.org/topics/areas-of-work/protection-in-europe/118.html>.

³⁷² Dublin III Regulation; previously, Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1; Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L222; Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No. 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention [2006] OJ L66/37.

³⁷³ Proposed Regulation on Asylum and Migration Management ([n 132](#)). For a detailed critique, see ECRE, *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)* (Feb. 2021).

³⁷⁴ Explanatory Memorandum to Proposed Regulation on Asylum and Migration Management ([n 132](#)) 2.

³⁷⁵ ECRE, ‘Editorial: The Pact on Migration and Asylum: It’s never enough, never, never’ (25 Sep. 2020) <https://www.ecre.org/the-pact-on-migration-and-asylum-its-never-enough-never-never/>: ‘There are also some positive changes: an expanded definition of family to include siblings; a recalibration of evidential standards; and a new criterion related to academic qualifications; long-term residence rights should be granted after three years, an incentive to stay.’

³⁷⁶ For details, see ECRE ([n 373](#)) 29–31.

³⁷⁷ Maiani, F., ‘The Dublin III Regulation: A New Legal Framework for a More Humane System?’, in Chetail, De Bruycker, & Maiani ([n 116](#)) 101.

³⁷⁸ Costello ([n 101](#)) 233; note, for example, the divergent recognition rates across the EU: Migration Policy Institute, ‘Asylum Recognition Rates in the EU/EFTA by Country, 2008–2017’ European Asylum Support Office, ‘Latest Asylum Trends’ <https://www.easo.europa.eu/latest-asylum-trends>.

³⁷⁹ Dublin III Regulation, art. 7.

³⁸⁰ Ibid., arts. 8–11. The definition of ‘family members’ has been broadened by the Dublin III Regulation: see art. 2(g) also art. 2(h).

³⁸¹ Ibid., art. 12.

³⁸² Ibid., art. 13.

³⁸³ Ibid., art. 14.

³⁸⁴ Ibid., arts. 15, 3(2).

³⁸⁵ Ibid., art. 17(1); Dublin Regulation, art. 3(2). This was affirmed in NS ([n 103](#)).

³⁸⁶ Dublin III Regulation, art. 3(3); Dublin II Regulation, art. 3(3). Note that all EU Member States are considered as safe third countries: Dublin III Regulation, recital (3); Dublin II Regulation, recital (2).

³⁸⁷ Council Regulation (EC) No. 2725/2000 ([n 132](#)); Council Regulation (EC) No. 407/2002 ([n 132](#)). See also Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1.

³⁸⁸ For detailed analysis, see Maiani ([n 377](#)) 114 ff.

³⁸⁹ Ibid., 120.

³⁹⁰ See, in particular, Explanatory Memorandum to the proposed Regulation on Asylum and Migration Management ([n 132](#)) 10–16.

³⁹¹ ECRE, ‘Summary Report on the Application of the Dublin II Regulation in Europe’, AD2/3/2006/EXT/MH (Mar. 2006) 3.

³⁹² ICF International, *Evaluation of the Dublin III Regulation: Final Report* (Dec. 2015) 6 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf.

³⁹³ Asylum Information Database, *Not There Yet: An NGO Perspective on Challenges to A Fair and Effective Common European Asylum System* (Annual Report 2012/13) 15; see also <https://www.irinnews.org/maps-and-graphics/2015/07/21/playing-eu-asylum-lottery>.

³⁹⁴ Maiani ([n 377](#)) 106–7.

³⁹⁵ Ibid., 108.

³⁹⁶ European Commission, ‘Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ (6 Apr. 2016) COM(2016) 197 final, 3.

³⁹⁷ On which, see Goodwin-Gill, G. S., ‘The Mediterranean Papers: Athens, Naples, and Istanbul’ (2016) 28 *IJRL* 276.

³⁹⁸ ICF International ([n 392](#)) 4.

³⁹⁹ Explanatory Memorandum to the proposed Regulation on Asylum and Migration Management ([n 132](#)) 11.

⁴⁰⁰ *Ibid.*, 14.

⁴⁰¹ Costello ([n 101](#)) 253 in relation to *Hirsi* ([n 148](#)).

⁴⁰² *TI v United Kingdom*, App. No. 43844/98 (7 Mar. 2000); *KRS v United Kingdom*, App. No. 32733/08 (2 Dec. 2008); *MSS* ([n 266](#)); *Tarakhel v Switzerland*, App. No. 29217/12 (4 Nov. 2014); *NS* ([n 103](#)); cf. Case C-394/12 *Abdullahi v Bundesasylamt* (CJEU, 10 Dec. 2013), which seemed to privilege the ‘efficient’ operation of Dublin over the rights of refugees: Costello ([n 101](#)) 276. For general discussion of these cases and developments, see Costello ([n 101](#)) 258–76; Moreno-Lax, V., ‘Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*’ (2012) 14 *EJML* 1; Mallia, P., ‘Case of *M.S.S. v. Belgium and Greece*: A Catalyst in the Re-Thinking of the Dublin II Regulation’ (2011) 30(3) *RSQ* 107. *Maiani* ([n 377](#)) 128 questions whether *Abdullahi* remains good law under Dublin III, noting the challenge brought in Case C-155/15 *Karim* [2015] OJ C198/23; on that point, see also Peers, S., ‘The Dublin III Regulation’, in Peers and others ([n 326](#)) 353. Analogies can be drawn with non-removal cases in the subsidiary protection context; see health cases in [Ch. 12](#), s. 4.2; [Ch. 7](#).

⁴⁰³ Indeed, in Case C-578/16 *CK and Others v Republika Slovenija* (CJEU, 16 Feb. 2017) para. 69, it noted that the European Court of Human Rights’ reasoning in *Paposhvili v Belgium*, App. No. 41738/10 (13 Dec. 2016) paras. 174–5 was also relevant to Dublin transfers.

⁴⁰⁴ *TI* ([n 402](#)); *KRS* ([n 402](#)); *MSS* ([n 266](#)); *NS* ([n 103](#)); *CK* ([n 403](#)); Case C-163/17 *Jawo v Bundesrepublik Deutschland* (CJEU, Grand Chamber, 19 Mar. 2019); Moreno-Lax ([n 402](#)). In 2016, the European Commission recommended that Dublin transfers to Greece could resume: Recommendation of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013, C(2016) 871. This was much criticized: see, for example, <http://www.ecre.org/ecre-urges-the-eu-and-member-states-not-to-resume-dublin-transfers-to-greece/>.

⁴⁰⁵ *Ilias and Ahmed v Hungary*, App. No. 47287/15 (Grand Chamber, 21 Nov. 2019).

⁴⁰⁶ *Ibid.*, para. 142.

⁴⁰⁷ *Ibid.*, para. 131.

⁴⁰⁸ *Ibid.*, para. 133.

⁴⁰⁹ *Ibid.*, para. 134. Furthermore, it explained that without first examining the merit of their claims, ‘it cannot be known whether the persons to be expelled risk treatment contrary to Article 3 in their country of origin or are simply economic migrants.’ Only through ‘a legal procedure resulting in a legal decision’ can findings ‘be made and relied upon’: para. 137.

⁴¹⁰ Costello ([n 101](#)) 258.

⁴¹¹ NS ([n 103](#)) para. 81; Jawo ([n 404](#)) 83; Joined Cases C-297/17, C-318/17, C-319/17, and C-438/17 *Ibrahim v Bundesrepublik Deutschland* (CJEU, Grand Chamber, 19 Mar. 2019) 86.

⁴¹² Tarakhel ([n 402](#)) para. 104.

⁴¹³ Ibid., para. 105.

⁴¹⁴ CK ([n 403](#)) para. 76. In *CK*, the CJEU considered whether it constituted inhuman and degrading treatment to transfer an asylum seeker with a particularly serious mental or physical illness where there was a real and proven risk of a significant and permanent deterioration in his or her state of health. The court found that if an asylum seeker provided objective evidence of the particular seriousness of his or her state of health, and the significant and irreversible consequences to which his or her transfer might lead, then the authorities were ‘under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person’: para. 75.

⁴¹⁵ Jawo ([n 404](#)) para. 98.

⁴¹⁶ Ibid., para. 92.

⁴¹⁷ Ibid., para. 93.

⁴¹⁸ Ibid., para. 91.

⁴¹⁹ Ibid., para. 95.

⁴²⁰ *Rezaifar v Denmark*, UN doc. CCPR/C/119/D/2512/2014 (10 Apr. 2017) paras. 8.8, 8.9. The Committee noted that ‘the State party does not explain how, in case of return to Italy, the renewable residence permit would actually protect the author and her children, including a minor child who suffers from a heart condition, from exceptional hardship and destitution, similar to the ones the author has already experienced in Italy’ (para. 8.8). See also *Jasin v Denmark*, UN doc. CCPR/C/114/D/2360/2014 (22 Jul. 2015); *YAA and FHM v Denmark*, UN doc. CCPR/C/119/D/2681/2015 (10 Mar. 2017).

⁴²¹ Dublin Regulation III; see also recital (21). NS ([n 103](#)) paras. 94, 106 used the language ‘systemic deficiencies’. For detailed analysis of the minimum requirements for transfer to be lawful, see *Maiani* ([n 377](#)) 133–8; Lübbe, A., ‘“Systemic Flaws” and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?’ (2015) 27 *IJRL* 135.

⁴²² *R (on the application of EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, para. 42; see also CK ([n 403](#)) paras. 91–6. On the systemic flaws point, see Goodwin-Gill, G. S., ‘Current Challenges in Refugee Law’, in Gauci, J.-P., Giuffré, M., & Tsourdi, E., eds., *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (2015).

⁴²³ US–Canada Safe Third Country Agreement ([n 261](#)). For background and rationale, see Arbel, E., ‘Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States’ (2013) 25 *IJRL* 65, 68–70. On earlier

attempts to reach agreement, based on an October 1995 ‘Memorandum of Agreement’, see the second edition of this work, 336.

⁴²⁴ Exceptions include asylum seekers with a family member in the receiving State who has an eligible refugee application pending or lawful immigration status (other than visitor status); unaccompanied minors; persons not required to obtain a visa; or persons with a valid visa (other than a transit visa) to enter the receiving State; or where it is considered to be in the public interest: see US–Canada Safe Third Country Agreement ([n 261](#)) arts. 4(2), 6. A 2013 study found that the exceptions were applied ‘inflexibly and inconsistently’: Arbel & Brenner ([n 272](#)) 7.

⁴²⁵ US–Canada Safe Third Country Agreement ([n 261](#)) Preamble, noting Canada’s ratification of the 1951 Convention and Protocol, and the US’ ratification of the latter.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Ibid., art. 3.

⁴²⁹ See *Canadian Council for Refugees v Canada* 2007 FC 1262, paras. 154, 161, 240 (not specifically overturned by the Federal Court of Appeal); Harvard Immigration and Refugee Law Clinic, ‘Bordering on Failure: The U.S.–Canada Safe Third Country Agreement Fifteen Months after Implementation’ (Mar. 2006) 11–15 http://hrp.law.harvard.edu/wp-content/uploads/2013/11/Harvard_STCA_Report.pdf; Arbel and & Brenner ([n 272](#)); Arbel ([n 423](#)) 73–5; Macklin, A., ‘Disappearing Refugees: Reflections on the Canada–U.S. Safe Third Country Agreement’ (2005) 36 *Columbia Human Rights Law Review* 365; Canadian Council for Refugees, ‘Closing the Front Door on Refugees: Report on the First Year of the Safe Third Country Agreement’ (Dec. 2005).

⁴³⁰ Arbel ([n 423](#)) 73; see also Arbel & Brenner ([n 272](#)) 8–11.

⁴³¹ See Macklin ([n 429](#)) 380. These practices were exacerbated and expanded under President Trump, and following his Executive Orders in early 2017 to restrict the entry of migrants and refugees from certain countries (see Protecting the Nation from Foreign Terrorist Entry into the United States, Executive Order (27 January 2017); Protecting the Nation from Foreign Terrorist Entry into the United States Executive Order (6 March 2017)), academics and civil society organizations called on the Canadian government to suspend the agreement: see Letter signed by Canadian law professors (31 Jan. 2017). For a detailed overview of ‘every known Trump-era immigration policy’, see ‘Immigration Policy Tracking Project’ <https://immpolicytracking.org/home/>.

⁴³² *Canadian Council for Refugees v Canada* ([n 429](#)) para. 338.

⁴³³ *Canada v Canadian Council for Refugees* 2008 FCA 229, paras. 76–81. It was also maintained that there was ‘no factual basis upon which to assess the alleged Charter breaches’ since the applicant had not been present in Canadian territory: para. 103. The Canadian Supreme Court declined to hear a further appeal: *Canadian Council for Refugees v Canada*, 2009 CanLII 4204 (SCC).

⁴³⁴ *John Doe v Canada* ([n 23](#)) para. 7.

⁴³⁵ Ibid., para. 120.

⁴³⁶ Ibid.; also para. 125. See also analysis in Settlage, R. G., ‘Indirect Refoulement: Challenging Canada’s Participation in the Canada–United States Safe Third Country Agreement’ (2012) 30 *Wisconsin International Law Journal* 142, 184–8.

⁴³⁷ See Amnesty International Canada and Canadian Council for Refugees, ‘Contesting the Designation of the US as a Safe Third Country’ (9 May 2017).

⁴³⁸ Canadian Council for Refugees v Canada 2020 FC 770, para. 163.

⁴³⁹ *Canada (Citizenship and Immigration) v Canadian Council for Refugees* 2021 FCA 72; see also, Canadian Council for Refugees, ‘Federal Court of Appeal decision disappointing but acknowledges ineffectiveness of review process’ (15 Apr. 2021): <https://ccrweb.ca/en/federal-court-appeal-decision-disappointing>.

⁴⁴⁰ International Civil Aviation Organization, ICAO Best Practices, Annex 9, **Chapter 5: Inadmissible Persons and Deportees**.

⁴⁴¹ See, for example, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final. See generally Coleman, N., *European Readmission Policy: Third Country Interests and Refugee Rights* (2009); Panizzon, M., ‘Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?’ (2012) 31(4) *RSQ* 101; Giuffré, M., ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (2013) 32(3) *RSQ* 79; Giuffré, M., ‘State Responsibility beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?’ (2013) 24 *IJRL* 692 (on a bilateral agreement for joint naval patrols to interdict and deflect people at sea). For an interactive map and links to a variety of readmission agreements concluded by the EU Member States (plus Iceland, Norway, and Switzerland), see Return Migration and Development Platform, ‘Inventory of the Agreements linked to Readmission’ <http://www.jeanpierrecassarino.com/datasets/ra/>. The EU itself can also enter into readmission agreements, a list of which is available here: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm.

⁴⁴² Costello ([n 101](#)) 252.

⁴⁴³ In theory, UNHCR prefers readmission agreements to safe third country decisions, since they are not subject to unilateral decision-making and guarantee readmission: see, for example, ‘UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status (COM(2000) 578 final, 20 September 2000)’ (Jul. 2001) para. 38; UNHCR, ‘UNHCR Position on Readmission Agreements, “Protection Elsewhere” and Asylum Policy’ (1 Aug. 1994) Pt. 5, cited in Legomsky ([n 273](#)) 630–1. However, they must comply with certain legal safeguards: UNHCR ([n 250](#)).

⁴⁴⁴ Costello ([n 101](#)) 253, referring in particular to the removal of Iranians and Iraqis to Turkey pursuant to the Greece–Turkey readmission agreement; Apap, Carrera, & Kirişci ([n](#)

263) 22–3.

⁴⁴⁵ *Sharifi v Italy and Greece*, App. No. 16643/09 (21 Oct. 2014). See also UNHCR’s submission in that case, which details how returns were carried out in practice: UNHCR, ‘Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Sharifi and Others v Italy and Greece* (App. No. 16643/09)’ (Oct. 2009) <http://www.unhcr.org/4deccee39.pdf>.

⁴⁴⁶ On the extraterritorial application of the principle of *non-refoulement*, see Ch. 6, s. 1.1.

⁴⁴⁷ Ghezelbash (n 115) 100.

⁴⁴⁸ Costello (n 101) 233.

⁴⁴⁹ See, for example, Committee on Migration, Refugees and Population, Parliamentary Assembly of the Council of Europe, *Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers*, Doc. 11304 (15 Jun. 2007) para. 10.

⁴⁵⁰ This began in 1991 for Haitians interdicted at sea, and in 1994 for Cubans interdicted at sea. See generally Dastyari (n 188); Dastyari, A., ‘Refugees on Guantánamo Bay: A Blue Print for Australia’s “Pacific Solution”?’ (2007) 79 *Australian Quarterly* 4, 6; Dastyari, A. & Effeney, L., ‘Immigration Detention in Guantánamo Bay: (Not Going Anywhere Anytime Soon)’ (2012) 6(2) *Shima: The International Journal of Research into Island Cultures* 49; Ghezelbash (n 115) Ch. 5.

⁴⁵¹ Only 425 people were transferred to Guantánamo Bay between 1996 and 2004: Dastyari (n 188) 5.

⁴⁵² See Ghezelbash (n 115) 103–10 for a detailed overview.

⁴⁵³ The policy operated from 2001–08, and was revived in 2012 after unsuccessful attempts by the Australian government to establish transfer arrangements with East Timor and Malaysia. As a further deterrent element, since July 2013, those found to be refugees have been barred from resettlement in Australia. For an overview of the policy, see McAdam, J. & Chong, F., *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (2019) Ch. 5; Gleeson, M., *Offshore: Behind the Wire on Manus and Nauru* (2016). Goodwin-Gill, G. S., ‘The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations’ (2007) 9 *UTS Law Review* 26; Foster, M. & Pobjoy, J., ‘A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s “Excised” Territory’ (2011) 23 *IJRL* 583; Gleeson (n 260). A challenge to the validity of offshore processing was rejected by the High Court of Australia in *Plaintiff S195 v Minister for Immigration and Border Protection* [2017] HCA 31.

⁴⁵⁴ Regional Resettlement Arrangement between Australia and Papua New Guinea (n 261).

⁴⁵⁵ Refugee Council of Australia and Asylum Seeker Resource Centre, *Australia’s Man-Made Crisis on Nauru: Six Years On* (Sep. 2018).

⁴⁵⁶ UN Committee on the Elimination of Discrimination against Women, ‘Concluding Observations on the Eighth Periodic Report of Australia: UN doc. CEDAW/C/AUS/CO/8 (20 Jul. 2018) para. 53; UN Human Rights Committee, ‘Concluding Observations on the Sixth

Periodic Report of Australia': UN doc. CCPR/C/AUS/CO/6 (Nov. 2017) para. 35; UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Fifth Periodic Report of Australia': UN doc. E/C.12/AUS/CO/5 (11 Jul. 2017) para. 17; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: UN doc. A/HRC/37/50 (26 Feb. 2018); *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E Méndez: UN doc. A/HRC/28/68 (5 Mar. 2015); UN Committee against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia': UN doc. CAT/C/AUS/CO/4-5 (23 Dec. 2014); UN Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Australia': UN doc. CRC/C/AUS/CO/4 (28 Aug. 2012).

⁴⁵⁷ Hathaway ([n 115](#)) 389 (fns omitted).

⁴⁵⁸ For an overview, see McAdam, J., *Extraterritorial Processing in Europe: Is "Regional Protection" the Answer, and If Not, What Is?* (Kaldor Centre for International Refugee Law, Policy Brief 1, May 2015); Ghezelbash ([n 115](#)) 171–4; see also the third edition of this work, 409–11. In recent years, both the UK and Denmark have again proposed such schemes: Lemberg-Pedersen, M., 'Danish Externalization Desires and the Drive Towards Zero Asylum Seekers' ECRE, 12 Mar. 2021) <https://www.ecre.org/op-ed-danish-externalization-desires-and-the-drive-towards-zero-asylum-seekers/>; House of Commons Home Affairs Committee, 'Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU', HC 705 (11 Nov. 2020).

⁴⁵⁹ For background, see Noll, G., 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *EJML* 303, 307; Ward, K., *Navigation Guide: Regional Protection Zones and Transit Processing Centres* (Information Centre about Asylum and Refugees in the UK, Nov. 2004) 10.

⁴⁶⁰ See Select Committee on European Union (UK) 'New International Approaches to Asylum Processing and Protection', in House of Lords EU Committee ([n 266](#)) Appendix 5; UK Home Office, 'New Vision for Refugees' (7 Mar. 2003). For a summary of the range of iterations over the years, see Ward ([n 459](#)).

⁴⁶¹ For instance, in November 2014, the German Interior Minister, Thomas de Maizière, proposed the establishment of asylum processing centres in North African transit States: Léonard, S. & Kaunert, C., 'The Extra-Territorial Processing of Asylum Claims' (2016) 51 *FMR* 49, 49; Ghezelbash ([n 115](#)) 172–4. See also European Parliament, Joint Motion for a Resolution on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies 2015/2660(RSP) (28 Apr. 2015).

⁴⁶² See, for example, Committee on Migration, Refugees and Population, Parliamentary Assembly of the Council of Europe, 'Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers': Doc. 11304 (15 Jun. 2007); European Commission, 'Towards More Accessible, Equitable and Managed Asylum Systems' (Communication) COM(2003) 315 final (3 Jun. 2003) 6; discussion in McAdam ([n](#)

458).

⁴⁶³ Advisory Committee on Migration Affairs (Netherlands), *External Processing: Conditions applying to the Processing of Asylum Applications outside the European Union* (Advisory Report No. 32, 2010) 18. See also EU Mobility Partnerships with Morocco (Jun. 2013), Tunisia (Mar. 2014), Moldova and Cape Verde (2008), Georgia (2009), Armenia (2011), and Azerbaijan (2013): https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en.

⁴⁶⁴ See *Hirsi* (n 148).

⁴⁶⁵ UNHCR, ‘Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with respect to Extraterritorial Processing’ Protection Policy Paper (2010) para. 3.

⁴⁶⁶ Vincent Cochetel, Director of the Europe Bureau, cited in Sherwood, H. and others, ‘Europe Faces “Colossal Humanitarian Catastrophe” of Refugees Dying at Sea’ *Guardian* (3 Jun. 2014) <http://www.theguardian.com/world/2014/jun/02/europe-refugee-crisis-un-africa-processing-centres>.

⁴⁶⁷ UNHCR (n 465) para. 51.

⁴⁶⁸ See Ch. 6, ss. 1.1, 1.3. In the High Court of Australia’s decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, Bell, Gageler, & Gordon JJ (in separate, minority judgments) pointed to substantive indicia that showed Australia was *in fact* exercising effective control over the detention of asylum seekers in Nauru, even if it was done pursuant to Nauruan law: Bell J (para. 93), Gageler J (paras. 172–3), Gordon J (para. 355), and analysis in Gleeson, M., ‘Case Note: *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*’ (Kaldor Centre for International Refugee Law, Jul. 2016) 10–11.

⁴⁶⁹ UNHCR (n 465) para. 35; Executive Committee Conclusions No. 33 (1984), No. 44 (1986), No. 48 (1987), No. 75 (1994), No. 82 (1997), No. 93 (2002), No. 101 (2004).

⁴⁷⁰ *Hirsi* (n 148); see further Ch. 6, s. 1.1.

⁴⁷¹ See Select Committee on European Union (n 460) para. 68; see also Select Committee on European Union, *Minimum Standards in Asylum Procedures*, House of Lords Paper No. 59, 11th Report of Session 2000–01 (2001) paras. 122–3. Forcibly transferring asylum seekers to transit processing centres would also contravene art. 18 of the EU Charter of Fundamental Rights (n 98). Children should not be removed unless their best interests have been taken into account as a primary consideration: see CRC 89, art. 3. Special attention would need to be given to particularly vulnerable groups, such as children, the elderly, and sufferers of torture or trauma.

⁴⁷² Advisory Committee on Migration Affairs (n 463) 41.

⁴⁷³ Noll, G., Fagerlund, J., & Liebaut, F., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (2002) 61.

⁴⁷⁴ For example, under the EU's 'Dublin system', asylum seekers may be transferred back to the first European country they entered to have their protection claim determined. In practice, it can take longer for transfer decisions to be made than if the substantive asylum claim were considered in the first place: UNHCR, 'UNHCR Recommendations on Important Aspects of Refugee Protection in Italy' (Jul. 2013) 7 (where it may take up to 24 months); ECRE, *Dublin II Regulation: Lives on Hold: European Comparative Report* (Feb. 2013) 218–27; Mouzourakis, M., 'We Need to Talk about Dublin': Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union, Refugee Studies Centre, Working Paper Series No. 105 (Dec. 2014) 18–19.

⁴⁷⁵ See also Ch. 7, s. 7. For detailed analysis of rights under the Refugee Convention, see generally Hathaway (n 115); Zimmermann (n 234).

⁴⁷⁶ UNHCR, 'Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems', Global Consultations on International Protection: EC/GC/ 01/17 (4 Sep. 2001) para. 3, referring to arts. 3, 4, 5, 7, 8, 12, 16, 20, 22, 31, and 33 of the 1951 Convention.

⁴⁷⁷ For example, ICCPR 66, art. 2; ECHR 50, art. 14.

⁴⁷⁸ See Ch. 7, s. 7. Both Hathaway and Edwards have independently argued that refugee status comprises Convention status *plus* human rights law entitlements: Hathaway (n 124) 8; Edwards (n 210). Grahl-Madsen, earlier had observed that the 'catalog of rights and benefits due to refugees' had been extended through various Council of Europe and ILO agreements: Grahl-Madsen (n 1) 34, 41.

⁴⁷⁹ Executive Committee Conclusions No. 33 (1984), No. 44 (1986), No. 48 (1987), No. 75 (1994), No. 82 (1997), No. 93 (2002), No. 101 (2004).

⁴⁸⁰ ICCPR 66, art. 7; CAT 84, arts. 3, 16.

⁴⁸¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96. Unlike the original version of the Directive, these standards now apply to applicants for both Convention refugee status and subsidiary protection: recital (13). For criticisms of the original approach, see Rogers, N., 'Minimum Standards for Reception' (2002) 4 *EJML* 215; Guild, E., 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review* 198.

⁴⁸² Reception Conditions Directive (recast), recitals (10) and (9), respectively.

⁴⁸³ See , for example, Nethery, A. & Silverman, S. J., eds., *Immigration Detention: The Migration of a Policy and its Human Impact* (2015), which covers immigration detention policies in 16 States. Silverman and Nethery note in their introductory chapter that 'nearly every state around the world has adopted immigration detention policy and practice in some form': 1. See also, for example, *Attorney General for Canada v Cain* [1906] AC 542; *Shaughnessy v US ex rel. Mezei* 345 US 206 (1953); *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, para. 89; *Jennings and Others v Rodriguez and Others*, 583 U.S. ___ (2018) No. 15-1204; art. 5(1)(f) ECHR 50; Note, 'The indefinite detention of

excluded aliens: statutory and constitutional justifications and limitations' (1983) 82 *Michigan Law Review* 61; and De Bruycker, P. & Tsourdi, E., 'The Challenge of Asylum Detention to Refugee Protection' (2016) 35(1) *RSQ* 1, introducing a special *RSQ* issue on the challenge of asylum detention to refugee protection.

⁴⁸⁴ Art. 9 of the 1951 Convention permits a State to take 'provisional measures' against a particular person, 'pending a determination that that person is in fact a refugee and that the continuance of such measures is necessary in the interests of national security'. While the Convention does not specifically limit the period of detention or require any particular form of review, the limits to State discretion are nevertheless implicit and subject overall to implementation in good faith. For reservations to arts. 9 and 26, see Ch. 11, s. 1.1. For general background, see Goodwin-Gill, G. S., 'International Law and the Detention of Refugees and Asylum-Seekers' (1986) 20 *International Migration Review* 193, 205–9; Goodwin-Gill, G. S., 'The detention of non-nationals, with particular reference to refugees and asylum-seekers' (1986) 9 *In Defense of the Alien* 138, 141–6.

⁴⁸⁵ Art. 3 of the 1951 Convention provides that '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'. Policies such as the 2003 US 'Operation Liberty Shield', which provided that asylum seekers from 33 specified countries were to be detained throughout their refugee status determination process, are incompatible with the Convention. See Ghezelbash, D., *Refugee Lost: Asylum Law in an Interdependent World* (2018) 40. See also UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012), Guideline 5 (Detention must not be discriminatory).

⁴⁸⁶ See s. 5.2; Ch. 5, s. 5.1.

⁴⁸⁷ See discussion in Ch. 5, s. 5.1. The 2012 UNHCR Guidelines (n 485) para. 32 (fns. omitted), also note that 'detention for the sole reason that the person is seeking asylum is not lawful under international law ... detention is not permitted as a punitive—for example, criminal—measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.' (footnotes omitted). See further Costello, C., Ioffe, Y., & Büchsel, T., 'Article 31 of the 1951 Convention relating to the Status of Refugees' UNHCR Legal and Protection Policy Research Series, PPLA/2017/01 (Jul. 2017) 38.

⁴⁸⁸ See generally UN docs. A/CONF.2/SR.13 (10 Jul. 1951) 13–15; SR.14 (10 Jul. 1951) 4, 10–11; SR.35, (25 Jul. 1951) 11–13, 15–16, 19.

⁴⁸⁹ There is some debate on whether art. 31(2) applies to *all* refugees entering illegally, or only to those to whom the 'benefit' of art. 31(1) applies. A textual approach appears to dictate the latter, but attention to the 'object and purpose' of the clause may provide justification for the more generous interpretation.

⁴⁹⁰ Noll notes that 'where the detention of a refugee fails the necessity test of [art. 31(2)], it

may be punitive, and therefore proscribed under [art. 31(1)] as well.’: Noll, G., ‘Article 31: Refugees Unlawfully in the Country of Refuge’, in Zimmermann ([n 234](#)) 1263. On art. 9, see [Ch. 11](#), s. 1.

[491](#) On art. 32, see [Ch. 11](#), s. 1.2.5.

[492](#) See Goodwin-Gill ([n 221](#)) 195–6, 219 (noting inter alia that ‘[w]here Article 31 applies, the indefinite detention of [refugees with justification for undocumented onward travel] can constitute an unnecessary restriction, contrary to Article 31(2)’: at 195); Costello ([n 487](#)) 45 (noting that ‘[n]ecessity demands an individual assessment of the legitimacy of the purpose being pursued by the restrictions in question, and an assessment of whether less restrictive means are available to meet that aim’). At the time of writing, UNHCR Guidelines on art. 31 had been in draft for some time.

[493](#) See Costello ([n 101](#)) [Ch. 7](#).

[494](#) See, for example, art. 9 ICCPR 66; art. 5 ECHR 50; art. 2 Protocol 4 to ECHR 50; art. 7 ACHR 69; art. 6 ACHPR 81; also art. 5 1985 United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live: UNGA res. 40/144 (13 Dec. 1985) Annex. In *Saadi v United Kingdom*, App. No. 13229/03 (Grand Chamber, 29 Jan. 2008) para. 67, the European Court of Human Rights recalled that ‘no detention which is arbitrary can be compatible with [art. 5(1) ECHR 50]’, and set out four requirements to avoid arbitrariness (at para. 74). Costello critiqued the court’s judgment in *Saadi* as obscuring the ‘inherent arbitrariness’ of ‘being detained because it is convenient for officials’: Costello, C., ‘Immigration Detention: The Grounds Beneath our Feet’ (2015) 68 *Current Legal Problems* 143, 154. On the court’s caselaw on art 5(1)(f) see further Costello ([n 101](#)) 285–92. Challenging detention on the basis of ‘arbitrariness’ is, however, difficult in some jurisdictions. In *Gisbert v US Attorney General* 988 F.2d 1437 (5th Cir., 1993) as amended by *Gisbert v US Attorney General* 997 F.2d 1122 (5th Cir., 1993), the court held that customary international law prohibitions against prolonged arbitrary detention cannot supersede US statute, the Attorney General’s actions, or judicial decisions. See also, in Australia, *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J): ‘It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution’.

[495](#) Emergency powers and the inherent limitations on many human rights are nevertheless a problem for refugees and asylum seekers, given the generality and vagueness of the wording of exceptions (public emergency, life of the nation, national security, *ordre public*, necessary in a democratic society) but also by experience with State practice in the face of actual or perceived threats. See generally Higgins, R., ‘Derogations under Human Rights Treaties’ (1976–77) 48 *BYIL* 281. Judicial decisions like *Fernandez-Roque v Smith* 567 F. Supp. 1115 (1981) are relatively rare, particularly in today’s highly securitized climate. In that case, the District Court for the Northern District of Georgia considered that the government’s power to detain non-nationals was conditional on there being clear and

convincing evidence that those affected were likely to abscond, or posed a risk to national security, or a significant and serious threat to persons or property. Reversing this decision, 734 F.2d 576 (11th Cir., 1984), the Court of Appeals concluded that the applicants lacked a sufficient constitutional liberty interest, and did not address the international law arguments. Cf. *Barrera-Echavarria v Rison* 21 F.3d 314 (9th Cir., 1994): eight years' imprisonment of an excluded alien who had arrived from Cuba with the Mariel boatlift because the US government considered him a danger to society violated his Fifth Amendment rights, as such extended detention was 'excessive in relation to its regulatory goal'.

⁴⁹⁶ See Human Rights Committee, 'General Comment No. 35: Article 9 (Liberty and security of person)': UN doc. CCPR/C/GC/35 (adopted at 112th sess., 7–31 October 2014) para. 18; Ghezelbash ([n 485](#)) 134. In the EU, see Reception Conditions Directive (recast) art. 8(1)–(3) (providing for detention in certain specified circumstances where necessary and based on an individual assessment). See also *FKAG v Australia*, UN doc. CCPR/C/108/D/2094/2011 (26 Jul. 2013) para. 9.3 and *MMM v Australia*, UN doc. CCPR/C/108/D/2136/2012 (25 Jul. 2013) para. 10.3. Both communications concerned recognized refugees who were refused visas based on adverse security assessments.

⁴⁹⁷ *FKAG v Australia* ([n 496](#)) para. 9.3; *MMM v Australia* ([n 496](#)) para. 10.3. On mandatory detention policies, see further *McAdam & Chong* ([n 453](#)) 94–113 (Australia); Ghezelbash ([n 485](#)) 35–73, 133–8 (Australia and the United States) 175–7 (Canada and New Zealand); Dastyari ([n 188](#)) 188–9 (United States).

⁴⁹⁸ 2012 UNHCR Guidelines ([n 485](#)) Guideline 6, para. 44. Conversely, the European Court of Human Rights has found that a brief period of detention may amount to degrading treatment contrary to art. 3 ECHR 50: see *MSS* ([n 266](#)) para. 232. Delays occasioned by the decision-making process itself are unlikely to justify a finding that the detention is arbitrary, 'provided the State is acting with reasonable diligence': see *Zaoui v Attorney-General* [2004] NZCA 228, [2005] 1 NZLR 577, para. 97 (McGrath J, with whom O'Regan J was in general agreement). Hammond J dissented on this point: see paras. 201, 221. *Zaoui* concerned a recognized refugee who was the subject of a security risk certificate which was under review. In the EU, however, art. 9(1) of the recast Reception Conditions Directive provides that '[d]elays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention'.

⁴⁹⁹ Human Rights Committee, 'General Comment No. 35' ([n 496](#)) para. 18, citing *FKAG v Australia* ([n 496](#)) para. 9.3. See also 2012 UNHCR Guidelines ([n 485](#)) Guideline 6, para. 44. On a domestic level, the legality of indefinite detention continues to be contested, however; see *Al-Kateb v Godwin* ([n 494](#)) in which, as a consequence of Australian statutory and Constitutional interpretation, a majority of the High Court of Australia held that indefinite detention of an 'unlawful non-citizen' was permissible and not subject to any 'purposive limitation', intention not to affect fundamental rights, or 'reasonable period' requirement; also *Commonwealth of Australia v AJL20* [2021] HCA 21. In 2017, the New Zealand Supreme Court found that the risk of an alleged people-smuggler's indefinite administrative detention in Australia was a 'compelling or extraordinary circumstance' justifying referral to

the Minister (rather than automatic compliance with the extradition request) under relevant domestic legislation: see *Maythem Kamil Radhi v The District Court of Manukau and The Commonwealth of Australia* [2017] NZSC 198, paras. 18–19, 50–5. Other jurisdictions have held that detention is permissible only so long as removal is a reasonable prospect.

⁵⁰⁰ See *FKAG v Australia* ([n 496](#)) paras. 9.4 (finding a breach of art. 9(1) ICCPR 66 on the grounds inter alia that the authors were ‘deprived of legal safeguards allowing them to challenge their indefinite detention’). The failure to provide effective review also constituted a breach of art. 9(4) ICCPR 66: see paras. 9.6–9.7 (noting that ‘the Committee is not convinced that it is open to the High Court to review the justification of the authors’ detention in substantive terms’).

⁵⁰¹ Human Rights Committee, ‘General Comment No. 35’ ([n 496](#)) para. 13 (excepting ‘judicially imposed sentences for a fixed period of time’). See also 2012 UNHCR Guidelines ([n 485](#)) Guideline 7.

⁵⁰² See also Human Rights Committee, ‘General Comment No. 35’ ([n 496](#)) paras. 39–48, noting inter alia that this right applies to ‘all detention by official action or pursuant to official authorization’, including administrative detention (para. 40). Right to release may be ‘unconditional or conditional’: (para. 41).

⁵⁰³ 2012 UNHCR Guidelines ([n 485](#)) para. 18. See also Guideline 4.3 and Annex A.

⁵⁰⁴ This interpretation was adopted in the work of the Commission on Human Rights on the right of everyone to be free from arbitrary arrest, detention, and exile; see UN doc. E/CN.4/826/Rev.1 (1964), paras. 23–30. See also, Hassan, P., ‘The word “arbitrary” as used in the Universal Declaration of Human Rights: “Illegal or Unjust”? ’ (1969) 10 *HarvILJ* 225; Lillich, R., ‘Civil Rights’, in Meron, T., ed., *Human Rights in International Law* (1984) See further *FKAG v Australia* ([n 496](#)) para. 9.3; *MMM v Australia* ([n 496](#)) para. 10.3.

⁵⁰⁵ Australia’s immigration detention policy has been found to violate art. 7 ICCPR 66. See *FKAG v Australia* ([n 496](#)) para. 9.8; *MMM v Australia* ([n 496](#)) para. 10.7. See also *McAdam & Chong* ([n 497](#)) 103–06, recalling the many studies revealing the adverse psychological effects of detention on individuals and setting out the additional risks of self-harm identified by the Commonwealth and Immigration Ombudsman, *Suicide and Self-Harm in the Immigration Detention Network*, Report No. 02/2013 (May 2013). In the European context, see *MSS* ([n 266](#)) paras. 231–4, 366–8 (finding Greece and Belgium respectively to be in violation of art. 3 ECHR 50 in relation to the conditions of detention at the Athens International Airport centre); *Khlaifia and Others v Italy*, App. No. 16483/12 (15 Dec. 2016) paras. 163–77, 187–211 (finding no violation of art. 3 ECHR 50 on the basis of the conditions in which the applicants were held on board ships or in the Lampedusa reception centre). For analysis of the experience of women in detention, see Rivas, L. & Bull, M., ‘Gender and Risk: An Empirical Examination of the Experiences of Women Held in Long-Term Immigration Detention in Australia’ (2018) 37 *RSQ* 307. See also 2012 UNHCR Guidelines ([n 485](#)) Guideline 8. For legal analysis of the effect of detention on children, see Dechent, S., Tania, S., & Mapulanga-Hulston, J., ‘Asylum Seeker Children in Nauru:

Australia's International Human Rights Obligations and Operational Realities' (2019) 31 *IJRL* 83 and von Werthern, M. and others, 'The Impact of Immigration Detention on Mental health: A Systematic review' (2018) 18 *BMC Psychiatry* 382 (also addressing general issues).

⁵⁰⁶ Cf. *United States Diplomatic and Consular Staff in Tehran*, where the International Court of Justice observed that, '[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights': [1980] ICJ Rep. 42, para. 91. Art. 9 of the EU's recast Reception Conditions Directive sets out specific guarantees for detained asylum seekers: see also arts. 8 (Detention); 10 (Conditions of detention); 11(1) and 19 (Member States' obligations to provide health care to asylum seekers).

⁵⁰⁷ See Human Rights Committee, 'General Comment No. 35' ([n 496](#)) para. 14 (noting that 'detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained', and referencing, *inter alia*, the Committee's findings on the impropriety of detaining asylum seekers in prisons); 2012 UNHCR Guidelines ([n 485](#)) Guideline 8, para. 48(iii) (noting also that '[t]he use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided') and para. 48(vi); Reception Conditions Directive (recast) art. 10(1); *Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92, para. 18.

⁵⁰⁸ See UDHR 48 art. 25(1) ('[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... medical care'); ICESCR 66, arts. 2(1)–(2) (non-discrimination); 12(1) ('[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'); and 12(2)(d); Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)': UN doc. E/C.12/2000/4, para. 34 ('[S]tates are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services'); CRC 89, art. 24. In *Kargakis v Greece*, App. No. 27025/13 (14 Jan. 2021), the European Court of Human Rights found a violation of art. 3 ECHR 50 because prison conditions were not adapted to the needs of the applicant, who had a disability (in addition to the duration of imprisonment).

⁵⁰⁹ In *Tarakhel* ([n 402](#)) para. 119, the Grand Chamber reiterated that 'reception conditions for children seeking asylum [even those accompanied by their parents] must be adapted to their age, to ensure that those conditions do not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences" ... Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.' In *Rahimi v Greece*, App. No. 8687/08 (5 Apr. 2011) paras. 85–6, the court found the conditions of detention of a 15 year old unaccompanied minor to be degrading treatment contrary to art. 3 ECHR 50, notwithstanding that the

detention was limited to two days. The court took into account that ‘the applicant, due to his age and personal situation, was in a situation of extreme vulnerability’. It also found violations of art. 5(1)(f) (noting *inter alia* that ‘in ordering the detention of the applicant, the national authorities did not in any way address the question of his best interests as a minor’: (para. 109), art. 5(4), and art. 13 ECHR 50 (authors’ translation from the French). See also Tribunal civil (Réf.)-Bruxelles (25 Nov. 1993) No. 56.865, *D.D. & D.N. c/ Etat belge, Min. de l’Interieur et Min. de la santé publique, de l’Environnement et de l’Intégration sociale*, in which the court found the detention of an asylum seeker and her newborn baby to be inhuman and degrading, contrary to arts. 3 and 8 ECHR 50: *RDDE*, No. 76 (Nov.–Dec. 1993) 604; UNHCR Guidelines ([n 485](#)) in particular Guidelines 9.2 (on the needs of children), and 9.3 (on women, including pregnant women, and nursing mothers); *FKAG v Australia* ([n 496](#)) para. 9.3; *MMM v Australia* ([n 496](#)) para. 10.3; Ghezelbash ([n 485](#)) 163–4. For a particularly strong indictment of detention and its effects on children, see McCallin, M., ‘Living in Detention: A Review of the Psychological Well-Being of Vietnamese Children in the Hong Kong Detention Centres’ (International Catholic Child Bureau, 1992).

⁵¹⁰ Convention on the Rights of Persons with Disabilities, art. 14(2): ‘States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation’; Committee on the Rights of Persons with Disabilities, ‘Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities’ (adopted at 14th sess., Sep. 2015); 2012 UNHCR Guidelines ([n 485](#)) Guideline 9.5.

⁵¹¹ See 2012 UNHCR Guidelines ([n 485](#)) Guideline 9 (‘The special circumstances and needs of particular asylum-seekers must be taken into account’), covering victims of trauma or torture (Guideline 9.1); victims or potential victims of trafficking (Guideline 9.4); older asylum seekers (Guideline 9.6); and lesbian, gay, bisexual, transgender, or intersex asylum-seekers (Guideline 9.7).

⁵¹² For an account of the debate, see the second edition of this work, 249–51.

⁵¹³ Executive Committee Conclusion No. 44 (1986) para. 128.

⁵¹⁴ *Ibid.*, para. (b).

⁵¹⁵ See further, 2012 UNHCR Guidelines ([n 485](#)) Guideline 7.

⁵¹⁶ Goodwin-Gill ([n 492](#)) 185; Expert Roundtable, ‘Summary Conclusions: Article 31 of the 1951 Convention’, Geneva (8–9 Nov. 2001) paras. 10(b)–(d) in Feller, Türk, & Nicholson ([n 221](#)) 255.

⁵¹⁷ See Goodwin-Gill ([n 492](#)) 218, citing Summary Conclusions on Article 31 ([n 516](#)) para. 10(c). See also comments by Mr van Heuven Goedhart, UN High Commissioner for Refugees, setting out his own experience of flight: A/CONF.2/SR.14 (22 Nov. 1951) 5.

⁵¹⁸ Summary Conclusions on Article 31 ([n 516](#)) 253, 256–7.

⁵¹⁹ 2012 UNHCR Guidelines ([n 485](#)). The 2012 Guidelines replaced the ‘Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers’ (Feb. 1999).

⁵²⁰ 2012 UNHCR Guidelines ([n 485](#)) Guidelines 4 and 4.3, and Annex A. See further Executive Committee of the High Commissioner’s Programme, ‘Alternatives to Detention’: EC/66/SC/CRP.12 (3 Jun. 2015); Immigration Detention Coalition, There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (rev. edn., 2015); Costello C. & Kaytaz, E., ‘Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva’ UNHCR Legal and Protection Policy Research Series, PPLA/2013/02.REV.1 (Jun. 2013).

⁵²¹ UNHCR, ‘2014–2019 Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees’ (2014) 5. The Strategy’s three main goals are to end the detention of children, to ensure the legal availability and implementation of alternatives to detention, and to ensure that the conditions of detention meet international standards: See also Edwards, A., ‘From Routine to Exceptional: Introduction to UNHCR’s Global Strategy—Beyond Detention 2014–2019 Supporting Governments to End the Detention of Asylum-Seekers’ (2016) 35(1) *RSQ* 128.

⁵²² Reception Conditions Directive (recast) art. 8. See also recital (15). See also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 art. 26(1); Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31, art. 28(1).

⁵²³ Executive Committee Conclusion No. 107 (2007) para. (b)(xi). See further Executive Committee Conclusion No. 85 (1998) para. (dd) (‘Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention’).

⁵²⁴ Executive Committee Conclusion No. 107, para. (c)(ii). A similar position was taken by the Human Rights Committee in 2014: Human Rights Committee, ‘General Comment No. 35’ ([n 496](#)) para. 18 (also drawing attention to ‘the extreme vulnerability and need for care of unaccompanied minors’). See also Executive Committee, ‘Alternatives to Detention’ ([n 520](#)) which sets out child- appropriate alternatives to detention.

⁵²⁵ ‘Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the context of International Migration in Countries of Origin, Transit, Destination and

Return’ UN doc. CMW/C/GC/4-CRC/C/GC/23 (16 Nov. 2017) para. 5 (fns omitted).

⁵²⁶ Art. 37(b) provides in relevant part that ‘[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.

⁵²⁷ ‘Joint General Comment No. 4’ ([n 525](#)) para. 10.

⁵²⁸ Report of the Special Rapporteur (2015) ([n 460](#)) para. 80, cited in Costello ([n 487](#)) 47.

⁵²⁹ 2012 UNHCR Guidelines ([n 485](#)) Guideline 9.2. See also UNHCR, ([n 521](#)) 5 (‘Detention of children is particularly serious due to the devastating effect it may have on their physical, emotional and psychological development, even if they are not separated from their families. Children should, in principle, not be detained at all’); UNHCR, ‘A Framework for the Protection of Children’ (2012) 23.

⁵³⁰ 2012 UNHCR Guidelines ([n 485](#)) para. 7. Questioning at a border does not constitute detention: see *Ahmad Zanzoul v The Queen* [2008] NZSC 44, para. 8. In *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, the High Court of Australia found that Australia’s detention of 157 asylum seekers on board an Australian border protection vessel was lawful under domestic law, but did not undertake detailed analysis of international refugee law.

⁵³¹ *Ilias and Ahmed v Hungary* (Grand Chamber) ([n 405](#)) para. 246. This overturned the Fourth Section’s finding in *Ilias and Ahmed v Hungary* ([n 494](#)) para. 56.

⁵³² *Ilias and Ahmed v Hungary* (Grand Chamber) ([n 405](#)) para. 212.

⁵³³ Ibid.

⁵³⁴ Ibid., para. 217. The court also discussed distinctions between airport transit zones and reception centres for the identification and registration of migrants.

⁵³⁵ Nagy, B., ‘A –pyrrhic?– Victory concerning Detention in Transit Zones and Procedural Rights: FMS & FMZ and the legislation adopted by Hungary in its Wake’ *EU Migration Law blog* (15 Jun. 2020).

⁵³⁶ Joined Cases C-924/19 PPU and C-925/19 PPU FMS, FNZ (C-924/19 PPU) SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság (CJEU, Grand Chamber, 14 May 2020) para. 229.

⁵³⁷ Ibid., para. 223; see also para. 302.

⁵³⁸ Ibid., para. 302.

⁵³⁹ While there are a number of notable exceptions, including the use of settlements with a self-sufficiency component and special temporary legal regimes for refugees from conflict, ‘interim’ settlements may endure for many years, leading to justifiable concern about warehousing in protracted refugee situations: see , for example, Betts, A., & Collier, P., *Refuge: Transforming a Broken System* (2017) 52–5.

⁵⁴⁰ Robinson, N., *The 1951 Convention relating to the Status of Refugees: A Commentary* (1953) 133, n 207.

⁵⁴¹ Executive Committee Conclusion No. 22 (1981). On mass influx generally, see Ch. 5, s. 6.

⁵⁴² See MSS (n 266) para. 223; *Khlaifia* (n 505) paras. 137, 184.

⁵⁴³ UN doc. E/AC.32/SR.11 (2 Feb. 1950) 6.

⁵⁴⁴ See art. 2, 1930 ILO Convention (No. 29) concerning Forced Labour, and its 2014 Protocol; art. 1, 1957 ILO Convention (No. 105) concerning the Abolition of Forced Labour. In 1984, the ILO Committee of Experts noted that German legislation allowed for asylum seekers to be required to perform ‘socially useful work’ if they wished to maintain welfare entitlements. It called on the government to bring law and practice into conformity with ILO Convention No. 29, above. Para. 23(a) of the ILO’s ‘Guiding Principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market’ (7 Jul. 2016) has since noted that national policies should, at the very least, include measures to ‘combat and prevent all forms of discrimination in law and in practice, forced labour and child labour, as they affect men, women and children refugees and other forcibly displaced persons’.

⁵⁴⁵ This is not to say that the individual’s right to asylum may not have some future, but merely that progress is more likely to be achieved through the development of regional instruments and the promotion of effective municipal laws, particularly to ensure the integrity of the principle of *non-refoulement*. Note, however, the 1991 decision of the *Conseil constitutionnel* of France on the right of asylum and the Schengen Convention. Referring to the Preamble of the 1946 Constitution (‘Tout homme persécuté en raison de son action en faveur de la liberté a droit d’asile sur les territoires de la République’), the court decided that the Schengen Convention might be ratified without infringing this right, because it expressly reserved to States the entitlement to consider an asylum claim *even though it was properly the responsibility of another State party*: *Conseil constitutionnel*, Décision no. 91-294 DC, 25 juillet 1991, paras. 30–1; Oliver, P., ‘The French Constitution and the Treaty of Maastricht’ (1994) 43 *ICLQ* 1.

⁵⁴⁶ On which, see Ch. 10. On non-refoulement through time, see Ch. 5

⁵⁴⁷ Cf. UNGA res. 832(LX) (21 Oct. 1954) and UNGA res. 1166(XII) (26 Nov. 1957).

International Protection

The lack or denial of protection is a principal feature of refugee character, and it is for international law, in turn, to substitute its own protection for that which the country of origin cannot or will not provide. *Non-refoulement* is the foundation stone of international protection, and in this and the following two chapters the content of that protection is examined in more detail, with attention specifically to international institutions, treaties, solutions, and the incorporation of international standards in municipal law.

1. International institutions

The first intergovernmental arrangements on behalf of refugees were contemporaneous with the establishment of various institutions charged with their implementation.¹ The Covenant of the League of Nations was adopted as Part I of the Treaty of Versailles on 29 April 1919, and the organization itself was inaugurated on 10 January 1920, after the Peace Treaty came into force.² At first glance, the Covenant appeared to allow little scope for involvement in humanitarian issues, but there were sufficient references to social justice and ‘to the regulation of matters of international interest’ to open the way for action.³ The anomalous situation of refugees, particularly Russians, without the protection of their country of origin or nationality, rapidly attracted attention, not least because of the politics involved. Many States were unwilling to recognize or deal with the Soviets, the Bolshevik revolution was seen as an affront to civilized government, in some instances diplomats and consular officials from the old regime continued to exercise their functions, but international issues still needed solutions.⁴

Russia was also the catalyst for action on other fronts, namely, the repatriation of prisoners of war and the necessity for measures to combat the spread of epidemics there and in eastern Europe. Article 25 of the Covenant proved to be a useful basis for involvement in ‘humanitarian activities’, notwithstanding the absence of express words.⁵ The League Council relied on this in April 1920, when it decided to invite Fridtjof Nansen to assume responsibility for the

repatriation of prisoners of war (POWs).⁶ Famine, too, had clear international implications. Mortality from this and from disease in Russia was estimated to be about 4 million above average for the civil population between 1918–20, and from October 1921–June 1922, almost 5 million deaths resulted.⁷ Here, article 23(f) of the Covenant provided a clear basis for the League to establish the International Health Bureau and to take a number of related measures.⁸

The International Committee of the Red Cross (ICRC) and the Red Cross movement had already been working with the League on these issues and in 1921, Gustave Ador, the ICRC's President, took advantage of these successes and the Council's meeting in Paris to submit 'a fresh proposal', focussing on Russian refugees.⁹ He urged the appointment of a commissioner as 'an obligation of international justice', and because the League was 'the only supernational political authority capable of solving a problem which is beyond the power of exclusively humanitarian organisations'.¹⁰ The ICRC proposed that a High Commissioner be appointed, to define the legal position of Russian refugees so that they should not be 'unprotected by any *legal organisation recognised by international law*';¹¹ to organize their employment and repatriation;¹² and to coordinate the efforts of private organisations. The accompanying memorandum noted that the refugees were 'without legal protection and without any well-defined legal status'.¹³

The Secretary-General of the League, Sir Eric Drummond, sounded out governments and following a 'Conference of Enquiry' held in Geneva from 23–24 August 1921, Fridtjof Nansen was invited to take up the post of High Commissioner for Russian Refugees.¹⁴ The tasks of the High Commissioner included defining the legal status of refugees; organizing their repatriation or 'allocation' to potential resettlement countries and, together with private organizations, providing relief.¹⁵ In this period, the League also acted for many other groups; they included Armenians, whose exodus from Turkey to various neighbouring countries had begun in 1915, and began again in 1921;¹⁶ Assyrians and Assyro-Chaldeans; and a group of 150 persons of Turkish origin who, under the terms of the Protocol of Lausanne of 24 July 1923, were expressly barred from returning to their country of origin.¹⁷ Also beginning in the 1920s came the flight from fascism, first from Italy, then from Spain, and finally from Germany and its conquered or incorporated territories in the 1930s.

A 1928 arrangement¹⁸ recommended that the services normally rendered to nationals abroad by consular authorities should be discharged on behalf of

refugees by representatives of the High Commissioner. Unless within the exclusive competence of national authorities, such services were to include: certifying the identity and position of refugees; certifying their family position and civil status, so far as that was based on documents issued or action taken in the refugees' country of origin; testifying to the regularity, validity, and conformity with the previous law of their country of origin of documents issued in that country; certifying the signature of refugees and copies and translations of documents drawn up in their own language; testifying before the authorities of the country to the good character and conduct of individual refugees, their previous record, professional qualifications, and university or academic standing; and recommending individual refugees to the competent authorities with a view to obtaining visas, residence permits, admission to schools, libraries, and so on.¹⁹ In order to give legal effect to these recommendations two States, France and Belgium, concluded an agreement authorizing the High Commissioner's representatives to issue the documents in question.²⁰

In the period 1923–29, certain 'technical services' principally relating to assistance were entrusted to the International Labour Organization, leaving the High Commissioner responsible for the political and legal protection of refugees. With Nansen's death in 1930, the Assembly of the League of Nations established the Nansen Office to undertake humanitarian activities on behalf of refugees, and entrusted protection to the Secretary-General.²¹ A succession of other bodies followed: first, the High Commissioner's Office for Refugees Coming from Germany was established in 1933;²² then, in 1938, came the High Commissioner's office for all refugees, charged with providing political and legal protection, superintending the entry into force of the relevant conventions, coordinating humanitarian assistance, and assisting governments and private organizations in their efforts to promote emigration and permanent settlement.²³ The same year, following the 32 nation Evian Conference convened on the initiative of the United States to deal with 'the question of involuntary emigration', the Intergovernmental Committee on Refugees (IGCR) was created.²⁴ At this time of a continuing outflow from Germany and Austria, the answer was thought to lie not so much in protection or in dealing with root causes, as in coordinating involuntary emigration with existing immigration laws and practices, in collaboration with the country of origin.²⁵

From October 1939, the IGCR was essentially non-functional, although it was substantially reorganized and its mandate extended following an Anglo-

American meeting in Bermuda in April 1943.²⁶ In November of that year, the Allies also set up the United Nations Relief and Rehabilitation Administration (UNRRA); as the name and time imply, its role was to provide relief to the millions displaced by the Second World War and, in particular, to assist those wishing to repatriate.²⁷ UNRRA was conceived as a temporary institution, and its only concern with refugees arose from its relief responsibilities. Notwithstanding some remarkable success in overseeing the return movements of the displaced,²⁸ by June 1947 nearly 650,000 still remained without solutions, most of them east Europeans and many of them refugees from the events of the post-war. In 1946, however, the United Nations had unanimously recognized the fundamental principle that no refugees with valid objections to returning to their countries of origin should be compelled to do so.²⁹ Following the recommendation of ECOSOC, it also created the International Refugee Organization (IRO)³⁰ and defined those within its mandate.³¹ While there was general agreement on the necessity to assist the victims of Nazi, fascist, and similar regimes, many countries remained adamantly opposed to providing international protection to so-called political dissidents. Politics once more entered the picture.³² These same countries argued that the number of ‘non-repatriables’ would be considerably reduced if hostile propaganda ceased in the camps, and if the activities of war criminals and the like were curbed. This opposition extended to a refusal to contribute to the financing of large-scale resettlement operations.³³

The IRO operated until 28 February 1952,³⁴ its functions defined in its Constitution to include: repatriation; identification; registration and classification; care and assistance; legal and political protection; and transport, resettlement, and re-establishment of persons of concern to the Organization.³⁵ Throughout its life, the IRO, and particularly its resettlement work, were sharply attacked in the United Nations, both directly and indirectly.³⁶ Direct attacks concentrated on the IRO’s ‘complicity’ in resettlement activities designed to meet labour demands and to provide shelter for expatriate organizations hatching plots and threatening world peace.³⁷ The responses were generally muted, relying more on statements of principle—the freedom to return or not to return—and only rarely charging east European countries with direct responsibility for the exodus.³⁸ IRO operations continued in a period of heightening east–west tension. It remained funded by only 18 of the 54 governments then members of the United Nations, and it is hardly surprising, either that its policies should be caught up in the politics of the day, or that there may not have been some truth

behind the ‘immigration bureau’ charge.³⁹

Many tens of thousands of refugees and displaced persons were resettled under IRO auspices.⁴⁰ The self-interest of States was at work, and refugee resettlement policies also served broader political interests.⁴¹ And yet at the same time, there was a vast humanitarian problem then facing individual States and the international community. Refugee situations can and do lead to instability; if left unresolved, they may breed refugee discontent, leading to political tensions at the local, regional, or universal level. Solutions had to be found; given the relations then prevailing between east and west, given the west’s popular endorsement of human rights and freedom of choice, and given population pressures in much of Europe, third country resettlement was the single most attractive option available to those States committed to resolving the problem.

The IRO existed to deal with the aftermath of the Second World War and the immediate consequences of political change. Even during its lifetime, however, the General Assembly acknowledged the need for a successor organization, and in the days of the IRO’s demise, the major questions debated were *definitional*—just who should benefit from international action; and *functional*—what should be done for refugees, who should do it, and who should pay. Eastern European countries continued to voice their suspicions, but there was also a significant change in the policy of the United States, the major donor. The IRO had been expensive, and increasingly the US authorities came to rely on their own refugee schemes (such as the escapee programme), on bilateral and regional arrangements, and on the Intergovernmental Committee for European Migration, set up in 1951 outside the United Nations system.⁴² While these developments were yet to come, the General Assembly decided in 1949 to establish a High Commissioner’s Office for Refugees.⁴³

1.1 The Office of the United Nations High Commissioner for Refugees (UNHCR)

At its 1950 session, the General Assembly formally adopted the Statute of UNHCR⁴⁴ as an annex to resolution 428(V),⁴⁵ in which it also called upon governments to cooperate with the Office. The functions of UNHCR encompass ‘providing international protection’ and ‘seeking permanent solutions’ to the problem of refugees by way of voluntary repatriation or assimilation in new national communities.⁴⁶ The Statute expressly provides that ‘the work of the High Commissioner shall be of an entirely non-political character; it shall be

humanitarian and social and shall relate, as a rule, to groups and categories of refugees'.⁴⁷ Of the two functions, the provision of international protection is of primary importance, for without protection, such as intervention to secure admission and *non-refoulement* of refugees, there can be no possibility of finding lasting solutions.⁴⁸

Besides defining refugees, the UNHCR Statute prescribes the relationship of the High Commissioner with the General Assembly and the Economic and Social Council (ECOSOC), makes provision for organization and finance, and identifies ways in which the High Commissioner is to provide for protection.⁴⁹ These develop the functions engaged in by predecessor organizations and include: (1) promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; (2) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; and (3) promoting the admission of refugees.⁵⁰

Notwithstanding the statutory injunction that the work of the Office shall relate, as a rule, to groups and categories of refugees, a major part of UNHCR's protection work has long been concerned with individual cases, as was that of its predecessor organizations. No State has objected to UNHCR taking up individual cases as such,⁵¹ although States may, and do, question whether an individual is indeed a refugee.⁵² Nevertheless, the individual dimension to the protection function is a natural corollary to the declared task of supervising the application of international conventions. Such instruments define refugees in essentially individualistic terms and provide rights on behalf of refugees which can only be understood in the sense of the particular. The acquiescence of States in the individual protection function of UNHCR, however, significantly delineates both the competence of the Office and the status of the individual refugee in international law.

Today, most States clearly want the United Nations to assume responsibilities for a broad category of persons obliged to flee their countries for a variety of reasons.⁵³ The General Assembly has endorsed UNHCR activities for humanitarian reasons, but also essentially because the lack of protection creates a vacuum.⁵⁴ This in turn may be due to the legal consequences of statelessness;⁵⁵ or it may be a matter of fact, where an individual is unable or unwilling to avail himself or herself of the protection of the government of their country, either

because of a well-founded fear of being persecuted, or because of some man-made disaster, such as violence resulting from a variety of sources.⁵⁶

The underlying rationale for international protection is thus that humanitarian necessity which derives from valid reasons involving elements of coercion or compulsion. The refugee in flight from persecution and the refugee in flight from the violence of a ‘man-made disaster’ are alike the responsibility of the United Nations, even as the present system of duty and cooperation falls short of demanding durable solutions from sovereign States. General Assembly resolutions can extend the functional responsibilities of UNHCR, its subsidiary organ, but they do not thereby directly impose obligations on States.

1.1.1 Relation of UNHCR to the General Assembly and its standing in general international law

UNHCR was established by the General Assembly as a subsidiary organ under article 22 of the UN Charter,⁵⁷ and that body has continued its role in expanding or approving extensions of the mandate of the Office.⁵⁸ The relationship of the two organizations is laid down in the Statute, which declares that UNHCR acts, not at the direction of the UN Secretary-General, but ‘under the authority of the General Assembly’,⁵⁹ that it shall ‘follow policy directives given by [that body] or the Economic and Social Council’,⁶⁰ and that it ‘shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine’.⁶¹ The High Commissioner is further required to report annually to the General Assembly, through the Economic and Social Council, and the report is to be considered as a separate agenda item.⁶²

1.1.2 The UNHCR Executive Committee

Finally, the Statute calls upon the High Commissioner, particularly where difficulties arise, to request the opinion of the advisory committee on refugees, if it is created, to consist of ‘representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem’.⁶³ ECOSOC duly set up such a committee in September 1951,⁶⁴ which was reconstituted as the UN Refugee Fund Executive Committee in 1955.⁶⁵ The UNHCR Executive Committee in its present form⁶⁶ was established by ECOSOC in 1958, again at the request of the General Assembly.⁶⁷

ECOSOC was instructed to appoint from 20 to 25 members of the UN or of any of the specialized agencies (thus keeping membership open to States not then UN members, such as Switzerland), the members to be elected according to the criteria laid down in the UNHCR Statute.⁶⁸ The Executive Committee's terms of reference include advising the High Commissioner, on his or her request, in the exercise of functions under the Statute, on the appropriateness of assistance being provided to help solve specific refugee problems, authorizing the High Commissioner to appeal for funds to that end, and approving assistance projects accordingly.⁶⁹ The General Assembly has also occasionally requested the High Commissioner, 'to abide by directives' which the Executive Committee might give in regard to refugee situations.⁷⁰ ECOSOC, in turn, has required Executive Committee reports to be attached to the High Commissioner's annual report to the General Assembly,⁷¹ and it continues to be responsible, again at the request of the General Assembly, for regular elections enlarging the Executive Committee membership.⁷²

In 1975, the Executive Committee set up a Sub-Committee of the Whole on International Protection to study, 'the more technical aspects of the protection of refugees and ... report to the Committee on its findings'.⁷³ Conclusions adopted on the basis of this work were especially common in the period 1977–1994,⁷⁴ but the Sub-Committee was abolished in 1995, when the Executive Committee decided to reorganize itself around one annual plenary session and a number, generally three, of inter-sessional meetings of a new Standing Committee of the Whole having general competence over protection, programmes and finance.⁷⁵ The practice of adopting conclusions on specific protection issues fell away somewhat; it picked up slightly in 2016–17, and although none was adopted in 2018, the General Assembly nevertheless stressed the 'relevance' of the practice and encouraged the Executive Committee to continue the process.⁷⁶

When adopted in plenary by consensus, Executive Committee conclusions will not be formally binding, but may nevertheless be highly relevant to the legal background of refugee protection.⁷⁷ Even though the regular 'output' of protection conclusions is now somewhat reduced,⁷⁸ the substantial increase in membership since 2001 gives further support to the view that the conclusions can therefore be evidence of *opinio juris*, whether in highlighting the protection needs of particular groups of asylum seekers, confirming or improving standards of treatment, or promoting consistent interpretation by resolving differences between States or between States and UNHCR.⁷⁹

States are thus closely involved, at multiple levels, in the operations and governance of the principal international institution concerned with the protection of refugees, and UNHCR's practice is therefore relevant both to its standing and to the legal status of rules and practices developed when implementing its mandate. UNHCR is not only a forum in which the views of States may be represented; it is also, as a subject of international law, an actor in the field whose actions count in the process of law formation.⁸⁰

Specific authority for UNHCR's direct involvement in protection has been recognized by States parties to the 1951 Convention/1967 Protocol; article 35 of the Convention, for example, provides: 'The contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'.⁸¹ The 1969 OAU Convention requires member States to cooperate similarly, while declaring itself to be the 'effective regional complement in Africa' of the 1951 Convention.⁸² UNHCR, however, is not itself a party to those instruments, and its standing must be located in more general principles and in relevant practice, including its formal participation in the drafting and implementation of comprehensive approaches to refugee problems, in concluding specific agreements with States, specialized agencies and other organizations, in contributing to the determination of refugees status, and in pursuing and promoting solutions.⁸³

Clearly, by derivation and intention, UNHCR does enjoy international personality. As a subsidiary organ of the General Assembly, its 'personality' (its capacity to possess international rights and duties) can be traced to the United Nations at large.⁸⁴ Moreover, its Statute shows that the Office was intended by the General Assembly to act on the international plane.⁸⁵ Its standing in regard to protection has been further reinforced by successive General Assembly resolutions urging all States to support the High Commissioner's activities, for example, by granting asylum, observing the principle of *non-refoulement* and acceding to the relevant international treaties. While it is trite knowledge that General Assembly resolutions are not legally binding, 'it is another thing', as Judge Lauterpacht noted in the *Voting Procedure* case, 'to give currency to the view that they have no force at all, whether legal or other, and that therefore they cannot be regarded as forming in any sense part of a legal system of supervision'.⁸⁶ On this occasion, the 'legal system of supervision' was the

mandate in respect of South West Africa. In his separate opinion, Judge Lauterpacht noted that, while the mandatory had the right not to accept a recommendation of the supervising body, it was nevertheless bound to give it due consideration in good faith, which in turn entailed giving reasons for non-acceptance.

Admittedly, General Assembly resolutions with regard to refugees and to UNHCR do not have the same degree of particularity as a recommendation relating to the administration of a mandate. Nevertheless, against the background of the UN Charter and general international law, UNHCR, with its principal function of providing international protection to refugees, can be seen to occupy the central role in an analogous legal system of supervision. Indeed, though discretions continue to favour States in certain of their dealings with refugees, the fundamental character of the principle of *non-refoulement* puts it in a higher class than the ‘intangible and almost nominal’ obligation to consider in good faith a recommendation of a supervisory body, such as Judge Lauterpacht discerned in the *Voting Procedure* case.⁸⁷ The entitlement of UNHCR to exercise protection on the basis of a universal jurisdiction receives additional support from the decision of the International Court of Justice in the *Reparations* case. There, the Court read into the rights and duties of the United Nations Organization, as a ‘necessary intendment’, the capacity to exercise a measure of functional protection on behalf of its agents.⁸⁸ UNHCR, by comparison, is expressly ascribed the function of providing international protection to refugees; State practice reflects ‘recognition or acquiescence in the assumption of such jurisdiction’⁸⁹ universally, and without regard to any requirement of treaty ratification. The ‘effective discharge’⁹⁰ of this function evidently requires capacity to assert claims on behalf of individuals and groups falling within the competence of the Office.

Given States’ obligations with regard to refugees, to whom are they owed? Although initially concluded as an agreement between States on the status and treatment of refugees, the 1951 Convention has nevertheless inspired both doctrine and practice in which the language of refugee rights is entirely appropriate. And yet, the individual is still not considered to be a subject of international law, capable of enforcing his or her rights on the international plane.⁹¹ Moreover, the problems faced by refugees (such as interdiction on the high seas, arbitrary and prolonged detention, or other violations of human rights), are not such as would prompt exercise of the right of diplomatic protection on

the part of the State of nationality. In the case of States parties to the 1951 Convention and the 1967 Protocol, the existence of obligations *inter se* is established, and this has certain theoretical advantages for the refugee with a willing protecting State behind him or her. Refugees recognized under the Convention/Protocol are entitled to exercise certain rights in every Contracting State, and each Party owes the duty of implementation to every other State party. Article 16, for example, provides that '[a] refugee shall have free access to the courts of law on the territory of all Contracting States', and this benefit applies to *all* refugees and to *all* Contracting States, irrespective of the place of residence of the refugees. A failure to allow a recognized refugee to access the courts represents therefore a very simple example of breach of a treaty obligation.⁹²

The legal effects of participating in a multilateral treaty can be set out in a simple and straightforward manner. First, each State party undertakes an obligation towards every other State party to implement the treaty in good faith.⁹³ Secondly, the responsibility of each State party is engaged at the *bilateral* level, in that each State party has undertaken toward every other State party, not only a general obligation to implement the treaty in good faith, but also a series of specific obligations in the form of the particular articles of the treaty. In the present case, therefore, the State is not only obliged to ensure that recognized refugees generally have access to its courts, but it is also specifically obligated towards such other State party with regard to the refugees recognized by the latter, and who are within its territory or jurisdiction.

Thus, the State whose recognized refugees are denied Convention rights in another State party is entitled to invoke that State's responsibility. The recognizing State has incurred injury, first, at the direct inter-State level, through the violation of the article in question;⁹⁴ it does not need to rely on obligations *erga omnes partes*, for here an action or omission attributable to the State under international law clearly constitutes a breach of an international obligation of that State.⁹⁵ Moreover, the breach of obligation in the present case would fall within the categories described in article 42 of the International Law Commission's Articles on State responsibility, for the obligation is both owed to the State individually, and, so far as it is also owed to all the States party to the Convention, the obligation breached 'specifically affects' that State by way of injury to one of 'its' recognized refugees.⁹⁶ The ILC has further observed that:

[A]lthough a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between the two parties. Multilateral treaties of this kind have often been referred to as giving rise to ‘bundles of bilateral relations’.⁹⁷

Arguably, the obligations laid down in the 1951 Convention are also of this nature. A violation of its terms may affect all States parties, but not necessarily in the same way. The State whose subjective right has been violated is the injured State competent to claim; in the present context, it is the State which, through the denial of access to the courts to its ‘own’ refugees, is directly or individually affected, rather than the other States parties to the Convention/Protocol, which are not directly or not individually affected, but nonetheless potentially competent to claim if able to bring themselves within the terms of article 48.

Although theoretically of benefit to the refugee recognized in one State and denied Convention rights in another, the practical difficulty of persuading the former to ‘exercise protection’ remains to be overcome. At the national level also, the claims of recognized refugees (like those of citizens) may face both procedural and substantive obstacles in the face of judicial caution in confronting executive discretion, particularly on issues touching foreign affairs.⁹⁸ Both the Convention and the Protocol expressly provide for the settlement of disputes relating to their interpretation or application, and for reference to the International Court of Justice at the request of any of the parties to the dispute, should other means of settlement fail.⁹⁹ No litigation has resulted, however, despite the precedents that would appear to support States in the legal defence of matters other than those which affect directly their material interests.¹⁰⁰

Under article 24 of the European Convention on Human Rights, by contrast, any Contracting State may refer to the European Commission an alleged breach of the Convention by another party. The instrument itself thus provides for a ‘European public order’, a regime in which all States parties have a sufficient interest in the observance of the European Convention’s provisions to allow for the assertion of claims. While there are similarities in the objectives of the European Convention and the refugee conventions—both call for certain standards of treatment to be accorded to certain groups of persons—the refugee conventions lack effective investigation, adjudication, and enforcement procedures; they can hardly be considered to offer the same opportunity for judicial or quasi-judicial solutions. Nonetheless, in view of the importance of the

rights involved, all States have an interest in their protection;¹⁰¹ and UNHCR, by express agreement of some States and by the acquiescence of others, is the qualified representative of the ‘international public order’ in such matters. A cogent theory of responsibility remains to be developed to cover this situation, however, and the legal consequences that may flow from a breach of the international obligations in question are still unclear.¹⁰²

International claims can take the form of protest, a call for an inquiry, negotiation, or a request for submission to arbitration or to the International Court of Justice. Both the nature of breaches of obligation affecting refugees and the nature of the protecting organization rule out certain types of claims, such as arbitration, while strictly legal considerations might exclude, for example, recourse to the International Court of Justice.¹⁰³ The possibility of interim measures ordered by the Court under article 41 of the Statute should not be discounted, however.¹⁰⁴ In *United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures)*,¹⁰⁵ the Court noted that the object of its power to indicate such measures is to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings. The rights of the United States to which the Court referred included the rights of its nationals to life, liberty, protection, and security. It held that continuation of the situation exposed those individuals to privation, hardship, anguish, and even danger to health and life and thus to a serious possibility of irreparable harm. The Government of the Islamic Republic of Iran was ordered, among others, to ensure the immediate release of those held.¹⁰⁶ In its judgment on the merits, the Court noted that, ‘[W]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.’¹⁰⁷

Recent cases suggest strongly that there is considerable potential in provisional measures as the basis for a protection competence on the part of the Court. In *Georgia v Russia*, on an application founded on the 1965 International Convention for the Elimination of All Forms of Racial Discrimination, the Court ordered provisional measures, in particular, because of the possibility otherwise of irreparable prejudice to the rights in question.¹⁰⁸ It referred specifically to violations of the right to security of persons, the right to protection by the State

against violence or bodily harm, including potential loss of life or bodily injury, and violations of the right to freedom of movement and residence within a State's borders. It took account also of the fact that, in certain circumstances, those forced to leave and deprived of their right of return could be at serious risk of irreparable prejudice. Georgia's claim was later rejected, when the Court found that it had not exhausted the Convention's negotiation requirement.¹⁰⁹

More recently, the ICJ ordered Myanmar to 'take all measures within its power' to protect Rohingya Muslims from genocide, acknowledging that the 600,000 Rohingya still in the country were 'extremely vulnerable' to military violence.¹¹⁰

1.2 The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

On 29 November 1947, the United Nations General Assembly voted in favour of a plan to partition Palestine into two separate States, one Arab and one Jewish;¹¹¹ fighting between the two communities commenced almost at once. The British mandate terminated on 14 May 1948, and the next day the Jewish community proclaimed the State of Israel. The first Arab–Israel war followed, with many thousands of Palestinian Arabs fleeing into neighbouring countries. When a formal armistice was finally declared just over a year later, the emergent Israeli State had control over most of the territory of the former Mandate Palestine with the exception of the areas known as the West Bank and the Gaza Strip, which were respectively under the control of Jordan and Egypt. An estimated 750,000 Palestinians fled and/or were forced to leave their homes or were expelled and were living in refugee camps in the Gaza Strip, the West Bank, Jordan, Lebanon, and Syria.¹¹²

On 11 December 1948, the General Assembly established a Conciliation Commission for Palestine (UNCCP), charged with taking steps to achieve a final settlement.¹¹³ A year later, in December 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was set up as a subsidiary organ of the General Assembly, to assist those who had left Palestine as a result of the conflict;¹¹⁴ that assistance is mainly in the fields of relief, health, and education. As already described above in Chapter 4 with regard to the interpretation of article 1D of the Convention, none of the General Assembly resolutions providing for relief to Palestine refugees, or establishing agencies for the provision of such relief, defines those who are to benefit. UNRWA has

therefore developed and modified its working definitions over the years, which have been communicated to the General Assembly and never opposed. So far as registration with UNRWA determined the provision of relief, funding constraints have led to limitations on eligibility and to the exclusion from UNRWA rolls of numbers of Palestinians who became refugees as a result of the 1948 conflict. Rules issued in 1993 defined a ‘Palestine refugee’ for UNRWA purposes as ‘any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict’. Provision is also made for registration entitlement to descend, though through the male line only, and for a Palestinian not presently receiving relief to apply for it.¹¹⁵

This definition has been extended to the children of such refugees, and following the 1967 War, the General Assembly approved the provision of humanitarian assistance by UNRWA, ‘on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities’. Notwithstanding the ‘temporary’ and ‘emergency’ aspects of this measure, it has been endorsed in later General Assembly resolutions and extended further to those displaced by ‘subsequent hostilities’.¹¹⁶ UNRWA assistance has always been limited as to locality, being restricted to Lebanon, Syria, Jordan, the Gaza Strip and, after the 1967 displacements, Egypt; and limited also as to refugees registered and actually residing in those host countries. Registration, which initially facilitated ration distribution, acquired greater significance in the countries of refuge, where it was increasingly equated with acceptance as a refugee and *prima facie* entitlement to remain; that was not its original purpose, however, which can give rise to misunderstanding.¹¹⁷

As has been noted above, Palestinian refugees were excluded from the competence of UNHCR, and later also from the 1951 Convention.¹¹⁸ Political reasons were partly responsible, as was the necessity to delimit formally the mandates of UNHCR, UNRWA, and UNCCP.¹¹⁹ At the time, both protection and assistance for Palestinian refugees fell within institutional arrangements that included UNCCP and UNRWA. Solutions, repatriation, or compensation were also expected to eventuate; the General Assembly, for example, intended UNCCP to take on, ‘in so far as it considers necessary in existing circumstances, the functions given to the United Nations Mediator on Palestine by resolution 186(S-2) ...’¹²⁰ Those functions had in turn been defined to include the use of:

[g]ood offices with the local and community authorities in Palestine to (i) Arrange for the operation of common services necessary to the safety and well-being of the population of Palestine ... (iii) Promote a peaceful adjustment of the future situation of Palestine.¹²¹

UNCCP was instructed to ‘facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation’, and by resolution 394(V) of 14 December 1950, to ‘continue consultations with the parties concerned regarding measures for the protection of the rights, property and interests of the refugees’. But already the effectiveness of UNCCP, contingent upon the cooperation and political will of the States concerned, was in doubt; the summary of debate in the General Assembly is brief but eloquent testimony to the fundamental differences between the parties, upon whom depended a solution to the refugee problem. To one side, the objective of a peaceful settlement required direct negotiations; to the other, direct negotiations were contingent on full recognition of the rights of the Arabs to Palestine and to their own homes.¹²² With the passing of the years, the General Assembly’s repeated requests to the Conciliation Commission to continue its efforts became increasingly formal, almost ritualistic. The prospects for repatriation, resettlement, rehabilitation, and compensation waned, UNCCP became irrelevant to the protection needs of Palestinian refugees, and UN institutional mechanisms were unable to bridge the gap.¹²³ UNRWA’s role continued as the provider of international assistance to Palestinian refugees, save that with the beginnings of the *intifada* movement in 1989, it came in practice also to exercise a significant protection role on behalf of Palestinians against the occupying forces.¹²⁴

In 1951, the Palestinian refugee question was seen as a temporary phenomenon, but over time its refugee dimensions have been overtaken by the aspirations of the Palestinian people to self-determination and statehood.¹²⁵ The remoteness of a political solution has led some to query the value of UNRWA and to argue that, insofar as it allegedly perpetuates the ‘refugee’ question, it is part of the problem. Some commentators have also suggested that the refugee aspects would be better handled by UNHCR and have wondered, with little regard to history, why UNRWA’s ‘refugee definition’ should not be aligned with UNHCR’s.¹²⁶ In this way, it is thought, the numbers of refugees would be reduced, supposedly because UNHCR (and the 1951 Convention) do not recognize the transmissibility of status to successive generations. UNHCR is also said to be readier and more able to promote solutions, such as resettlement and

local integration. At base, this is a political issue, not a legal, definitional one, and critical dimensions that distinguish the Palestinian question tend to be ignored, such as the fact that Palestinian refugees were recognized as such before debate even began on the UNHCR Statute or the 1951 Convention; that the contours of the Palestinian State remain contested; and that the interests of countries presently hosting Palestinian refugees will need to be brought into alignment. For Palestinians, and for many actors in the region and beyond, whatever settlement is proposed and adopted will need to meet the requirements of successive General Assembly resolutions; that remains a distant prospect, and despite funding difficulties, UNRWA will likely remain an important actor in providing protection and assistance.¹²⁷

1.3 The Office of the United Nations High Commissioner for Human Rights (OHCHR)

A major achievement of the United Nations has been to establish social justice and human rights as the foundation for a stable international order. From 1946 to 2006, the Commission on Human Rights, established by ECOSOC, was responsible for human rights activities, together with its Sub-Commissions and the Commission on the Status of Women. The Commission was replaced by the Human Rights Council in 2006,¹²⁸ but in the meantime in 1993, the General Assembly had decided to appoint a ‘High Commissioner for the promotion and protection of all human rights’, recognizing this as a legitimate concern of the international community.¹²⁹ The High Commissioner, who is expected to engage in dialogue with governments and to enhance cooperation, is responsible for promoting ‘the effective enjoyment of all civil, cultural, economic, political and social rights’, to play an active role in removing current obstacles, meeting challenges to full realization, and preventing the continuation of human rights violations throughout the world.¹³⁰

Given the ‘universal, indivisible, interdependent and interrelated’ nature of all human rights, their applicability to people moving between States is indisputable. The High Commissioner’s designation as the UN’s ‘principal authority for ... human rights activities under the direction and authority of the Secretary-General’ needs to be read, however, ‘within the framework’ of the General Assembly’s overall competence, and therefore with due regard to other, specific mandates. Otherwise, what the High Commissioner for Human Rights does in the context of migration will likely touch on the competence and responsibility

of the High Commissioner for Refugees, or of UNICEF, or of the International Labour Organization, or of IOM, and complementarity and coordination may be at risk of giving way to institutional tensions.

In 1999, for example, the Commission on Human Rights decided to appoint a Special Rapporteur on the rights of migrants, a move endorsed by ECOSOC and welcomed by the General Assembly.¹³¹ In her first report, the Special Rapporteur indicated potential cross-over with other mandates and competences, noting that there is no ‘commonly accepted generic or general legal concept of the migrant in international law’; in her view,

Definitions that are related to the reasons why people leave their countries of origin are perhaps the least suitable kind of definition, except to the extent that they give access to legal protection and status in the host country, as in the case of refugees. In the light of the political, social, economic and environmental situation of many countries, it is increasingly difficult, if not impossible, to make a clear distinction between migrants who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that do not exist in their places of origin.¹³²

She therefore proposed for the purposes of her human rights mandate to consider as migrants those who have moved or had to move, irrespective of their status, but with due regard to their particular needs and vulnerabilities;¹³³ irregular or undocumented migrants required special attention.¹³⁴ Since then, the subject has remained on the agenda of the General Assembly, which has adopted regular resolutions on the protection of migrants and in 2018, approved the Global Compact for Safe, Orderly and Regular Migration, itself premised on ‘effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle’.¹³⁵

In addition to the work of the Special Rapporteur, the Office of the High Commissioner for Human Rights has taken several significant initiatives to promote the better protection of migrants, both generally and specifically. In 2014, for example, it developed ‘Recommended Principles and Guidelines on Human Rights at International Borders’,¹³⁶ and as Co-Chair of the Global Migration Group Working Group on Migration, Human Rights and Gender, it has contributed to further guidelines on the human rights protection of migrants in vulnerable situations.¹³⁷ Although nominally focused on ‘migrants who may not qualify as refugees’, the notion of ‘vulnerable situation’ is not a term of art

and is by no means self-applying; the Guidelines link it to situations defined by reference to ‘existing legal norms’ and to the need for protection under the international human rights framework, and although there will necessarily be ‘overlap’ with asylum seekers and those entitled to protection under specific treaty regimes, that would seem necessary to avoid gaps in the regime.¹³⁸

The Office of the High Commissioner for Human Rights has also undertaken missions focussing on the human rights situation in particular countries,¹³⁹ as well as studies, for example, on the protection of migrants in the context of large movements,¹⁴⁰ the slow-onset effects of climate change on human rights protection for cross-border migrants,¹⁴¹ the situation of migrants in transit,¹⁴² and migration governance for parliamentarians.¹⁴³ These reports may contribute to better knowledge of protection deficiencies regarding those moving between States, to removing obstacles and finding solutions.¹⁴⁴ This may, in turn, strengthen the position of those actively searching for protection, many of whom find themselves often in limbo, in prolonged detention, or falling between the cracks of increasingly complex national processes.

1.4 The United Nations Office for the Coordination of Humanitarian Affairs (OCHA)

1.4.1 Strengthening coordination

The 1986 report of the Group of Governmental Experts on measures to avert new flows of refugees recommended that the Secretary-General make full use of the competences provided by the Charter. In particular, it recommended that relevant, timely and fuller information be available within the Secretariat, that it should be effectively analysed so as to provide early assessment of possible refugee flows, and that the information be disseminated to the competent United Nations organs, in consultation with the States directly concerned.¹⁴⁵ Many States were opposed to the idea, but an Office for Research and the Collection of Information (ORCI) was set up in 1987, although it was ultimately short-lived.¹⁴⁶ Dissatisfaction with the effectiveness of these first measures led to the proposal for the designation by the United Nations Secretary-General of a high level official as emergency relief coordinator. Given technological developments and the growth in NGO and civil society information gathering and dissemination, a UN office dedicated to collection and analysis might not be thought necessary. However, recent migration crises have underlined once again that, to be

effective, the international humanitarian system cannot continue to be largely reactive and a more comprehensive approach is clearly necessary.¹⁴⁷

On 19 December 1991, the General Assembly adopted resolution 46/182 on strengthening the coordination of United Nations humanitarian emergency assistance.¹⁴⁸ Annexed to that resolution was a set of guidelines, principles, and proposals, which included the standards of humanity, neutrality, and impartiality as the essential basis for the provision of humanitarian assistance;¹⁴⁹ but also respect for ‘the sovereignty, territorial integrity and national unity of States’, and recognition of the responsibility of each State, ‘first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory’.¹⁵⁰ States with populations in need of humanitarian assistance are called upon to facilitate the work of appropriate intergovernmental and non-governmental organizations, while neighbouring States are urged to participate closely with affected countries. The nexus between disaster prevention and preparedness, and economic growth and sustainable development, is also acknowledged.¹⁵¹

The senior position of Emergency Relief Coordinator (ERC), created by resolution 46/182, brought together the functions previously carried out by various representatives of the Secretary-General for major and complex emergencies, and the responsibilities for natural disasters which had been entrusted to the UN Disaster Relief Coordinator (UNDRO). The resolution also set up the Inter-Agency Standing Committee (IASC), ‘with the participation of all operational organizations and with a standing invitation to the International Committee of the Red Cross, the League of Red Cross and Red Crescent Societies, and the International Organization for Migration’.¹⁵²

In 1998, the Department of Humanitarian Affairs was reorganized into the Office for the Coordination of Humanitarian Affairs (OCHA),¹⁵³ with an expanded mandate over the coordination of the UN’s humanitarian response programmes. Coordination is promoted through the Inter-Agency Standing Committee, chaired by the Emergency Relief Coordinator.¹⁵⁴

The role of OCHA and the Emergency Relief Coordinator is, in principle, wide enough to allow the promotion of significantly higher levels of inter-State and inter-organization cooperation than have been seen so far.¹⁵⁵ The Coordinator is responsible not only for processing requests from States for emergency assistance, but also for overseeing all emergencies through ‘the systematic pooling and analysis of early-warning information’.¹⁵⁶ While expected to

organize needs assessment missions ‘in consultation with the Government of the affected country’, the Coordinator is authorized to facilitate the provision of emergency assistance ‘by obtaining the consent of all the parties’,¹⁵⁷ for example, in a situation of internal conflict, or where no effective governmental authority exists. In addition, the Coordinator acts as a central focal point on UN emergency relief operations,¹⁵⁸ and is expected to work closely not only with agencies in the UN system, but also with the ICRC, the International Federation of Red Cross and Red Crescent Societies (IFRC), the International Organization for Migration (IOM), and ‘relevant non-governmental organizations’.

During the 1990s, however, inter-agency coordination was also pursued through other mechanisms, in particular, the lead agency model, though with mixed results.¹⁵⁹ A new approach, ‘clusters’, was introduced in 2005, following the Secretary-General’s report on strengthening the coordination of the UN’s emergency humanitarian assistance.¹⁶⁰ This identified ‘significant capacity gaps’ in, among others, shelter and camp management and protection. It recognized that the protection of civilians is primarily the responsibility of States, but also that ‘the humanitarian system must work to fill protection gaps ...’,¹⁶¹ and that ‘[P]artnerships within the system may be necessary to overcome those gaps in assistance—such as protection and camp management in situations involving internally displaced persons—that do not enjoy leadership from any one agency.’¹⁶² It went on to recommend that humanitarian response capacity be strengthened by broadening the capacity base, making more efficient use of available resources, strengthening financial mechanisms, and preserving the ‘humanitarian space’ in integrated missions.¹⁶³

A ‘humanitarian response review’ commissioned by the Emergency Relief Coordinator was published two months later, in August 2005.¹⁶⁴ It looked at complex (man-made) emergencies and natural disasters, at preparedness and response capacities, and at protection in relation to the latter. It found ‘a conspicuous lack of recognition of a generally accepted definition of the meaning and requirements of protection’.¹⁶⁵ The review took a broad view of protection, which it saw as covering ‘a wide range of activities, including physical presence, bilateral negotiations, multilateral diplomacy, training, education, data collection, dissemination, and advocacy and gaining access to victims’. The concept of protection generally was only vaguely understood, however, and capacity to respond was severely lacking, notwithstanding the fact that protection was ‘a cross-cutting issue in all response sectors’, requiring

special and urgent attention.¹⁶⁶

Although a number of coordination elements were in place, the review noted the feeling that the time for a more inclusive mechanism had arrived. The ‘lead agency’ approach applied by UNHCR in the 1990s had not gained much support,¹⁶⁷ but might do so now if there were ‘appropriate and transparent terms of reference, including strong obligations for consultation and accountability (including financial accountability) towards partner organizations’.¹⁶⁸ The ‘cluster approach’ was adopted with a view to improving humanitarian operations and avoiding the weaknesses of the lead agency approach. In a humanitarian emergency, clusters are groups of organizations designated by the Inter-Agency Standing Committee; they include both UN and non-UN organizations, each with responsibility for particular action sectors, such as water, health, logistics, shelter, or protection.¹⁶⁹

1.4.2 The complementary role of UN agencies

In dealing with the crises of forcible displacement, many United Nations agencies become involved. The International Labour Organization (ILO), for example, was an early partner with Fridtjof Nansen in the response to Russian refugees in the 1920s, and later assumed the High Commissioner’s responsibilities in promoting employment. In 2016, an ILO tripartite technical meeting adopted guiding principles on the access of refugees and others displaced to the labour market, and it continues to collaborate actively with UNHCR on this key aspect of resilience and solutions.¹⁷⁰

The original mandate of UNICEF, the United Nations Children’s Fund established in 1946, was to provide assistance to children in countries which were the victims of aggression; now it provides both emergency and long-term assistance to mothers and children in need throughout the world. UNICEF’s work with children frequently extends into refugee situations, providing assistance to unaccompanied children, for example, or establishing safe water supplies and therapeutic feeding.¹⁷¹

The FAO (Food and Agriculture Organization) also has long been involved in disaster assistance, and the UN’s capacity to respond was strengthened in the 1960s with the creation of the World Food Programme (WFP),¹⁷² responsible for disposing of surplus food and channelling aid to meet food needs and emergencies inherent in chronic malnutrition.¹⁷³ WFP has its own staff in many countries, and the UNDP (United Nations Development Programme) Resident

Representative also acts on its behalf.

Article 2(d) of the Constitution of the World Health Organization (WHO) empowers it to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of governments. WHO is strongly represented throughout the world, with Programme Coordinators or National Programme Coordinators working in almost every country. Obviously, mass displacements across borders can contribute to the incidence and spread of disease, particularly where large numbers are crowded into makeshift camps with poor sanitation. In emergencies, WHO can provide advice and the services of specialists, as well as urgently needed medicaments from its Geneva and regional stocks.¹⁷⁴

1.5 Other organizations and agencies

1.5.1 International Organization for Migration (IOM)

The origins of IOM in the foreign policy of the United States have been described elsewhere.¹⁷⁵ Times have changed since 1951, but the organization remains formally outside the United Nations; it is not a UN agency, but with the General Assembly's adoption of resolution 70/296 in July 2016, it is being brought into a 'closer relationship'.¹⁷⁶ IOM is certainly a player in migration policy and practice today, its budget for 2019 exceeded \$1.6 billion, its staff is around 11,000, and it operates through over 100 offices worldwide.¹⁷⁷ Its role alongside UN agencies continues, and IOM now coordinates the UN Network on Migration and provides its secretariat.¹⁷⁸

IOM's Constitution gives very few hints about its activities, other than declaring that it is primarily a service organization, and that it 'responds to requests for specific services'.¹⁷⁹ Its report for 2018 provides more detail, indicating that it has been involved in resettlement and 'movement management', 'assisted voluntary returns', border and identity management, counter-trafficking, and even protection and assistance for migrants.¹⁸⁰ Although the Constitution reflects no particular set of principles or international standards, the 2018 Report, like ones before it, maintains the organization's adherence to international standards and the fulfilment of migrants' rights.¹⁸¹ Certain of the organization's practices have attracted criticism, however, not least by reason of the apparent lack of accountability.¹⁸² Now, in accordance with the 2016 Agreement with the UN, IOM undertakes, 'to conduct its activities in accordance with the Purposes

and Principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields'.¹⁸³ Important as this commitment is, a gap remains between IOM as a 'related organization' and, for example, a UN specialized agency. Nothing in the Agreement requires IOM to follow up on General Assembly recommendations or otherwise to strengthen the relationship in the sense of articles 57 and 63 of the UN Charter, and reporting to the General Assembly remains entirely within the discretion of the IOM Director General.¹⁸⁴ The advocacy role on individual rights, always expected of UNHCR if sometimes lacking, is conspicuous by its absence.¹⁸⁵

IOM's history does not necessarily control its future, but it can help to understand the aims and interests of States, as they have evolved from 1951 to the most recent constitution and thereafter.¹⁸⁶ Communism may no longer be the target, but new forms of securitization have rapidly established their place, leading many governments to look for novel, and sometimes legally questionable, ways and means by which to manage the movements of people. IOM has a wealth of experience in the provision of migration services in accordance with its Constitution, but even though it creates no new obligations, the Global Compact for Safe, Orderly and Regular Migration has a strong rights orientation and, at the time of writing, it is not at all clear that the organization's traditional role and ways of working can be integrated into a 'closer relationship' with the UN. The General Assembly, for example, has consistently noted that the protection of migrants engages a very full spectrum of relevant issues.¹⁸⁷

As an international organization, of course, IOM is bound by international law, and there is no a priori obstacle to its institutional responsibility or to the individual liability of its personnel.¹⁸⁸ The challenge, here as elsewhere, is in making accountability real, for example, in circumstances where IOM has been contracted by one or more governments to assume responsibilities in areas of sovereign competence, such as the 'externalization' of border management, detention, offshore processing, or 'voluntary returns'.¹⁸⁹ To be sure, IOM sees itself as 'a principled, accountable and transparent organization',¹⁹⁰ but at present it is difficult to see how its responsibility extends beyond the States that fund the projects. On the one hand, as the agent of its member States, it may be jointly responsible for the good faith implementation of their international legal obligations. On the other, and from a broader perspective, as an agency working

closely with the broader international community and committed to the purposes and principles of the UN,¹⁹¹ it is arguably subject to protection oversight by agencies having specific mandate competences—the ILO in the protection of migrant workers, UNHCR in the protection of refugees and the displaced, UNICEF in the protection of children, and OHCHR across the broad field of human rights.

In the meantime, protection remains an overarching principle in humanitarian operations. This requires coordination and cooperation among agencies with responsibilities to those displaced and moving between States, but also accountability to audit against relevant international standards. In this, a hierarchy of authority based on established mandates, practice, and precedent can hardly be excluded.¹⁹²

1.5.2 The International Red Cross and Red Crescent Movement

As already mentioned, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) have long been key partners in providing relief for refugees and those displaced by conflict and disasters, and the ICRC played an important catalytic role in ensuring that refugees had a place on the international agenda.¹⁹³ Both organizations have also contributed to protection standard-setting in the management of their operations and activities.¹⁹⁴ The ICRC has comparable protection responsibilities to UNHCR, but under the system consolidated by the 1949 Geneva Conventions and the 1977 Additional Protocols. Article 8, common to the first three Geneva Conventions, and article 9 of the Fourth Convention, each provide for their respective provisions to ‘be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict’. Each Convention likewise recognizes the ‘humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may ... undertake for the protection of ...’ persons within their scope, and for their relief.¹⁹⁵ In addition, the Conventions provide for the appointment of substitutes for the Protecting Powers, such as ‘an organization which offers all guarantees of impartiality and efficacy’.¹⁹⁶

Humanitarian objectives and the role of the ICRC are stressed throughout each of the four Geneva Conventions, in common article 3, and in their respective provisions on protected persons and the meaning of protection.¹⁹⁷ In addition to

its activities under the Conventions, the ICRC is recognized as retaining its right of initiative,¹⁹⁸ the freedom to engage in ‘toute initiative humanitaire, ... toute action que les conventions n’auraient pas prévues mais qui serait nécessaire pour la protection des victimes’.¹⁹⁹

At the grass roots level, the IFRC brings together 190 member societies, and regularly engages in providing humanitarian relief following disasters, and in disaster risk reduction and preparedness. In 2016, it promoted the adoption of guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (the ‘IDRL Guidelines’).²⁰⁰ In addition, the IFRC and other stakeholders have contributed comments on the International Law Commission’s work on protection in the event of disasters.

In 2016, the ILC adopted a set of 18 draft articles with commentaries, which it referred to the General Assembly with a recommendation that a convention be considered.²⁰¹ A disaster is defined as, ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society’.²⁰² The draft is careful to stress the sovereignty of the State affected, and its primary responsibility for providing relief. Beyond that, however, it moves strongly in the direction of progressive development, giving rise to some concern among States, particularly where various duties are set out.²⁰³ Several States have queried the ‘duty to cooperate’,²⁰⁴ for example, as well as the duty to reduce the risk of disasters,²⁰⁵ and the duty ‘to ensure the protection of persons and provision of disaster relief assistance’.²⁰⁶ Similarly, many have strongly rejected the duty to seek assistance from others, including States and the United Nations,²⁰⁷ as has the assertion that, while external assistance requires the consent of the State affected, such consent should not be withheld arbitrarily.²⁰⁸

In 2018, the General Assembly invited further comment by governments, and decided to return to the subject in 2020.²⁰⁹ This was not done, however, and in the meantime the practice of States, international organizations, and other actors will likely continue to have an impact, if only gradual, on the consolidation of this emerging body of international law.²¹⁰

1.5.3 Regional organizations

The protection of refugees may also be promoted, directly and indirectly, by regional organizations, including, for example, the African Union (formerly the

Organization of African Unity),²¹¹ the Organization of American States, the Council of Europe, and the European Union. These have generated, among others, instruments such as the 1969 AU/OAU Convention on the Specific Aspects of Refugee Problems in Africa,²¹² the 1969 American Convention on Human Rights, the 1950 European Convention on Human Rights, the 1959 European Agreement on the Abolition of Visas for Refugees, the 1967 European Agreement on Consular Functions, together with the Protocol concerning the Protection of Refugees, and the 1980 European Agreement on Transfer of Responsibility for Refugees. As noted throughout this work, since the adoption of the Treaty of Amsterdam in 1997, the European Union has also pursued the goal of harmonizing asylum practice among the Member States, and the EU's Fundamental Rights Agency, with its roots in the Charter of Fundamental Rights, has been particularly active in oversight and standard setting on refugee and migration-related issues.²¹³

The necessity for inter-agency and inter-State cooperation on refugee and migration issues was already a priority in different forums, even before the most recent initiatives to develop and adopt the Global Compacts. The Organization (formerly the Conference) on Security and Co-operation in Europe, for example, encouraged a focus on related issues from the mid-1980s onwards, particularly with a view to improving East–West relations and encouraging cooperation.²¹⁴

1.5.4 Non-governmental organizations (NGOs)

Protection concerns reveal a commonality of interest; *effective* protection demands a purposeful degree of cooperation, by no means limited to States or international organizations. For example, in 1980, the Economic and Social Council recognized the ‘essential role played by inter-governmental organizations, the International Committee of the Red Cross and other non-governmental organizations’ in meeting humanitarian needs in emergency situations.²¹⁵ Many hundreds of national and international NGOs are involved in assisting and protecting refugees and asylum seekers around the world. *Médecins sans Frontières*, for example, specializes in bringing medical care and health services to refugees in emergency camps and settlements;²¹⁶ *Human Rights Watch* undertakes field visits and in-depth inquiry into refugee situations worldwide, strongly advocating for the maintenance of international protection standards, as do *Amnesty International* and the *International Commission of Jurists*;²¹⁷ the *European Council on Refugees and Exiles*, a forum established in

1973 for cooperation which now brings together 105 NGOs across 40 European countries;²¹⁸ and various national *Refugee Councils* provide legal or other counselling, or seek to influence national policy on refugees and asylum seekers.²¹⁹

1.5.5 Humanitarian workers

No examination of international protection would be complete without some reference to the other side of the coin, which is the protection due to relief workers, many of them employed by international organizations, non-governmental organizations, and governments themselves. They have frequently been subject to kidnapping, threats, physical attack, aerial bombardment, and fighting between different factions.²²⁰ Over several decades, the Security Council has repeatedly demanded that all parties take the necessary steps to ensure the safety of UN personnel and others, for example, in the former Yugoslavia,²²¹ Cambodia,²²² and Mozambique.²²³ A report for Humanitarian Outcomes in 2017 noted that most attacks on relief workers are perpetrated by national-level non-State armed groups aiming to take control of the State, who view aid organizations as a potential threat to their authority and useful proxy targets.²²⁴

In 1992, the General Assembly also expressed its concern, and the following year urged support for initiatives ‘concerning the safety of United Nations and associated personnel, in particular the consideration of new measures to enhance (their) safety’.²²⁵ The resolutions in question refer specifically to ‘international and local staff undertaking humanitarian work’, which has obvious implications for jurisdiction and responsibility. The Executive Committee also has endorsed the necessity of safety for relief workers.²²⁶

The 1994 Convention on the Safety of United Nations and Associated Personnel defines UN personnel as persons engaged or deployed by the Secretary-General as members of a military, police, or civilian component of a United Nations operation, as well as officials and experts on missions of the United Nations and its specialized agencies.²²⁷ It extends to associated personnel, that is, those assigned by a government or an intergovernmental organization, under agreement to carry out activities directly connected with a United Nations operation. Also included are those engaged by the Secretary-General or a specialized agency, or deployed by a humanitarian non-governmental organization or agency under agreement with the Secretary-General or with a specialized agency. However, the convention will *not* apply to a UN operation

authorized by the Security Council as an enforcement action under Chapter VII of the Charter, in which personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.²²⁸ However, the 1994 Convention does oblige States parties to establish jurisdiction over those who commit crimes against personnel involved in United Nations operations; defines the duties of States to ensure the safety and security of personnel and to release or return personnel captured or detained; and calls on host States and the United Nations to conclude agreements on the status of United Nations operations and personnel. An Optional Protocol adopted in 2005 extends the Convention's scope to include 'delivering humanitarian, political or development assistance in peacebuilding' and 'delivering emergency humanitarian assistance'.²²⁹ The impact of these measures remains unclear.

2. The protection of refugees in international law

Day-to-day protection activities are necessarily dictated by the needs of refugees and asylum seekers, but a summary reading of both the UNHCR Statute and the 1951 Convention gives a general picture. There are, first, both direct and indirect aspects to the protection function, with the latter comprising UNHCR's promotion activities already mentioned. Direct protection activities, including intervention on behalf of individuals or groups, involve protection of the refugee's basic human rights, for example, non-discrimination, liberty, and security of the person.²³⁰ UNHCR is also concerned specifically with the following: (1) the prevention of the return of refugees to a country or territory in which their life or liberty may be endangered;²³¹ (2) access to a procedure for the determination of refugee status; (3) the grant of asylum; (4) the prevention of expulsion; (5) release from detention; (6) the issue of identity and travel documents; (7) the facilitation of voluntary repatriation; (8) the facilitation of family reunion; (9) the assurance of access to educational institutions; (10) the assurance of the right to work and the benefit of other economic and social rights; (11) treatment generally in accordance with international standards, not excluding access to and by UNHCR, the provision of physical and medical assistance, and personal security; and (12) the facilitation of naturalization. Of these, the first four, together with the general function, are traditionally considered to be of prime importance, with the principle of *non-refoulement* standing as the essential starting-point in the search for permanent solutions.

However, the measures to which refugees have been subject, and the conditions under which they must frequently live, have given added weight to claims for personal security, family reunion, assistance, and international efforts to achieve solutions.

As a matter of international law, the precise standard of treatment to be accorded to refugees will vary, depending on whether the State in which they find themselves has ratified the Convention and Protocol or any other relevant treaty. It may further depend on whether the refugee falls within the narrow or broad sense of the term, is lawfully or unlawfully in the territory of the State, or has been formally recognized as a refugee.

2.1 General international law

With regard to basic human rights, the lawfulness or otherwise of presence is as irrelevant as the distinction between national and non-national,²³² while certain provisions of the 1966 Covenants on human rights are indicative of standards going beyond a purely treaty-based regime. Article 2(2) ICCPR 66, for example, obliges the State to respect and to ensure the rights declared to ‘all individuals within its territory and subject to its jurisdiction’. The same article elaborates a principle of non-discrimination in broad terms, including national or social origin, birth or other status, within the list of prohibited grounds of distinction. Article 4(1), it is true, permits derogation in certain circumstances,²³³ and contains a narrower statement of the principle of non-discrimination that would allow States to distinguish between nationals and non-nationals. Nevertheless, any measures in derogation must be consistent with States’ other obligations under international law,²³⁴ and no derogation is allowed from those provisions which guarantee the right to life, or which forbid torture or inhuman treatment, slavery, servitude, or conviction or punishment under retroactive laws. The right to recognition as a person before the law and the right to freedom of conscience, thought, and religion are also declared in absolute terms.²³⁵

The International Covenant on Civil and Political Rights has been widely ratified,²³⁶ while certain rights and standards also possess a positive foundation in general international law. In one oft quoted dictum, the International Court of Justice observed that ‘the principles and rules concerning the basic human rights of the human person, including protection from slavery and racial discrimination’,²³⁷ figure within the class of obligations owed by States *erga omnes*, that is, to the international community of States as a whole. Although this

concept is not without its difficulties, the rights in question frequently appear in conventions among those from which no derogation is permitted, even in exceptional circumstances. Other rights of a similar fundamental character ought likewise to benefit everyone, and they would include the right to life; the right to be protected against torture or cruel or inhuman treatment or punishment; the right not to be subject to retroactive criminal penalties; and the right to recognition as a person before the law. Such rights clearly allow for no distinction between citizen and non-citizen, whether the latter be a migrant, visitor, refugee, or asylum seeker, and whether lawfully or unlawfully in the State.²³⁸ The obligations of respect and protection are incumbent on States, irrespective of ratification of treaties, and refugees ought in principle to benefit, whether admitted on a temporary, indefinite, or a permanent basis. In practice, however, this objective may remain elusive, particularly where the State of refuge is unable or unwilling to take the necessary measures. Refugees have thus fallen victim to external, armed aggression; to attacks by pirates resulting in murder, rape, abduction, and robbery; to abandonment when in distress at sea; to threats to life and security by para-military ‘death squads’; to forced conscription, even as children; to arbitrary detention and torture; to denial of food and water; and to rape and other sexual violence.²³⁹ The exercise of protection on such occasions is a difficult and delicate task, whether attempted by UNHCR or by concerned States, and the problem is further exacerbated where the injury takes place in an area formally beyond the jurisdiction of any State. While international solidarity may manifest itself in calls for action, practical results can be far harder to obtain.

Once refugees have secured admission, however, the goal of attaining a lasting solution to their plight would seem to entail certain further standards of treatment geared to that objective. In 1981, a Group of Experts considered the implications of the concept of temporary refuge, and proposed a list of some 16 ‘basic human standards’ which, in its view, should govern the treatment of those temporarily admitted; these were duly endorsed by the UNHCR Executive Committee and the General Assembly later that year.²⁴⁰ The objective, the initiative for which drew especially on generally negative practices in South East Asia, was rather the promotion of certain practically attainable standards, than the formulation of rules. The Executive Committee thus reiterated the need to observe fundamental rights, including the principle of non-discrimination. It also recommended that asylum seekers be located by reference to their safety and well-being, as well as

the security of the State of refuge;²⁴¹ that they be provided with the basic necessities of life; that the principle of family unity be respected and that assistance with tracing of relatives be given; that minors and unaccompanied children be adequately protected; that the sending and receiving of mail, and receipt of material assistance from friends, be allowed; that, where possible, appropriate arrangements be made for the registration of births, deaths, and marriages; that asylum seekers be permitted to transfer to the country in which a lasting solution is found, any assets brought into the country of temporary refuge; and that all necessary facilities be granted to enable the attainment of a satisfactory durable solution, including voluntary repatriation.

These recommendations are not of a normative character, although a rules base can certainly be found for many of them among basic human rights principles.²⁴² They were formulated primarily with a view to reaching solutions which, in the case of refugees from Indo-China, meant first asylum followed by third country resettlement. Nevertheless, they are regularly invoked as a statement of the minimum standards applicable, particularly in the first phases of a refugee movement.²⁴³

2.2 Treaties and municipal law

Basic human rights derive their force from customary international law, and indicate the content of the *general* obligations which control and structure the treatment by States of nationals and non-nationals. For States which have ratified treaties specifically benefitting refugees, the particular standards required ought to be easier to determine. This, however, raises the problem of the obligation, if any, requiring ratifying States to incorporate or otherwise implement the provisions of the treaties in question in their municipal law. The 1951 Convention contains no provision requiring legislative incorporation or any other formal implementing step; indeed, article 36, which obliges States to provide information on national legislation, refers only to such laws and regulations as States ‘may’ adopt to ensure application of the Convention. Similarly, nothing is said with regard to the establishment of procedures for the determination of refugee status, or otherwise for ascertaining and identifying those who are to benefit from the substantive provisions of the Convention.

Although it offers little assistance in the solution of specific problems, the *general* duty of a party to a treaty to ensure that its domestic law is in conformity with its international obligations is beyond contradiction.²⁴⁴ The governing

principles, however, do not include an obligation as such to incorporate the provisions of treaties into domestic law.²⁴⁵ The International Law Commission's final articles on State responsibility abandon the distinction previously drawn between obligations of conduct, obligations of result, and obligations to prevent a particular occurrence. Many commentators have observed that, while these distinctions may serve a useful analytical purpose and in determining when a breach has occurred (provided always that they are used correctly ...), they do not have either specific or direct consequences for responsibility.²⁴⁶ Dupuy and others pointed out that in the typology originally developed by the former Rapporteur on State responsibility, Roberto Ago, the conduct/result distinction was back to front; in civil law, an obligation of *conduct* is 'une obligation de s'efforcer', that is, to endeavour or to strive to realize a certain goal or to prevent a certain occurrence.²⁴⁷ An obligation of *result*, by contrast, is precisely that—an obligation, to borrow Crawford's words, which involves 'in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations to do all in one's power to achieve a result, but without ultimate commitment'.²⁴⁸ In the one case, the fact that the result is not achieved is both necessary and sufficient to generate responsibility; in the other, 'what counts is the violation of the best effort obligation, not the end result generally achieved'.²⁴⁹ In each case, it is the primary rule which determines the relevant standard of performance:

Some obligations of conduct or means may only be breached if the ultimate event occurs (i.e. damage to the protected interest); others may be breached by a failure to act even without eventual damage. International law neither has, nor needs to have, a presumption or rule either way. It depends on the context, and on all the factors relevant to the interpretation of treaties or the articulation of custom.²⁵⁰

At the level of analysis, the result/conduct distinction can nevertheless play a helpful role, not least in the human rights field, where *process* (and the adequacy, effectiveness, and ultimately legality thereof) is also relevant. Conduct and result overlap; torture, ill-treatment, arbitrary deprivation of life, and *refoulement* are all examples of forbidden conduct; but due process and accountability mechanisms are necessary, linked, though still separate bases for determining whether 'protection' is available or effective.

The particular nature of treaties generally and those for the protection of individuals and of human rights obligations, in particular, illustrates the variety

of what is required to avoid responsibility.²⁵¹ So, for example, article 22(1) of the 1961 Vienna Convention on Diplomatic Relations declares a clear obligation of result: ‘The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.’²⁵² In this case, the internationally required result is that of omission by the organs of the receiving State; in other cases, positive action may be required. Thus, States parties to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination agree, among others, ‘to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists’.²⁵³ Similarly, the specific *enactment* of legislation may be required, as by article 20 ICCPR 66: ‘Any propaganda for war shall be prohibited by law’.²⁵⁴ In all such cases, the international obligation requires a specifically determined result, and ascertaining if the obligation has been fulfilled simply turns on whether the State’s act or omission is or is not in fact in conformity with the internationally required result, the sufficient injury being the breach of legal duty.²⁵⁵

Other international obligations, by their nature or the manner in which they are framed, may concede the State’s full freedom in its choice of means for implementation. Article 22(2) of the 1961 Vienna Convention on Diplomatic Relations declares the receiving State’s ‘special duty to take all appropriate steps to protect the premises of the mission’, but defines those steps no further. Article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143) obliges ‘Each Member for which the Convention is in force ... to declare and pursue a national policy designed to promote and to guarantee, *by methods appropriate to national conditions and practice*, equality of opportunity and treatment’.²⁵⁶ Such ‘obligations of conduct’ are especially common in standard-setting treaties (for example, treaties of establishment guaranteeing most-favoured-nation treatment) and in human rights instruments. On occasion, full freedom of choice can be implied from the terms of the treaty itself, while in other cases a preference for the adoption of legislative measures will be indicated. Nevertheless, although legislation may be considered appropriate, even essential, it is evidently only one way by which the international obligation can be fulfilled. It is not so much the law which counts, as that compliance be assured. As the International Law Commission noted in 1977: ‘[s]o long as the State has not failed to achieve *in concreto* the result required by an international obligation, the fact that it has not taken a certain measure which would have

seemed especially suitable for that purpose—in particular, that it has not enacted a law—cannot be held against it as a breach of that obligation'.²⁵⁷

In two human rights treaties concluded in the 1960s, States are called upon to enact such ‘legislative or other measures as may be necessary’²⁵⁸ to give effect to rights; and to ‘prohibit and bring to an end’ certain conduct, ‘by all appropriate means, including legislation as required by circumstances’.²⁵⁹ Words such as ‘necessary’ and ‘appropriate’ indicate that the State enjoys discretion in its choice of implementing measures, but the standard of compliance remains an international one. The question is that of effective or efficient implementation of the treaty provisions, *in fact*, and in the light of the principle of effectiveness of obligations.²⁶⁰ Just as taking the theoretically most appropriate measures of implementation is not conclusive as to the fulfilment of an international obligation, so failing to take such measures is not conclusive as to breach.²⁶¹ The same holds good with regard to a State’s adoption of a potentially obstructive measure, so long as such measure does not itself create a specific situation incompatible with the required result; what counts is what in fact results, not enactment and promulgation, but application and enforcement.²⁶²

The test of implementation of international obligations might suggest simply comparing what is required with what is achieved. In practice, however, major problems of interpretation and appreciation arise in view of, amongst others, the relative imprecision of the terminology employed in standard-setting conventions; the variety of legal systems and practices of States; the role of discretion, first, in the State’s initial choice of means, and secondly, in its privilege on occasion to require resort to such remedial measures as it may provide. In a standard-setting context, local remedies are especially important;²⁶³ their availability and effectiveness will often determine the question of fulfilment or breach of obligation, the ‘generation’ of international responsibility and the implementation of this responsibility.

The difficulties attaching to the general issue of incorporation are illustrated by two occasions on which the UK’s performance in the light of its international obligations was called in question, and notwithstanding the passage of time, the central issues remain relevant. In 1979, the United Kingdom was examined by the Human Rights Committee with regard to its report on the implementation of the International Covenant on Civil and Political Rights. The UK representative disagreed with the view that States were obliged to adopt positive measures;²⁶⁴ what mattered was the treatment that people received and the way in which the

law worked in practice.²⁶⁵ This position was maintained when incorporation and effective implementation of the 1951 Convention were discussed in the House of Commons in May 1979,²⁶⁶ continuing a debate begun the previous year in the House of Lords.²⁶⁷ The Minister for State noted that nothing in the Convention required incorporation, and that it imposed no obligation and offered no guidance in the matter of procedures for the determination of refugee status.²⁶⁸ While accepting that the Executive Committee's 1977 recommendations²⁶⁹ might comprehend 'the basic requirements for the effective implementation of the Convention', he nevertheless felt that the UK's existing procedure was sufficient.

The arguments regarding legislative implementation and establishment of a procedure, while formally correct in the light of obligations actually assumed, fail to go to the heart of the matter, which is effectiveness of implementation. That incompatibilities with the Convention had developed was impliedly admitted in the announcement of certain changes in practice.²⁷⁰ UK law, like that of many countries, was of general application, making no special provision for refugees. It therefore needed to be supplemented by a judicious use of administrative discretion, both to avoid the application of the general law and to secure appropriate benefits.²⁷¹

The effective implementation of the 1951 Convention must therefore first take into account the fact that States parties have undertaken particularly important obligations governing (a) the legal definition of the term 'refugee'; (b) the application of the Convention to refugees without discrimination; (c) the issue of travel documents to refugees; (d) the treatment of refugees entering 'illegally'; (e) the expulsion of refugees; and (f) the *non-refoulement* of refugees. These topics all fall, somewhat loosely, within the field of immigration or aliens law; such law itself is most usually of general application, so that if special measures are not taken to single out the refugee, he or she is likely to be denied the rights and benefits due under the Convention and Protocol.²⁷² Secondly, the Convention defines a status to which it attaches consequences, but says nothing about procedures for identifying those who are to benefit. While the choice of means may be left to States, some such procedure would seem essential for the effective implementation and fulfilment of Convention obligations. It should be available to deal with claims to refugee status, whether made in the context of applications for asylum either at the border or after admission, for a travel document, for a social security benefit, or in an appeal against expulsion.

Specific *legislative* action in the above matters may well be sufficient to

remove the refugee from the ambit of the general law; it might therefore be considered a necessary condition for effective implementation. The establishment of a procedure for the determination of refugee status, given the object and purpose of the instruments in question, may likewise be considered a further necessary condition. Whether in any given case such measures, either together or alone, are sufficient conditions for effective implementation remains to be judged in the light of the actual workings of the municipal system as a whole. This, in turn, is to be assessed against such standards and best practices as may have been developed by States themselves, or indirectly, through the recommendations of the UNHCR Executive Committee, or at one remove, such as in the jurisprudence of competent international and regional tribunals.

2.2.1 The principle of good faith

Closely allied to every State's obligation to ensure that its domestic law conforms to its international obligations stands the principle of good faith, already referred to in specific protection contexts.²⁷³ In the words of the International Court of Justice in the *Nuclear Tests* case, good faith is: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source.'²⁷⁴ Article 2(2) of the United Nations Charter places the principle in the forefront of those which are to govern the conduct of Members.²⁷⁵ While it has an ethical content,²⁷⁶ its essentially legal character in international law has also been recognized. In the *Norwegian Loans* case, Judge Lauterpacht observed that, '[U]nquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.'²⁷⁷ Fitzmaurice, a former Special Rapporteur on the Law of Treaties and Judge of the International Court of Justice, defined the principle as follows:

The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily and capriciously.²⁷⁸

Lack of good faith in the implementation of a treaty must be distinguished from a violation of the treaty itself. A State lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but more precisely, when it seeks to avoid or to 'divert' the obligation which it has

accepted, or to do indirectly what it is not permitted to do directly.²⁷⁹ In the *Free Zones* case, France was under treaty obligations to maintain certain frontier zones with Switzerland free from customs barriers. The Permanent Court of International Justice, while recognizing that France had the sovereign and undoubted right to establish a police cordon at the political frontier for the control of traffic and even for the imposition of fiscal taxes other than customs duties, held that, '[A] reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.'²⁸⁰ Similarly, in the *North Atlantic Coast Fisheries* case (Great Britain–United States), it was recognized that Great Britain had the right and duty, as the local sovereign, to legislate in regulation of fisheries. However, 'treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject matter to such acts as are consistent with the treaty'.²⁸¹

The question is, to what extent, if at all, does the principle of good faith directly oblige a State to a particular course of conduct?²⁸² The doctrine of abuse of rights is not commonly accepted today as a source of obligation in itself, but notions of reasonableness and proportionality do play a comparable role, particularly in the field of human rights. Moreover, the principle of good faith invites particular attention to the *effects* of State action, rather than to the (subjective) intent or motivation, if any, of the State itself.

In relation to the implementation of treaty obligations, the good faith dimension may be relatively clear; for example, only if the appropriate legislative and administrative steps are taken, will refugees be identified and guaranteed protection against *refoulement*. What remains less clear is the legality of State action *outside* the scope of a particular treaty, for example, in relation to control measures applied beyond territorial jurisdiction, with a view to preventing those in search of refuge from reaching the State and claiming asylum. This is an area with much grey in it, but also one whose parameters are nonetheless laid down in many 'peripheral' rules dealing, among others, with the use of force, racial discrimination, and, it is submitted, reasonableness and proportionality.²⁸³

3. The protection of particular groups of refugees

Many different groups of refugees face particular vulnerabilities, and the following sections examine just a small selection; each group is protected by one or more particular human rights treaties, which recognize their rights, and members of these groups are often subject to discrimination or otherwise marginalized.

3.1 Women refugees

During refugee movements, women and girls²⁸⁴ risk further violations of their human rights, and have repeatedly been subject to rape and abduction.²⁸⁵ Their passage to safety must often be bought for the price of sexual favours, and even within the relative security of a refugee camp or settlement, where they bear additional responsibilities as heads of households, they face discrimination in food distribution, and access to health, welfare, and education services—doubly disadvantaged as refugees and as women.²⁸⁶ This was common knowledge for years, but apart from the case of piracy attacks in the South China Sea in the 1970s and 1980s, the protection of women refugees did not appear on the UNHCR Executive Committee agenda until 1985. Then, the primary question was not so much the physical security or systemic discrimination which women face in flight and in refuge, but whether women might constitute a particular social group, membership of which could give rise in appropriate circumstances to a well-founded fear of persecution.²⁸⁷

Edwards identified five phases of feminist engagement with international refugee law and policy, recognizing, of course, that they are not watertight categories and may operate simultaneously.²⁸⁸ During the period 1950 to 1985, women were neither included in the drafting of the major refugee instruments, nor seen as specifically included within their scope of protection. This shifted after 1985, first with a focus on women as a particular group, and then from 1988 onwards, as a regular feature, with particular reference to questions of safety, discrimination, and sexual exploitation.²⁸⁹ The next phase, ‘gender mainstreaming’ (1997–mid-2004), was followed by ‘age, gender and diversity mainstreaming’ (from 2004 onwards).²⁹⁰ A final stage reoriented the focus to refugee men and boys ‘as victims of gender stereotypes, constraints, and violence’ (2009–present), rather than solely as perpetrators of violence.²⁹¹

In 1990, under pressure from a number of governments, UNHCR first raised the possibility of developing a *policy* on refugee women,²⁹² while also looking at their specific needs in the refugee determination context, and in that of physical

safety.²⁹³ With respect to the latter, UNHCR noted that special measures were needed in camps and settlements in order to protect women from abuse, especially female heads of household and single women.²⁹⁴ Action was required to ensure the provision of food, water, and relief supplies, to meet health (including reproductive health) needs, to provide education, to promote skills training and economic activities, and to enable women's voices to be heard on important decisions, such as voluntary repatriation.²⁹⁵

Guidelines on the protection of refugee women were drafted in 1991 for the use of UNHCR personnel and were replaced in 2008 by the *Handbook for the Protection of Women and Girls*.²⁹⁶ In 1993, a comprehensive note on certain aspects of sexual violence against women was produced,²⁹⁷ which, in turn, led to an equally wide-ranging conclusion.²⁹⁸ Also in 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women,²⁹⁹ recognizing that this was an issue of international concern and that all States had an obligation to work towards its eradication.

Only in 2006, however, did the Executive Committee adopt a Conclusion in which it emphasized the need to identify women and girls at risk, noting that displacement 'can expose women and girls to a range of factors which may put them at risk of further violations of their rights', whether resulting from 'the wider protection environment' or 'the individual's particular circumstances' (including sexual- and gender-based violence).³⁰⁰ It also included a focus on preventive strategies to identify, assess, and monitor risks faced by women and girls, and strategies to enhance the empowerment of displaced women and girls. The Conclusion was followed in 2008 by UNHCR's *Handbook for the Protection of Women and Girls* which sets out relevant legal standards and principles, as well as innovative practices from the field.³⁰¹ Nevertheless, implementation continues to present challenges, both generally and in particular contexts, such as camps and settlements.³⁰²

The 2018 Global Compact on Refugees contains two specific paragraphs on women and girls (in addition to mainstreaming gender across the document). Noting that women and girls 'may experience particular gender-related barriers that call for an adaptation of responses in the context of large refugee situations',³⁰³ the Compact commits States to seeking to adopt and implement policies that empower women and girls, and which promote the full enjoyment of their human rights, and equal access to services and opportunities. It also calls for further resources and expertise to improve their safety, access to justice, and

agency, and to address all forms of violence against them.³⁰⁴

The Global Compact for Safe, Regular and Orderly Migration includes gender-responsiveness among its guiding principles,³⁰⁵ promotes gender equality and the empowerment of women and girls, and acknowledges women and girls as agents of change.³⁰⁶ However, Gottardo and Cyment argue that there were ‘missed opportunities for strengthening gender justice, labour rights, and human rights in the context of migration’, and that many States had ‘difficulty applying a gender lens that went beyond the traditional notion of what is considered to be a gendered issue; not only trafficking and sexual violence, but access to services for irregular migrants, and returns and border externalisation policies’.³⁰⁷

3.2 Child refugees

The need for special care and protection for *all* children was first recognized internationally in the 1924 League of Nations declaration on the rights of the child.³⁰⁸ Though followed by a series of similar and related declarations,³⁰⁹ including treaties that recognized the particular needs of refugee children,³¹⁰ the 1951 Refugee Convention itself does not include any specific provisions on children.³¹¹ In fact, it does little more than recommend measures to ensure family unity and protection, and provide for access at least to primary education.³¹²

It was not until 1989 that the international community acknowledged both the very special status of children, and the value of States entering into a treaty on their behalf. The 1989 UN Convention on the Rights of the Child (CRC 89), now ratified by 196 States, is a critical milestone in legal protection generally. More specifically, it acknowledges the protection needs of refugee children, with article 22 requiring States to ensure that refugee and asylum seeker children ‘receive appropriate protection and humanitarian assistance’. As Pobjoy notes, this ‘remains the only provision in any international human rights treaty that deals expressly with the situation of refugee children and children seeking refugee status’.³¹³ Importantly, it is not subject to derogation in times of emergency (unlike many other human rights treaties), which means that in some circumstances, children may be better protected than adults.³¹⁴ Article 22 essentially cross-references the body of rights in the treaty as a whole and in other international instruments, while emphasizing cooperation in tracing and family reunion,³¹⁵ and States parties to CRC 89 undertake to ‘respect and ensure the rights’ proclaimed to ‘each child within their jurisdiction’.³¹⁶ A child who takes refuge in the territory of a State party therefore benefits as much from its

provisions as child nationals of that country. In particular, the obligation in article 3 CRC 89 that the best interests of the child must be a primary consideration in all actions concerning children serves as ‘a critical additional safeguard for children seeking international protection’.³¹⁷

Yet, as Pobjoy argues, ‘international refugee law and international law on the rights of the child might be more creatively aligned to respond to the reality that the at-risk individual is both a child and a refugee’,³¹⁸ noting that CRC 89 may be engaged

first, as a *procedural guarantee* to incorporate safeguards into the refugee status determination process; second, as an *interpretative aid* to inform the interpretation of the *Convention* definition; and, third, as an *independent source of status* outside the international refugee protection regime.³¹⁹

The idea of the child as someone entitled to *special protection* derives in part from the specific context of the 1949 Geneva Conventions and international humanitarian law—the laws of war. States are obliged, for example, to allow the free passage of assistance intended for children under 15 and expectant mothers, or required to facilitate the good functioning of institutions for the care of children in occupied territory.³²⁰ The 1977 Additional Protocols go further, expressly confirming the special protection due to children, and Article 77 of Additional Protocol I declares in its opening paragraph that: ‘Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.’³²¹ Both the Geneva Conventions and the Additional Protocols repeatedly link the protection of the child to the maintenance of *family life*.³²² Even in cases of internment, families should be kept together, and every effort made to promote the reunion of families separated by reason of armed conflict. The general intent is to preserve family life and, by inference, the natural process of child development. Similar objectives are clear in the human rights context, where States have recognized that the family should receive ‘protection by society and the State’; and that ‘special measures of protection and assistance should be taken on behalf of all children and young persons’.³²³ Together with the principle of the best interests of the child as a primary consideration,³²⁴ these principles put in question any solution for child refugees that might either ‘officially’ remove the child from the actual or potential family environment, or have the effect of leaving the child

without care and support, for example, on return to the country of origin when family have not been found and interim arrangements in the country of refuge are no longer viable.³²⁵

The majority of the world's refugees are children,³²⁶ yet despite a solid normative framework at the international level,³²⁷ children face many acute protection challenges.³²⁸ UNHCR brought the situation of refugee children before the Executive Committee in 1987, stating its intention to include within its protection and assistance activities, 'refugees, asylum seekers and displaced persons of concern to UNHCR, up to the age of 18, unless under applicable national law, the age of majority is less'.³²⁹ In a comprehensive conclusion adopted the same year, the Executive Committee condemned the violence that often faces refugee children, reiterated the 'widely-recognized principle that children must be among the first to receive protection and assistance', and recognized that the situation of refugee children 'often gives rise to special protection and assistance problems as well as to problems in the area of durable solutions'.³³⁰ In 1988, UNHCR issued the first edition of its *Guidelines on Refugee Children*, confirming its policy 'to intervene with governments to ensure that they defend the safety and liberty of refugee children', but noting, too, that UNHCR would 'assume direct responsibility in many situations'.³³¹ Revised in 1994, the *Guidelines* recognize the centrality of CRC 89 as 'a normative frame of reference' for UNHCR's action, laying down legally required standards and legally established goals.³³² The sections on particularly vulnerable children and solutions reflect that content.³³³

The *Guidelines* emphasize that all work with children must be founded on detail and verification, and that action should begin as soon as possible to trace relatives and to promote family reunion.³³⁴ Children can become separated for many reasons, including abduction, when they are sent out of the country of origin by parents who remain behind, or when parents return home. Military recruitment of minors,³³⁵ detention or internment of parents, and the actions of aid workers have also led to children being separated from their families.³³⁶

Where tracing is successful, family reunion can still be delayed, for example, because of immigration restrictions.³³⁷ Several States have made reservations to CRC 89 provisions on family reunion, despite the importance otherwise given to the family as the basic unit of society. Restrictions on family reunion also result from the conditions attached to certain types of status, such as temporary protection, which, although they facilitate the grant of refuge, may be so

circumscribed as to frustrate fundamental rights relating to the family, and seriously undermine the best interests of the child.³³⁸

The situation of refugee children differs substantially from that of children still living in their country of birth. They may be orphaned, with relatives in different countries, and they may be living with an unrelated family which would like to adopt them.³³⁹ Reaching the most appropriate solution, however, becomes more difficult when there is no national decision-making body competent to make or confirm arrangements for a child's future. For example, UNHCR recognizes that while family reunion is the primary aim for unaccompanied refugee children, adoption can be considered where reunion either would not be in the best interests of the child, or is not likely to be realized within a reasonable time, normally two years at most.³⁴⁰

Refugee children also need access to schools, both where education has been disrupted by flight and where it was not previously available.³⁴¹ The 1951 Convention guarantees refugees 'the same treatment as is accorded to nationals with respect to elementary education' and the same treatment as non-nationals receive with respect to other levels of education.³⁴² This complements State obligations to provide education under international human rights law.³⁴³ UNHCR estimates that 4 million refugee children do not attend school,³⁴⁴ and sees fulfilment of a refugee child's right to education not only as an end in itself, but also as a means of enhancing protection and the prospects of a durable solution.³⁴⁵ In the New York Declaration for Refugees and Migrants, States express their determination to 'ensure that all children are receiving education within a few months of arrival',³⁴⁶ and in the Global Compact on Refugees, they commit to take steps to facilitate access to national education systems for both refugee and host community children, and to contribute '[m]ore direct financial support and special efforts' to reduce the time that refugee children spend out of education to 'ideally a maximum of three months after arrival'.³⁴⁷ This accords with a general recognition that inclusion of refugees in national educational systems is preferable to the creation of parallel institutions.³⁴⁸

Although UNHCR considers that the authorities of the country of asylum have the necessary legal responsibility to take adoption decisions, in practice such States do not always accept that refugee children on their territory are 'habitually resident' within the meaning of the Hague Convention on Intercountry Adoption.³⁴⁹ The situation is further complicated by the fact that in a 'normal' inter-country adoption, the State of origin also bears a substantial responsibility

to decide whether the child should benefit.³⁵⁰

These jurisdictional and practical concerns seem equally valid with respect to international child abduction. The 1980 Hague Convention,³⁵¹ for example, is premised on the relatively ‘normal’ situation of interference by one party with another’s custody rights. It aims ‘to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence’. Children *are* abducted in the course of refugee movements; some are taken forcibly into a country of asylum, others are abducted from refugee camps and settlements, for example, to work or take part in military operations; and still others are targeted for ‘illegal’ adoption. Although some cases of abduction will involve removal in the sense of the 1980 Hague Convention, the greatest need is for comparable procedures to protect children against other, more common abductions.

The absence of rules, and the lack of national and international bodies with jurisdictional competence and authority to act, prejudices refugee children at both ends of the spectrum. On the one hand, they commonly fall outside the protective umbrella of the procedures and institutions established by the State under the relevant conventions; on the other hand, they can be denied timely access to the one durable solution that may be appropriate in their case, adoption, solely by reason of the inability or unwillingness of national authorities to act on their behalf.

In October 1994, the Special Commission on the Implementation of the 1993 Convention on Adoption approved a recommendation which goes some way towards meeting needs and filling gaps.³⁵² First, States should not discriminate against refugee and displaced children in determining whether they are habitually resident, and the ‘State of origin’ should be considered to be ‘the State where the child is residing after being displaced’.³⁵³ The competent authorities in any such State should take particular care in the case of proposed inter-country adoptions to ensure that ‘all reasonable measures’ have been taken to trace family and bring about reunion, and that repatriation for reunion purposes is not feasible or desirable, because the child cannot receive appropriate care or benefit from ‘satisfactory protection’.³⁵⁴ They should also obtain the necessary consents and, ‘so far as is possible under the circumstances’, ensure that all relevant information regarding the child has been collected.³⁵⁵ In this regard, the authorities must also take particular care ‘not to harm the well-being of persons

still within the child's country'.³⁵⁶

If implemented, these recommendations may remedy some of the problems, but the variety of issues and difficulties still remaining strongly suggests that a supplementary legal instrument may be called for, in order to protect against abduction and unlawful adoption. This might have two related objectives: first, the competent agency should be able to initiate and facilitate communication and assistance between the refugee child's country of origin and the country of asylum or potential 'receiving State', as appropriate, with a view to achieving a solution that is in the best interests of the child; and secondly, if no such links can be established, that agency should be the international substitute for the Central Authority, if any, 'normally' competent for the child, and assume the role and responsibilities of such Authority as set out in the relevant conventions, adjusted to the particular situation of displacement. Whether that agency should be UNHCR, which already enjoys competence to provide international protection to refugees and is recognized as entitled to act on their behalf in dealings with governments, is another matter. In the circumstances, an agency having child welfare and child rights experience may be better placed to assume these particular responsibilities.

A series of Executive Committee Conclusions, guidelines, and general comments developed over the past decade by UNHCR has sought to enhance the protection of displaced children. For instance, UNHCR's Guidelines on Child Asylum Claims set out child-specific forms of persecution, providing both substantive and procedural guidance on conducting child-sensitive refugee status determinations.³⁵⁷ They note that children's 'unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account', and that '[c]hildren may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so'.³⁵⁸ Four Executive Committee Conclusions—on women and girls at risk,³⁵⁹ children at risk,³⁶⁰ birth registration,³⁶¹ and youth³⁶²—outline States' commitments to a rights-based approach to safeguard children's best interests and ensure their protection.³⁶³ Additionally, in 2012 UNHCR developed a Framework for the Protection of Children, underpinned by its global strategies on education, detention, sexual and gender-based violence, and ending statelessness.³⁶⁴

The UN Committee on the Rights of the Child has also issued general comments on the treatment of unaccompanied and separated children,³⁶⁵ the

child's right to be heard (including in asylum proceedings),³⁶⁶ the child's right to have his or her best interests taken into account,³⁶⁷ and—jointly with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families—on the human rights of children in the context of international migration.³⁶⁸ Additionally, the entry into force in 2014 of a third optional protocol to CRC 89 enables individual children to lodge complaints to the Committee about specific violations of their rights under the main treaty and its other two optional protocols,³⁶⁹ which could potentially include claims by asylum seeker or refugee children.

In the case of *Re G (a child)*, the UK Supreme Court considered the Hague Convention's emphasis on determining applications for the return of an abducted or removed child within six weeks, and protection against *refoulement*, which may take many months when the asylum appeals process is factored in.³⁷⁰ The Court stressed the importance of the effectiveness of obligations in each case, and resisted arguments to limit the scope of *non-refoulement*. It held that the child could not be removed until the asylum claim was finally determined,³⁷¹ but recognized that this could have a 'devastating impact' on Hague proceedings. However, there was no bar to a return order being made, as opposed to its being implemented, and if the asylum claim was upheld—a matter for the Secretary of State—the court had the power to review and set aside the order. The Court gave guidance as to coordination and disclosure of information regarding the Hague proceedings and recommended that any asylum appeal of judicial review be assigned to a Family Division judge.

In the 2016 New York Declaration for Refugees and Migrants, States affirmed that they would 'protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child'.³⁷² These sentiments are reflected in the 2018 Global Compacts: 'ensuring the best interests of the child' is an underpinning of the Global Compact on Refugees,³⁷³ while a 'child-sensitive' approach is a guiding principle of the Global Compact for Safe, Orderly and Regular Migration (which contains multiple references to children in its substantive provisions).³⁷⁴ The Refugee Compact emphasizes the importance of resourcing policies and programmes 'that take into account the specific vulnerabilities and protection needs of girls and boys, children with disabilities, adolescents, unaccompanied and separated children, survivors of sexual and gender-based violence, sexual exploitation and abuse, and harmful practices, and

other children at risk’, including ‘[c]apacity development for relevant authorities to undertake best interests determination and assessment to inform decisions that concern refugee children, as well as other child-sensitive procedures and family tracing’.³⁷⁵

3.3 Refugees with disabilities

The Convention on the Rights of Persons with Disabilities encompasses ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.³⁷⁶

Refugees with disabilities are often ‘forgotten or invisible during acute crises of human displacement’ and suffer from ‘multiple disadvantage’.³⁷⁷ Despite the fact that millions of refugees have a disability of some kind, little is known about their plight, or about the adjustments (if any) that are made to respond to their needs.³⁷⁸ Some refugees are persecuted on account of their disability,³⁷⁹ others face persecution for different reasons, and yet others acquire a disability on account of their displacement. For refugees with disabilities, barriers to full, effective, and equal participation in society may be both ‘attitudinal and environmental’.³⁸⁰ For instance, challenges relating to mobility, comprehension, and communication may be compounded by denial of opportunity, marginalization, bias, and discrimination,³⁸¹ and heightened for groups that may already experience disadvantage or abuse, such as women and children.³⁸² This is true throughout all phases of displacement, from the initial emergency through to durable solutions and longer-term integration.³⁸³

UNHCR’s 2007 note on ‘The Protection of Older Persons and Persons with Disabilities’ identified the need for a more inclusive and empowering approach to the protection of people with disabilities, ‘building on their skills, resources and abilities’.³⁸⁴ It noted the need for better identification, monitoring, and support, as well as systematic incorporation of the specific protection needs of people with disabilities in UNHCR policy guidance and programmes. It also acknowledged that if people with disabilities are conceptualized as a ‘vulnerable group’, rather than as people with specific rights and needs, then protection risks may not be adequately recognized;³⁸⁵ hence, the rights framework of the Disabilities Convention is crucial to realizing protection.³⁸⁶

In 2010, two years after the entry into force of the Disabilities Convention, the Executive Committee adopted a Conclusion on refugees (and others of concern

to UNHCR) with disabilities.³⁸⁷ The Conclusion calls upon States and UNHCR to protect and assist such people without discrimination; to provide sustainable and adequate support to address their needs; and to raise awareness of disability and foster respect for the rights and dignity of those with disabilities. In more concrete terms, it recommends the swift and systematic identification and registration of refugees and others with disabilities; encourages measures to communicate information accessibly and intelligibly, including in refugee status determination processes; and recommends that those with disabilities have an equal opportunity for durable solutions.³⁸⁸ Since that time, UNHCR has sought to mainstream disability into its work, policy documents, and tools.³⁸⁹

¹ On the inter-war years generally, see Simpson, J. H., *The Refugee Problem* (1939); Reale, E., ‘Le problème des passeports’ (1934-IV) 50 *Hague Recueil* 89; United Nations, *A Study of Statelessness* (1949): UN doc. E/1112 and Add. 1, 34–8; Sjöberg, T., *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees* (1991) Ch. 1; Goodwin-Gill, G. S., ‘International Refugee Law in the Early Years’, in Costello, C., Foster, M., & McAdam J., eds., *The Oxford Handbook of International Refugee Law* (2021).

² 1 *League of Nations Official Journal (LNOJ)* 3; [1919] UKTS 4 (Cmd. 153). The original members who ratified the Peace Treaty were Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), France, Guatemala, Italy, Japan, Poland, Peru, Siam, Czechoslovakia, and Uruguay; the Argentine Republic, Chile, Paraguay, Persia, and Spain had also acceded by the end of 1919: 1 *LNOJ* 12.

³ Ibid., art. 23: ‘Members of the League, (a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children . . . (f) will endeavour to take steps in matters of international concern for the prevention and control of disease.’ See also the reference in art. 25 to ‘the improvement of health, the prevention of disease and the mitigation of suffering throughout the world’. Cf. art. 11, second paragraph: ‘It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.’

⁴ Hsu Fu-yung, *La protection des réfugiés par la Société des Nations* (1935) 94–8; Nathan-Chapotot, R., *Les Nations Unies et les réfugiés* (1949) 5–11 (the sometimes pathological role of ideology); Goodwin-Gill, G. S., ‘The Politics of Refugee Protection’ (2008) 27(1) *RSQ* 8.

⁵ Art. 25: ‘The Members of the League agree to encourage and promote the establishment

and cooperation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.' Cf. Holborn, L. W., 'The League of Nations and the Refugee Problem' (1939) 203 *Annals of the American Academy of Political and Social Science* 124.

⁶ 'Procès-Verbal of the Fourth Session of the Council of the League of Nations' (1920) 1 *LNOJ* 80, 83–4 (report of Count Bonin Lingare, Italy): the League, 'could not undertake a more humane task' than the repatriation of POWs, 'or one more in keeping with Article 25'. The Council already had Nansen in mind as High Commissioner for Prisoners of War, as confirmed at the Fifth Session: (1920) 1 *LNOJ* 115, 123–4.

⁷ Quoted in Wheatcroft, S. G., 'Famine and Epidemic Crises in Russia, 1918–1922: The Case of Saratov' (1983) *Annales de démographie historique. Mères et nourrissons* 329.

⁸ Art. 23: (n 3). Cf. 'Procès-Verbal of the Second Session of the Council of the League of Nations' (1920) 1 *LNOJ* 43–4: 'Health measures are essentially international measures.'

⁹ Gustave Ador to the President of the Council of the League of Nations confirming an earlier telegram of 20 February 1921: (1921) 2 *LNOJ* 225, 227–9, and attached memorandum.

¹⁰ *Ibid.*

¹¹ *Ibid.* (italics in original).

¹² The reference to repatriation was soon qualified in light of conditions in Russia and the necessity for guarantees of security; see Gustave Ador, Letter of 15 June 1921 to the President of the Council: LoN doc. C.132.M.73.1921.

¹³ *Ibid.*, 228–9. The memorandum mentioned some 800,000 Russian refugees, but the total was probably at least twice that; nor were Russian refugees the only ones in need of protection and assistance.

¹⁴ 'Conference on the Question of the Russian Refugees', resolutions adopted on 24 August 1921: (1921) 2 *LNOJ* 899. On the last day of the Conference, Fridtjof Nansen was invited by telegram to take up the post of High Commissioner for Russian Refugees, which he accepted on 1 September 1921: (1921) 2 *LNOJ* 1006, 1027. Nansen continued his work with POWs, which wound up the following year, and was engaged also in the League's International Committee for Russian Relief, which was serviced by the High Commissioner's office in Geneva. See 'Relief Work in Russia', Letter and Note from the Norwegian Minister of Foreign Affairs to the President of the Council of the League and Memorandum by Dr Nansen (29 March 1922): (1922) 3 *LN OJ* 447–9; LoN doc. C.173.M.92.1922 (29 March 1922). As he remarked at the time, 'only by stopping the famine can the migrations which result from the famine be stopped ... and ... only by stopping the migrations can the present epidemic situation be satisfactorily and adequately dealt with' (1922) 3 *LNOJ* 449.

¹⁵ Annexe 224, Minutes of the 13th Session of the Council of the League of Nations, Geneva (17–28 Jun. 1921), cited by Weis, P., 'The International Protection of Refugees' (1958) 48 *AJIL* 193, 207–8. During the 1920s, large-scale relief operations were undertaken by private organizations for the multitudes displaced by the First World War and its

aftermath: Marrus, M., *The Unwanted—European Refugees in the Twentieth Century* (1st edn., 1985) 82–6. In the same period, considerable international attention and assistance focused also on spontaneous, coerced and agreed population exchanges in the Balkans; on the exchanges between Greece and Turkey and Greece and Bulgaria: Marrus, *ibid.*, 96–109; Meindersma, C., ‘Population Exchanges: International Law and State Practice—Part I’ (1997) 9 *IJRL* 335; ‘Part 2’ (1997) 9 *IJRL* 613.

¹⁶ Marrus (n 15) 74–81, 119–21. 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees: 84 LNTS 47 No. 2004.

¹⁷ 1928 Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in Favour of Russian and Armenian Refugees: 89 LNTS 63 No. 2006.

¹⁸ 1928 Arrangement relating to the Legal Status of Russian and Armenian refugees: 89 LNTS 53 No. 2005. It came into force between 10 States.

¹⁹ *Ibid.*, Res. (1). Other resolutions made recommendations, among others, in respect of choice of law in matters of marriage and divorce; that refugees not be denied certain rights and privileges on the basis of lack of reciprocity; that they be exempt from the *cautio judicatum solvi* (security for costs in legal proceedings); that they be accorded national treatment in matters of taxation, and that restrictions on access to the labour market not be rigorously applied to Russian and Armenian refugees in their country of residence. See further Ch. 11, s. 1.1.1.

²⁰ 1928 Agreement concerning the Functions of the Representatives of the League of Nations High Commissioner for Refugees: 93 LNTS 377 No. 2126. In France, this function was taken over by the International Refugee Organization (IRO) (agreement cited by Weis, P., ‘Legal Aspects of the Convention of 28 Jul. 1951 relating to the Status of Refugees’ (1953) 30 *BYIL* 478, 484), and subsequently by the *Office français de protection des réfugiés et apatrides* (OFPRA): *loi no. 52–893 du 25 juillet 1952*, art. 4, *décret no. 53–377 du 2 mai 1953*, art. 5. See now Loi n° 2015–925 du 29 juillet 2015 relative à la réforme du droit d’asile: JORF n°0174 du 30 juillet 2015 page 12977.

²¹ ‘Russian, Armenian, Assyrian, Assyro-Chaldean and Turkish Refugees’, Report by the Inter-Governmental Advisory Commission attached to the High Commissioner for Refugees (9 Sep. 1930): (1930) 11 *LNOJ* 1462 (Nansen had died on 13 May 1930, and it was proposed that the new office be named in his memory); Sixth Committee, Eleventh Ordinary Session (18 Sep. 1930): (1930) 90 *LNOJ* Spec. Supp., 7, 8–15; M. François-Poncet (Rapporteur) 8–9; Mrs Hamilton (British Empire) 10: the Secretary-General should take over ‘the fullest responsibility for their political and juridical status—to give them ... what amounts in practice to a formal guarantee that they have the protection of the League behind them so far as their political existence is concerned’. She also noted that political and juridical protection may go on indefinitely, but that there should be some limit to humanitarian assistance.

²² This office was initially set up outside the League, owing to German Government opposition; See ‘Proposal for the Organisation of an International Basis of Assistance for Refugees (Jewish and Other) coming from Germany’. Report of the Second Committee to the

Assembly: (1933) 117 *LNOJ* Spec. Supp. 47, Annex 4. Two years later, the High Commissioner, James G. McDonald, resigned, observing in a letter of 27 Dec. 1935 to the Secretary-General of the League, that private and international organizations could only mitigate an increasingly grave and complex situation. Given the condition of the world economy, resettlement opportunities were few and the problem had to be tackled at source. An annex to his letter called attention to human rights in Germany, to that country's international obligations towards minorities, and the violation of the rights and territorial sovereignty of other States that was involved by forced migration, denationalization, and withdrawal of protection: 'Letter of Resignation, with Annex containing an analysis of the measures in Germany against "Non-Aryans", and of their effects in creating refugees' (27 Dec. 1935): LoN doc. C.13.M.12.1936.XII (7 Jan. 1936).

²³ League of Nations, OJ Spec. Supp., no. 189 (1938) 86; see also 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany: 171 LNTS 76 No. 3952.

²⁴ The functions of the Committee were defined in a resolution adopted on 14 July 1938; text in *A Study of Statelessness* (n.1) 116–18. For a full account, see Sjöberg ([n 1](#)); and for later developments, Salomon, K., *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (1991).

²⁵ See also, Jennings, R. Y., 'Some International Law Aspects of the Refugee Question' (1939) 20 *BYIL* 98.

²⁶ Sjöberg ([n 1](#)) Ch. 4. Issues discussed included a British proposal to provide temporary asylum to refugees 'as near as possible to the areas in which the people find themselves at the present time and from which they may be returned to their homelands with the greatest expediency on the termination of hostilities': *ibid.*, 135.

²⁷ See generally Woodbridge, G., *UNRRA: The History of the United Nations Relief and Rehabilitation Administration*, 3 vols. (1950); Salomon ([n 24](#)) 46–54, 57–61 and generally; Salomon, K., 'UNRRA and the IRO as Predecessors of UNHCR', in Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (1990) 157; Reinisch, J., 'Internationalism in Relief: The Birth (and Death) of UNRRA' (2011) 210 *Past and Present* 258; Hathaway, J., 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 *ICLQ* 348.

²⁸ By the beginning of 1946, an estimated three-quarters of the displaced in Europe had been sent home: Marrus ([n 15](#)) 320.

²⁹ UNGA res. 8(I) (12 Feb. 1946).

³⁰ The IRO Constitution was adopted by 30 votes to five, with 18 abstentions; see UNGA res. 62(I) (15 Dec. 1946): 18 UNTS 3. A Preparatory Commission (PCIRO) was set up to ensure continuity between UNRRA and the IGCR (both of which were wound up on 30 June 1947) and the IRO, pending sufficient ratifications to bring the latter's Constitution into force. This became effective on 20 August 1948.

³¹ See generally UNGAOR, 1st Sess., 2nd Part, Supplement No. 2, *Report of ECOSOC to*

the General Assembly, 53–62; ‘Refugees and Displaced Persons. Report of the Third Committee’: UN doc. A/265 (13 Dec. 1946); ‘Financial and Budgetary Questions relating to the International Refugee Organization. Report of the Fifth Committee’: UN doc. A/275 (13 Dec. 1946).

³² See the 1946 exchange between Eleanor Roosevelt and Andrei Gromyko: UNGAOR, 66th and 67th Plenary Meetings (14, 15 Dec. 1946) 1420–29; also, First Report of the High Commissioner for Refugees to the General Assembly: UNGAOR, Sixth Sess., Supp. No. 9 (A2011) (1952) para. 11; draft report of the Third Committee, UN doc. A/2084 (26 Jan. 1952) paras. 34–57 (on the commissioning and publication of Vernant, J., *The Refugee in the Post-War World* (1953); also, Loescher, G., *Beyond Charity* (1993) 57–9.

³³ Under art. 10, IRO Constitution, as amended by the Fifth Committee, contributions to large-scale resettlement operations were to be made on a voluntary basis: UN doc. A/275 ([n 31](#)) para. 7 and Annex I.

³⁴ See generally Holborn, L., *The International Refugee Organization* (1956).

³⁵ Art. 2, IRO Constitution ([n 30](#)).

³⁶ See UNGAOR, 2nd Sess. (1947) Plenary, Summary Records, 1025–31; Annex 12, 257–66. Also, UNGAOR, 4th Sess. (1949) Third Committee, Summary Records, 72–89; Plenary, Summary Records, 212–25.

³⁷ See, for example, UNGAOR, 3rd Sess., 2nd Part, Third Committee, Summary Records, 434 (Poland); 446 (Yugoslavia); 451 (Ukrainian SSR); also, UNGAOR, 3rd Sess., 2nd Part, Plenary, Summary Records, 504–18.

³⁸ See UNGAOR, 4th Sess., Third Committee, Summary Records, 82–3 for an exception, the UK representative referring to instances of forced migration and deportation in the USSR.

³⁹ See further Goodwin-Gill ([n 4](#)).

⁴⁰ Holborn, L., *Refugees: A Problem of our Time* (1975) 31.

⁴¹ See Loescher, G. & Scanlan, J., *Calculated Kindness* (1986) 15–24.

⁴² See further s. 1.5.1.

⁴³ UNGA res. 319(IV) (3 Dec. 1949). For completeness sake, mention should also be made of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), established by UNGA res. 302(IV) (8 Dec. 1949), and on which see further at s. 1.2; and the United Nations Korean Reconstruction Agency established by UNGA res. 401A and B(V) (1 Dec. 1950) which was principally concerned with relief and economic reconstruction, and concluded its activities in 1958.

⁴⁴ For comprehensive reviews of UNHCR’s performance, see Loescher, G., Betts, A., & Milner, J., eds., *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the Twenty-first Century* (2nd edn., 2011); Loescher, G., ‘UNHCR and Forced Migration’, in Fiddian-Qasmiyah, E. and others, eds., *The Oxford Handbook of Refugee and Forced Migration Studies* (2014); Loescher, G., *The UNHCR and World Politics: A Perilous Path* (2001). For a more general critique of the international protection regime and proposals for its evolution, see Helton, A. C., *The Price of*

Indifference: Refugees and Humanitarian Action in the New Century (2002).

⁴⁵ For the resolution and Statute, see UNGA res. 428 (V) (14 Dec. 1950) (36-5-11). The United Kingdom abstained, principally because of concerns over the refugee definition in the Statute (it was too limited ...), including the fact that, in a remarkably prescient observation, the High Commissioner was likely to have difficulty in practice in determining the persons whom he was competent to protect: UNGAOR, 5th Sess., Plenary, Summary records, 669–80, paras. 66–8 (14 Dec. 1950). See Milner, J. & Ramasubramanyam, J., ‘The Office of the United Nations High Commissioner for Refugees’, in Costello, Foster, & McAdam ([n 1](#)).

⁴⁶ Statute, para. 1.

⁴⁷ Ibid., para. 2. The ‘non-political’ qualification was introduced on the proposal of Yugoslavia. Para. 3, however, obliges the High Commissioner to follow policy directives of the General Assembly and the Economic and Social Council; see UNGA res. 60/129 (16 Dec. 2005) para. 13.

⁴⁸ The protection of refugees has its origins and takes place in a human rights context, and the General Assembly has reaffirmed international protection as a principal function of UNHCR since at least 1974: UNGA res. 3272(XXIX) (10 Dec. 1974). Recent resolutions also emphasize that ‘the protection of refugees is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the Office of the High Commissioner to fulfil its mandated functions’: UNGA res. 75/163 (16 Dec. 2020) para. 6.

⁴⁹ Statute, para. 8.

⁵⁰ Besides the declared functions, UNHCR’s indirect or promotional activities encompass the application of national laws and regulations benefitting refugees, the development and adoption of appropriate national laws, regulations, and procedures, promotion of accession to international instruments, the development of new legal instruments, and overall the development of doctrine; see Goodwin-Gill, G. S., ‘The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law’ (2020) 69 *ICLQ* 1; Lewis, C., ‘UNHCR’s Contribution to the Development of International Refugee Law: Its Foundations and Evolution’ (2005) 17 *IJRL* 67; Türk, V., ‘The Role of UNHCR in the Development of International Refugee Law’, in Nicholson, F. & Twomey, P., *Refugee Rights and Realities* (1999) 153. The Executive Committee has also approved the dissemination and promotion of refugee law, training, and information; see, for example, *Report of the 31st Session* (1980): UN doc. A/AC.96/588, para. 48(1)(k).

⁵¹ Aga Khan, S., ‘Legal problems relating to refugees and displaced persons’ (1976-I) *Hague Recueil* 331–2; Schnyder, F., ‘Les aspects juridiques actuels du problème des réfugiés’ (1965-I) *Hague Recueil* 319, 416.

⁵² See [Ch. 2](#), s. 3.2.

⁵³ In 1980, for example, the UNHCR Executive Committee ‘emphasized ... the leading responsibility of (UNHCR) in emergency situations which involve refugees in the sense of its Statute or of General Assembly resolution 1388(XIV) and its subsequent resolutions’: *Report*

of the 31st Session (1980): UN doc. A/AC.96/588, paras. 29.A(c), 29.B(c)(e)(f)). Those ‘subsequent resolutions’ in turn tracked the UNHCR’s good offices work in securing contributions for assistance to refugees not within the competence of the UN, its development to include protection and assistance activities, and eventual recognition of a general responsibility to seek solutions to the problems of refugees and displaced persons of concern to UNHCR, wherever they occur. Since the early 1990s, UNHCR has engaged in a number of operations outside its general mandate to protect refugees, including the provision of humanitarian assistance in active conflict zones (Bosnia & Herzegovina, Iraq, Afghanistan), protection and assistance for internally displaced persons, particularly in cooperation with other UN agencies and NGOs, protection of stateless persons, and the promotion of measures to abolish statelessness. In addition, the protection dimensions of climate-change and disaster related displacement, and the complex scenarios of mixed migration also engage its responsibilities. and it has frequently been pressed to take on a more active assistance and protection role with internally displaced persons; see further Ch. 2, s. 3.3.

⁵⁴ During debate on the Statute, one representative suggested that the lack of protection should be the sole criterion for determining UNHCR’s competence: UNGAOR, 5th Session, Third Committee, Summary Records, 324th Meeting (22 Nov. 1950) para. 40 f. (United Kingdom); see also ibid., 325th Meeting (24 Nov. 1950) para. 36 (Chile—protection should be extended to anyone who, for reasons beyond their control, could no longer live in the country of their birth); 329th Meeting (29 Nov. 1950) paras. 3, 8 f. (Turkey—those needing protection included fugitives from war or persecution, or for political reasons). See further Ch. 13.

⁵⁵ On statelessness and protection of the stateless, see further Ch. 13.

⁵⁶ Man-made disasters have never been precisely defined, but the General Assembly resolutions have frequently included conflict as a ‘man-made’ driver of displacement; see, among many similar, UNGA resolutions 1286(XIII) (5 Dec. 1958); 1389(XIV) (20 Nov. 1959); 1500(XV) (5 Dec. 1960); and 1672(XVI) (18 Dec. 1961) (refugees from Algeria). From another perspective, however, note United Nations Office for Disaster Risk Reduction (UNISDR) [now UNDRR], ‘Words into Action Guidelines Implementation Guide for Man-made and Technological Hazards’ (2018): <https://www.undrr.org/>.

⁵⁷ ‘The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.’ UNHCR was originally set up for three years; its mandate is now without any time limit—‘until the refugee problem is solved’: UNGA res. 58/153, ‘Implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to carry out its mandate’ (22 Dec. 2003), para. 9. See further Goodwin-Gill (n 50) 2–6.

⁵⁸ From the beginning, the General Assembly acknowledged that refugees were an international responsibility, and that it might be necessary and desirable to modify and extend the competence of UNHCR to new groups of refugees and to new fields of activity: see UNGA res. 319(IV), ‘Refugees and stateless persons’ (3 Dec. 1949) Annex, para. 3.

⁵⁹ Statute, para. 3. The High Commissioner is elected by the General Assembly, on the nomination of the Secretary-General: *ibid.* para. 13. This (compromise) solution was adopted precisely in order to shelter the High Commissioner from the highly political work of the UN Secretariat, and to ensure that UNHCR enjoyed the necessary independence, authority, and impartiality to carry out its humanitarian work. On background and one Secretary-General's attempt to pre-empt established consultative procedures, see 'Sadako Ogata elected as UN High Commissioner for Refugees' (1991) 3 *IJRL* 120.

⁶⁰ Statute, para. 4.

⁶¹ *Ibid.*, para. 9. Since 1972, at least, such additional activities have also included assistance and *de facto* protection to repatriating refugees and internally displaced persons, or assistance to local populations affected by a refugee influx. To these specific or implied mandate responsibilities must now also be added the various special humanitarian tasks entrusted to UNHCR; see ⁿ 53.

⁶² *Ibid.*, para. 11. As a corollary, the same paragraph entitles the High Commissioner to present his or her views before the General Assembly and ECOSOC and their subsidiary bodies. Since 1969, the practice has been to transmit the report without debate to the General Assembly, unless one or more ECOSOC members or the High Commissioner request otherwise: Decision on Item 9, ECOSOC, *OR*, Resumed 47th Session: UN doc. E/4735/Add.1.

⁶³ Statute, para. 4. This section draws on Goodwin-Gill (ⁿ 50) 6–9.

⁶⁴ ECOSOC res. 393B (XIII) (10 Sep. 1951).

⁶⁵ ECOSOC res. 565 (XIX) (31 Mar. 1955), adopted further to the General Assembly's request in UNGA res. 832 (IX) (21 Oct. 1954) para. 4.

⁶⁶ 'The Executive Committee of the Programme of the United Nations High Commissioner for Refugees'.

⁶⁷ ECOSOC res. 672 (XXV) (30 Apr. 1958), further to UNGA res. 1166 (XII) 'International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees' (26 Nov. 1957) para. 5. *Repertory of Practice of United Nations Organs. Charter of the United Nations. Ch. X, 'The Economic and Social Council, Article 68, Supp. No. 1, vol. 2 (1954–55) 121, para. 5; 123, para. 11; Supp. No. 2, vol. 3 (1955–59) 141, para. 3; 144, para. 15; 152, para. 47; Supp. No. 3, vol. 2 (1959–66) 435, note 46; 439, note 111:* <https://legal.un.org/repertory/art68.shtml>.

⁶⁸ UNGA res. 1166 (XII) (ⁿ 67) para. 5.

⁶⁹ *Ibid.*, para. 5(b).

⁷⁰ UNGA res. 1673 (XVI), 'Report of the United Nations High Commissioner for Refugees' (18 Dec. 1961) para. 1; UNGA res. 1783 (XVII), 'Continuation of the Office of the United Nations High Commissioner for Refugees' (7 Dec. 1962) para. 2.

⁷¹ ECOSOC res. 672 (XXV) para. 5. On the form and content of the High Commissioner's reporting, see UNGA res. 58/153, 'Implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to

carry out its mandate' (22 Dec. 2003), para. 10.

⁷² Originally comprising 24 members, the Executive Committee has been progressively enlarged to its present (2021) membership of 107; see UNGA res. 75/162, 'Enlargement of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees' (16 Dec. 2020); see further, <https://www.unhcr.org/executive-committee.html>. As a purely academic issue, and one of little if any organizational relevance, the Executive Committee probably occupies a position of hybrid subsidiarity, sitting somewhere between ECOSOC and the General Assembly: *Repertory of Practice, Repertory of Practice of United Nations Organs. Charter of the United Nations*. Ch. X, 'The Economic and Social Council, Article 68, Supp. No. 3, vol. 2 (1959–66) refers to it as a body 'not subsidiary to the Council', but as one reporting to the Council which then transmits its reports to the General Assembly: 439, note 111.

⁷³ Report of the 26th Session (1975): UN doc. A/AC.96/521, para. 69(h), in 'Addendum to the Report of the United Nations High Commissioner for Refugees', UNGAOR, 30th Sess., Suppl. No. 12A (A/10012/Add.1); Report of the 27th Session (1976): UN doc. A/AC.96/534 (20 Oct. 1976) paras. 51–87.

⁷⁴ The substantive content of conclusions weakened around the turn of the century; see UNHCR, *Conclusions on International Protection 1975–2017*, Geneva: [UNHCR \(2017\) HCR/IP/3/Eng/REV. 2017](#)) [UNHCR, A Thematic Compilation of Executive Committee Conclusions](#), Geneva: UNHCR (7th edn. 2014) also, Sztucki, J., 'The Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme' (1989) 1 *IJRL* 285; Hurwitz, A., *The Collective Responsibility of States to Protect Refugees* (2009) 252–64.

⁷⁵ See Report of the 46th Session: UN doc. A/AC.96/860 (23 Oct. 1995) para. 32.

⁷⁶ UNGA res. 75/163, 'Office of the United Nations High Commissioner for Refugees' (16 Dec. 2020) para. 3; see also, UNGA resolutions 74/130 (18 Dec. 2019) para. 3; 73/151 (17 Dec. 2018) para. 3; 71/172 (19 Dec. 2016) para. 3.

⁷⁷ In their 2001 Opinion, Lauterpacht and Bethlehem saw Executive Committee conclusions as particularly important, given that, as provided for in para. 4 of the UNHCR Statute, membership comprises States with 'a demonstrated interest in, and devotion to, the solution of the refugee problem', that is, States 'whose interests are specially affected'. In such circumstances, they can 'be taken as expressions of opinion which are broadly representative of the views of the international community: Lauterpacht, E. & Bethlehem, D., 'The Scope and Content of the Principle of Non-refoulement: Opinion', in Feller, E., Türk, V., & Nicholson, F., eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87, 148 (para. 214); the membership has nearly doubled since they wrote. See also Heller, K. J., 'Specially-Affected States and the Formation of Custom' (2018) 112 *AJIL* 191; Lewis ([n 50](#)).

⁷⁸ Feller and Klug note the Executive Committee's 'growing influence' over day-to-day management and policy work, which some see as a threat to independence, the tension now

attaching to UNHCR's role in generating protection conclusions, and the difficulty in building consensus as a consequence of the extended membership: Feller, E. & Klug, A., 'Refugees, United Nations High Commissioner for (UNHCR)', in *Max Planck Encyclopedia of Public International Law* (Jan. 2013) paras. 23, 27, 28: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e530>; Cf. Fresia, M., 'Building Consensus within UNHCR's Executive Committee: Global Refugee Norms in the Making' (2014) 27 *JRS* 514.

⁷⁹ Higgins, R. and others, *Oppenheim's International Law: United Nations* (2017) Ch. 23, 'Office of the United Nations High Commissioner for Refugees', 879, 884–5; Feller & Klug (n 78) para. 25. Cf. *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014] ICJ Rep. 226, 247, para. 46 (within the scheme of the International Whaling Convention, resolutions adopted by the International Whaling Commission by consensus or unanimous vote, 'may be relevant for the interpretation of the Convention or its Schedule').

⁸⁰ See further Goodwin-Gill (n 50) 9–13 and *passim*.

⁸¹ Art. II of the 1967 Protocol is to similar effect. See Kälin, W., 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond', in Feller, Türk, & Nicholson (n 77) 613; Summary Conclusions on supervisory responsibility, *ibid.*, 667.

⁸² Art. VIII; Cartagena Declaration on Refugees, Conclusion and Recommendations, II.

⁸³ In the words of one commentator, UNHCR falls within a group of special organs, that are largely autonomous or semi-autonomous: Khan, D-E., 'The General Assembly, Procedure, Article 22', in Simma, B. and others, *The Charter of the United Nations: A Commentary* (3rd edn., 2012) 721, 729.

⁸⁴ See generally, *Reparations* case [1949] ICJ Rep. 174 at 178–9.

⁸⁵ For example, the Statute refers to the High Commissioner supervising the application of international conventions, promoting certain measures through special agreements with governments, and consulting governments on the need to appoint local representatives: paras. 8(a), (b), 16.

⁸⁶ See, generally, *South West Africa, Voting Procedure*, Advisory Opinion [1955] ICJ Rep. 67, at 120–2—separate opinion of Judge Lauterpacht, noting that General Assembly resolutions are 'one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations'.

⁸⁷ *Voting Procedure* case [1955] ICJ Rep. 67, at 119. See also Judge Lauterpacht's remarks generally in regard to good faith in the exercise of discretion: *ibid.*, 120.

⁸⁸ *Reparations* case (n 84) 184.

⁸⁹ Cf. Schwarzenberger, G. & Brown, E., *A Manual of International Law* (6th edn., 1976) 115, commenting on the movement of an implied consensual right or exercise of functional protection from its basis in consent to its acquisition of 'an increasingly absolute validity'.

⁹⁰ *Reparations* case (n 84) 180.

⁹¹ In Schwarzenberger & Brown (n 89) 64, the traditional view was stated thus: 'Whether [the individual] is entitled to benefit from customary or consensual rules of international law

depends on his own link—primarily through nationality—with a subject of international law which, on the international level, is alone competent to assert his rights against another subject of international law.’ Later, the authors noted that, ‘By means of conventions, attempts have been made to alleviate the position of refugees and stateless persons. Otherwise, they are objects of international law for whom no subject of international law is internationally responsible—a notable twentieth-century contribution to the category of *res nullius*’: 114–15. This was questionable, even in 1976. See further Ch. 11; also Jennings, R. Y. & Watts, A., eds., *Oppenheim’s International Law* (9th edn., 1992) vol.1, paras. 150, 411, 511–15.

⁹² But see Ziegler, R., ‘Protecting Recognized Geneva Convention Refugees outside their States of Asylum’ (2013) 25 *IJRL* 235; and further Ch. 11.

⁹³ See art. 26, 1969 Vienna Convention on the Law of Treaties (1155 UNTS 331): ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

⁹⁴ Kälin has argued that the obligations to implement the provisions of the 1951 Convention/1967 Protocol are, ‘obligations *erga omnes partes*, that is, obligations towards the other States parties as a whole. This is clearly evidenced by Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, entitling each State Party to the Convention or the Protocol to refer a dispute with another State “relating to its interpretation or application” to the International Court of Justice even if it has not suffered material damage’. Kälin (n 77) 613, 632; see also 636.

⁹⁵ See art. 2, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts; text annexed to UNGA res. 56/83, ‘Responsibility of States for internationally wrongful acts’ (12 Dec. 2001).

⁹⁶ Ibid., art. 42. See also Crawford, J., *The International Law Commission’s Articles on State Responsibility* (2002) Introduction, 38–42; ILC Commentary, *ibid.*, 254–60.

⁹⁷ Crawford (n 96) ‘Commentary’, para. 8, 258; see also para. 11 at 259 on injury arising from violations of collective obligations. This situation is therefore distinct from that described in art. 48 of the ILC Articles (invocation of responsibility by a State other than an injured State); this deals with the category of obligations ‘*erga omnes partes*’, that is, obligations owed, for example, to all the States party to a specific legal regime, such as a regional human rights convention. The phrase ‘*erga omnes*’ commonly describes obligations with a broader reach, to the international community of States as a whole. Overlap is likely between the two, especially in the human rights field. See Sicilanos, L.-A., ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 *EJIL* 1125, 1136.

⁹⁸ See *R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, discussed further in Ch. 11, s. 1.2.3; also, *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

⁹⁹ 1951 Convention, art. 38; 1967 Protocol, art. IV. Under the Protocol, but not under the

Convention, States are entitled to make reservations to the article on settlement of disputes, and at 30 April 2021, nine States had done so; see Ch. 11, s. 1.

¹⁰⁰ See *South West Africa* cases, preliminary objections [1962] ICJ Rep. 319, at 424–33 (separate opinion of Judge Jessup). But cf. *South West Africa* cases, second phase [1966] ICJ Rep. 6 at 32–3, 47 (holding that individual States do not have a legal right to require the performance of South Africa’s mandate over South West Africa).

¹⁰¹ *Barcelona Traction* case [1970] ICJ Rep. 3 at 32; also 1967 Declaration on Territorial Asylum, art. 2(1). An inter-State procedure also exists under other regional arrangements, such as the 1969 American Convention on Human Rights (arts. 45, 62), the 1981 African Charter on Human and Peoples’ Rights (art. 47), and the 1966 International Covenant on Civil and Political Rights, art. 41; the last-mentioned has not so far been used.

¹⁰² The notion of a ‘regional public order’ may also come into play, for example, further to the EU’s efforts to establish a Common European Asylum System, in which the 1951 Convention and the 1967 Protocol play a critical role; and to ‘manage’ particular movements of refugees and asylum seekers on an equitable basis, consistent with EU principles. See *European Commission v Hungary, Republic of Poland, and Czech Republic, Joined Cases C.715/17, C.718/17 and C.719/17*, CJEU, Third Chamber (2 Apr. 2020 (actions for failure to fulfil obligations under Article 258 of the Treaty on the Functioning of the European Union); Joined Cases C-924/19 PPU and C-925/19 PPU FMS, FNZ (C-924/19 PPU) SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Délalföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság (CJEU, Grand Chamber, 14 May 2020); C-808/18 Commission v Hungary (*Accueil des demandeurs de protection internationale*) (CJEU, Grand Chamber, 17 Dec. 2020).

¹⁰³ For example, only the General Assembly or the Security Council may request advisory opinions; ‘other organs’ of the UN and specialized agencies may be authorized by the General Assembly to request such opinions, ‘on legal questions arising within the scope of their activities’: art. 96, UN Charter; art. 65, Charter of the ICJ. But see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep. 136.

¹⁰⁴ Art. 41 provides: ‘The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party.’ See Akande, D., ‘Recent Developments with Regard to ICJ Provisional Measures’ *EJIL-Talk!* (21 Jul. 2011) Miles, C. A., *Provisional Measures before International Courts and Tribunals* (2017); Thirlway, H., ‘Peace, Justice, and Provisional Measures’, in Gaja, G. & Grote Stoutenburg, J., eds., *Enhancing the Rule of Law through the International Court of Justice* (2014) 75; Rosenne, S., *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (2004); Merrills, J. G., ‘Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice’ (1995) 44 *ICLQ* 90.

¹⁰⁵ [1979] ICJ Rep. 7.

¹⁰⁶ Ibid., paras. 36, 37, 42, 91.

¹⁰⁷ [1980] ICJ Rep. 3 at 42 (para. 91).

¹⁰⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures [2008] ICJ Rep. 353, paras. 142, 149.

¹⁰⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections [2011] ICJ Rep. 70, 120–40; Szewczyk, B. M. J., *Georgia v. Russian Federation* (2011) 105 AJIL 747; Okowa, P., ‘The International Court of Justice and the Georgia/Russia Dispute’ (2011) 11 *Human Rights Law Review* 739. See also, *Georgia v. Russia (I)*, App. No. 13255/07, European Court of Human Rights, Grand Chamber (3 Jul. 2014).

¹¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Order (23 Jan. 2020) ICJ Rep. (2020), 3.

¹¹¹ UNGA res. 181(II) A (29 Nov. 1947), adopted with 33 votes in favour, 13 against (including Lebanon, Saudi Arabia, Syria, and Yemen) and 10 abstentions.

¹¹² See generally, Morris, B., *The Birth of the Palestinian Refugee Problem, 1947–1949* (1987); *The Birth of the Palestinian Refugee Problem Revisited* (2nd edn., 2004); Schlaim, A., *Israel and Palestine: Reappraisals, Revisions, Refutations* (2009); *The Iron Wall: Israel and the Arab World* (new edn., 2014); Rogan, E. & Shlaim, A., eds., *The War for Palestine: Rewriting the History of 1948* (2nd edn., 2008).

¹¹³ UNGA res. 194(III) (11 Dec. 1948).

¹¹⁴ The Agency succeeded the Special Fund for Relief of Palestine Refugees, set up by UNGA res. 212(III) (19 Nov. 1948).

¹¹⁵ UNRWA, ‘Consolidated Registration Instructions’ (1 Jan. 2009): <http://www.unrwa.org/sites/default/files/2010011995652.pdf>.

¹¹⁶ UNGA resolution 2252 (ES-V) (4 Jul. 1967) (confirmed by UNGA res. 2341 B(XXII) (19 Dec. 1967)); and UNGA res. 56/54 (10 Dec. 2001).

¹¹⁷ ‘Entitlement to remain’, however, does not necessarily equate to a settled status and equality of treatment with nationals, for example, on employment; see UNRWA, ‘Written Contribution of the United Nations Relief and Works Agency for Palestine Refugees in the Near East on the Global Compact on Refugees’ (Feb. 2018): <https://www.unhcr.org/5a86d1967.pdf>; League of Arab States, 1965 Protocol for the Treatment of Palestinians in Arab States (‘Casablanca Protocol’) (11 Sep. 1965): <https://www.refworld.org/docid/460a2b252.html>.

¹¹⁸ See further also, Akram, S., ‘UNRWA and Palestine Refugees’, in Costello, Foster, & McAdam (n 1); Bocco, R., ‘UNRWA and the Palestinian Refugees: A History within History’ (2009) 28(2–3) *RSQ* 229.

¹¹⁹ Statute, para. 7(1); Convention, art. 1D; see Ch. 4, s. 4.2. On responsibilities towards Palestinians outside UNRWA’s area of operations, see UNHCR, ‘Aide-Mémoire. Protecting

Palestinians in Iraq and Seeking Humanitarian Solutions for those who Fled the Country' (Dec. 2006); UNRWA, 'Letter to UNHCR explaining UNRWA's Role and Responsibility vis-à-vis Palestinian Refugees in Syria' (6 Nov. 2019); Goddard, B., 'UNHCR and the International Protection of Palestinian Refugees' (2009) 28(2–3) *RSQ* 475; also, *Report of the 29th Meeting of the Standing Committee*, UN doc. A/AC.96/988 (7 Jul. 2004) para. 30; *Report of the 20th Meeting of the Standing Committee*, UN doc. A/AC.96/945 (2 Jul. 2001) para. 22.

¹²⁰ UNGA res. 194(III) (11 Dec. 1948).

¹²¹ Ibid., para. 11: '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 ... 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'. Brynen, R., 'Compensation for Palestinian Refugees: Law, Politics and Praxis' (2018) 51 *Israel Law Review* 29; Al Husseini, J. & Bocco, R., 'The Status of the Palestinian Refugees in the Near East: The Right of Return and UNRWA in Perspective' (2009) 28(2–3) *RSQ* 260; Lawand, K., 'The Right to Return of Palestinians in International Law' (1996) 8 *IJRL* 532.

¹²² Cf. UNGAOR, 5th Sess., Plenary, Summary Records, 325th Meeting (14 Dec. 1950) paras. 170–211. In his 1948 report to the General Assembly, the Mediator for Palestine, Count Bernadotte, referred to the misgivings of the Provisional Government in Israel regarding the return of Palestinian refugees; these derived from security, as well as from economic and political conditions. At that time, the Mediator doubted whether the security fears were in fact well-founded.

¹²³ Heian-Engdal, M., *Palestinian Refugees after 1948: The Failure of International Diplomacy* (2020); Erakat, N., *Justice for Some: Law and the Question of Palestine* (2019); reviewed Gunneflo, M. (2019) 24 *Journal of Conflict & Security Law* 631.

¹²⁴ See Albanese, F. P. & Takkenberg, L., *Palestinian Refugees in International Law* (2nd edn., 2020); Khouri, R. G., 'Sixty Years of UNRWA: From Service Provision to Refugee Protection' (2009) 28(2–3) *RSQ* 438; Kagan, M., 'Is There Really a Protection Gap? UNRWA's Role vis-à-vis Palestinian Refugees' (2009) 28(2–3) *RSQ* 511. Takkenberg, L., 'The Protection of Palestine Refugees in the Territories Occupied by Israel' (1991) 3 *IJRL* 414.

¹²⁵ See, for example, Qafisheh, M. M., ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (2013).

¹²⁶ See '1948 Refugees: Proceedings of an International Workshop' Hebrew University of Jerusalem Faculty of Law (14–15 Dec. 2016): (2018) 51 *Israel Law Review* 47 (with contributions from Rex Brynen, Guy S. Goodwin-Gill, Manal Hazzan, Hassan Jabareen, Eugene Kontorovich, Alaa Mahajna, Benny Morris, Israela Oron, Adi Schwartz, Yuval Shany, Daphna Shraga, Lex Takkenberg, Einat Wilf, Mahmoud Yazbak, and Yaffa Zilbershats); Peters J. & Gal, O., 'Israel, UNRWA, and the Palestinian Refugee Issue' (2009)

28(2–3) RSQ 588.

¹²⁷ Fiddian-Qasmiyah, E, ‘The Changing Faces of UNRWA’ (2019) 1(1) *Journal of Humanitarian Affairs* 28; Lindsay, J. G., ‘Fixing UNRWA: Repairing the UN’s Troubled System of Aid to Palestinian Refugees’, Washington Institute for Near East Policy, Focus #91 (26 Jan. 2009); Hilal, L., ‘Peace Prospects and Implications for UNRWA’s Future: An International Law Perspective’ (2009) 28(2–3) RSQ 607; ‘Palestine Refugee Agency Faces Greatest Financial Crisis in Its History Following 2018 Funding Cuts, Commissioner General Tells Fourth Committee’, GA/SPD/684 (9 Nov. 2018); <https://www.un.org/press/en/2018/gaspd684.doc.htm>.

¹²⁸ UNGA res. 60/251, ‘Human Rights Council’ (15 Mar. 2006) (170-4-3); ‘Report of the Secretary-General. In larger freedom: towards development, security and human rights for all’: UN doc. A/59/2005 (21 Mar. 2005) paras. 181–3; UNGA res. 60/1, ‘2005 World Summit Outcome’ (6 Sep. 2005 (adopted without a vote) paras. 157–60.

¹²⁹ UNGA res. 48/141 (20 Dec. 1993) (adopted without a vote). The High Commissioner is appointed by the Secretary-General and approved by the General Assembly, for a fixed term of four years with the possibility of one renewal: *ibid.*, para. 2(b). See also, Clapham, A., ‘Creating the High Commissioner for Human Rights: The Outside Story’ (1994) 5 *EJIL* 556; Van Boven, T., ‘The United Nations High Commissioner for Human Rights: The History of a Contested Project’ (2007) 20 *Leiden Journal of International Law* 767.

¹³⁰ UNGA res. 48/141 (ⁿ 129) para. 4.

¹³¹ Commission on Human Rights res. 1999/44 (27 Apr. 1999); ECOSOC decision 1999/239 (27 Jul. 1999); UNGA res. 54/166, ‘Protection of migrants’ (17 Dec. 1999 (adopted without a vote). Initially for three years, the mandate of the Special Rapporteur has been continued by the Human Rights Council; the first appointee, Gabriela Rodríguez Pizarro (1999–2005), has been followed by Jorge A. Bustamante (2005–11), François Crépeau (2011–17), and Felipe González Morales (2017–).

¹³² ‘First Report by the Special Rapporteur on the human rights of migrants’: UN doc. E/CN.4/2000/82 (6 Jan. 2000) paras. 28, 30.

¹³³ *Ibid.*, para. 36. The following sub-categories were suggested: ‘(a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State; (b) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, permanent resident or naturalized person or of similar status; and (c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements’: *ibid.*

¹³⁴ *Ibid.*, paras. 37, 40–2.

¹³⁵ UNGA res. 73/195 (19 Dec. 2018) (152-5-12) para. 15(f).

¹³⁶ ‘Promotion and protection of human rights, including ways and means to promote the human rights of migrants’: UN doc. A/69/277 (7 Aug. 2014) paras. 72–4; UN doc. A/69/CRP.1 (23 Jul. 2014); OHCHR, ‘Recommended Principles and Guidelines on Human

Rights at International Borders':
https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf

¹³⁷ ‘Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations’: UN doc. A/HRC/37/34 (3 Jan. 2018); and A/HRC/37/34/Add.1 (7 Feb. 2018). On the Global Migration Group, see <https://globalmigrationgroup.org/>.

¹³⁸ UN doc. A/HRC/37/34/Add.1 (ⁿ 137) paras. 1, 9. Such situations may be associated with the reasons for leaving the country of origin, because of what has arisen during the journey or on arrival, or because of a person’s identity, condition or circumstances: *ibid.*, paras. 12–16. See also UNGA res. 74/148, ‘Protection of migrants’ (18 Dec. 2019) para. 6 (vulnerable situations).

¹³⁹ See, for example, OHCHR, ‘In Search of Dignity: Report on the Human Rights of Migrants at Europe’s Borders’ (2017); ‘Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return’ (15–18 Oct. 2018).

¹⁴⁰ ‘Report on the promotion and protection of the human rights of migrants in the context of large movements’: UN doc. A/HRC/33/67 (13 Sep. 2016).

¹⁴¹ OHCHR & Platform on Disaster Displacement, ‘The slow onset effects of Climate Change and Human Rights Protection for cross-border migrants’ (2018).

¹⁴² OHCHR, ‘Situation of migrants in transit’ (2016): UN doc. A/HRC/31/35.

¹⁴³ OHCHR, International Labour Organization, & Inter-Parliamentary Union, ‘Migration, human rights and governance’, Handbook for Parliamentarians No. 24 (2015).

¹⁴⁴ On proposals for institutional change to improve protection, see Goodwin-Gill, G. S., ‘The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change’ (2016) 28 *IJRL* 679; also, Crépeau, F., ‘Refugees as Migrants’, in Costello, Foster, & McAdam (ⁿ 1); Chetail, V., ‘Moving towards an Integrated Approach of Refugee Law and Human Rights Law’, in Costello, Foster, & McAdam (ⁿ 1).

¹⁴⁵ Note by the Secretary-General, ‘International Co-operation to Avert New Flows of Refugees’: UN doc. A/41/324 (13 May 1986) para. 70.

¹⁴⁶ Bellamy, A. J., *Global Politics and the Responsibility to Protect: From Words to Deeds* (2011) Ch. 6 ‘Early Warning’, at 130–3; Ramcharan, B. G., ‘Early Warning at the United Nations: The First Experiment’ (1989) 1 *IJRL* 379; Beyer, G. A., ‘Human Rights Monitoring and the Failure of Early Warning: A Practitioner’s View’ (1990) 2 *IJRL* 56—the relevant recommendations of the Group of Governmental Experts and an extract from the United Nations *Organization Manual* describing the functions and organization of ORCI appear at 75–81; Beyer, G. A., ‘Monitoring Root Causes of Refugee Flows and Early Warning: The Need for Substance’ (1990) 2 *IJRL Special Issue* 71; Rusu, S., ‘The Role of the Collector in Early Warning’ (1990) 2 *IJRL Special Issue* 65; Ruiz, H. A., ‘Early Warning Is Not Enough: The Failure to Prevent Starvation in Ethiopia, 1990’ (1990) 2 *IJRL Special Issue* 83; Dimitrichev, T. F., ‘Conceptual Approaches to Early Warning: Mechanisms and Methods—A View from the United Nations’ (1991) 3 *IJRL* 264.

¹⁴⁷ In the Global Compact for Safe, Orderly and Regular Migration set out in the Annex to

UNGA res. 73/195 ([n 135](#)) paras. 18(c), (j), for example, States commit to setting up or strengthening ‘mechanisms to monitor and anticipate the development of risks and threats that might trigger or affect migration movements’, and to ‘promote cooperation with neighbouring and other relevant countries to prepare for early warning’ with regard to natural disasters, the adverse effects of climate change, and environmental degradation.

[148](#) See UN doc. A/46/L.55 (17 Dec. 1991) (Sweden); *Report of the Secretary-General on the review of the capacity, experience and coordination arrangements in the United Nations system for humanitarian assistance*: UN doc. A/46/568.

[149](#) These principles in the provision of humanitarian assistance derive directly from ICRC doctrine. See also *Report of the Third Committee, Draft resolution I, Promotion of international cooperation in the humanitarian field*: UN doc. A/45/751 (21 Nov. 1990).

[150](#) UNGA res. 46/182 (19 Dec. 1991) Annex, paras. 2–4.

[151](#) Ibid., para. 10; see also paras. 13–17 (Prevention); 18–20 (Preparedness, including early warning); 35(h) (Coordinator to promote transition from relief to rehabilitation and reconstruction); 40–2 (Continuum from relief to rehabilitation and development). Increasing attention is also now being paid to the role of law, both in disaster preparedness and response, and in protection in the event of disasters; see further s. 1.5.2.

[152](#) UNGA res. 46/182, Annex, para. 38—non-governmental organizations can be invited to attend on an *ad hoc* basis. The Consolidated Appeals Process (CAP) and the Central Emergency Revolving Fund (CERF) were added, in order further to improve coordination.

[153](#) See further, OCHA: <https://www.unocha.org/>.

[154](#) See *Report of the Secretary-General, ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations*, UN doc. A/60/87 (23 Jun. 2005); UNGA res. 60/124 (15 Dec. 2005); see further, ‘OCHA Leadership’: <https://www.unocha.org/about-ocha/ocha-leadership>.

[155](#) UNGA res. 46/182 (19 Dec. 1991) Annex, paras. 33–9 (leadership of the Secretary-General, role and responsibilities of the Coordinator, establishment of Inter-Agency Standing Committee, and country-level coordination).

[156](#) Ibid., para. 20: ‘Early-warning information should be made available in an unrestricted and timely manner to all interested Governments and concerned authorities, in particular of affected or disaster-prone countries. The capacity of disaster-prone countries to receive, use and disseminate this information should be strengthened’. Also, para. 35(g), identifying among the Coordinator’s responsibilities, ‘providing consolidated information, including early warning on emergencies, to all interested Governments and concerned authorities’.

[157](#) Ibid., para. 35(d).

[158](#) UN res. 46/182, Annex, para. 36. See *Report of the Secretary-General* ([n 154](#)).

[159](#) See Pugh, M. & Cunliffe, S. A., ‘The Lead Agency Concept in Humanitarian Assistance: The Case of the UNHCR’ (1997) 28 *Security Dialogue* 17.

[160](#) *Report of the Secretary-General* ([n 154](#)).

¹⁶¹ Ibid., para. 28.

¹⁶² Ibid., para. 37; see also paras. 53–8.

¹⁶³ Ibid., paras. 78–82.

¹⁶⁴ See OCHA, *Humanitarian Response Review*, an independent report commissioned by the United Nations Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs, Office for the Coordination of Humanitarian Affairs, New York, Geneva (Aug. 2005).

¹⁶⁵ Ibid., s. 4.2, at 30–1.

¹⁶⁶ Ibid., 31. Cf. Davies, K., ‘Continuity, change and contest. Meanings of “humanitarian” from the ‘Religion of Humanity’ to the Kosovo war’, Humanitarian Policy Group, Overseas Development Institute, Working Paper (Aug. 2012); also, Goodwin-Gill, G. S., ‘International Protection and Assistance for Refugees and the Displaced: Institutional Challenges and United Nations Reform’, Refugee Studies Centre, Oxford (May 2006).

¹⁶⁷ On which see, among others, Pugh & Cunliffe ([n 159](#)); Lautze, S., Jones, B., & Duffield, M., ‘Strategic Humanitarian Co-ordination in the Great Lakes Region, 1996–1997: An Independent Assessment’, United Nations (Mar. 1998); Mooney, E. D., ‘Presence, *ergo* Protection? UNPROFOR, UNHCR and the ICRC in Croatia and Bosnia and Herzegovina’ (1995) 7 *IJRL* 407; Mendiluce, J. M., ‘War and disaster in the former Yugoslavia: The limits of humanitarian action’, in *World Refugee Survey—1994*, 16.

¹⁶⁸ See OCHA ([n 164](#)) Ch. III, s. 2.2, 47.

¹⁶⁹ For constructive criticism of early experience with the cluster approach (but also an appreciation of its potential for coordination and information sharing), see Action Aid, ‘The Evolving UN Cluster Approach in the Aftermath of the Pakistan Earthquake: an NGO perspective’ (24 Apr. 2006). See further, UNHCR Evaluation Service, ‘Evaluation of UNHCR’s Leadership of the Global Protection Cluster and Field Protection Clusters: 2014–2016’, doc. ES/2017/04 (Oct. 2017); UNHCR, ‘Questions and answers on UNHCR’s Protection Cluster coordination role in natural disasters’, doc. EC/62/SC/INF.1 (23 Feb. 2011); ‘What is the Cluster Approach?’: <https://www.humanitarianresponse.info/en/about-clusters/what-is-the-cluster-approach>; ‘Who are we: The Global Protection Cluster’: <https://www.globalprotectioncluster.org/about-us/who-we-are/>; UNHCR, *Emergency Handbook*, ‘Cluster Approach (IASC)’: <https://emergency.unhcr.org/entry/61190/cluster-approach-iasc>; Russell, S. & Tennant, V., ‘Humanitarian Reform: From Coordination to Clusters’, in Fiddian-Qasmiyah and others ([n 44](#)) 302.

¹⁷⁰ ILO, ‘Guiding Principles on the Access of Refugees and other forcibly displaced persons to the labour market’ (2016); see also, ILO-UNHCR Partnership—Joint action for decent work and long-term solutions for refugees and other forcibly displaced persons’ (2020); Joint letter from ILO and UNHCR on enhancing collaboration (14 Nov. 2019): <https://www.refworld.org/docid/5ddbcacf7.html>; ILO, UNHCR, *Guide to market-based livelihood interventions for refugees* (2017); Goodwin-Gill, G. S., ‘Migrant Rights and “Managed Migration”’, in Chetail, V., ed., *Mondialisation, migration et droits de l’homme*:

le droit international en question’ Globalization, Migration and Human Rights: International Law under Review, vol. II (2007) 161 (s. 3, on refugees and the ILO multilateral framework on labour migration).

¹⁷¹ See UNICEF, ‘Humanitarian Action for Children 2021’ <https://www.unicef.org/topics/annual-report>; ‘The State of the World’s Children 2019’: <https://www.unicef.org/reports/state-of-worlds-children-2019>.

¹⁷² UNGA res. 1714 (XVI) (19 Dec. 1961); see further, Food and Agriculture Organization: <http://www.fao.org> and World Food Programme: <http://www.wfp.org>.

¹⁷³ The WFP definition of emergency includes ‘urgent situations in which there is clear evidence that an event has occurred which causes human suffering or loss of livestock and which the government concerned has not the means to remedy; and it is a demonstrably abnormal event which produced dislocation in the life of the community on an exceptional scale’: <https://www.wfp.org/emergency-relief>.

¹⁷⁴ See WHO: <http://www.who.int>.

¹⁷⁵ See Geiger, M. & Pécoud, A., eds., *The International Organization for Migration* (2020); Goodwin-Gill, G. S., ‘A Brief and Somewhat Sceptical Perspective on the International Organization for Migration’ (7 Apr. 2019): <https://www.kaldorcentre.unsw.edu.au/publication/brief-and-somewhat-sceptical-perspective-international-organization-migration>.

¹⁷⁶ According to one commentator, ‘[i]t is merely a related agency … a loosely connected network of projects and field offices, addressing a heteroclitic range of issues, and moving quickly from one to another, according to opportunities and circumstances’: Pécoud, A., ‘What do we know about the International Organization for Migration’ (2018) 44 *Journal of Ethnic and Migration Studies* 1621, 1622.

¹⁷⁷ Bradley, M., *The International Organization for Migration: Challenges, Commitments, Complexities* (2020); Bradley, M., ‘The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime’ (2017) 33(1) *Refuge* 97; Chetail, V., *International Migration Law* (2019) 344–5, 360–97.

¹⁷⁸ IOM, Standing Committee on Programmes and Finance, Twenty-fourth Session, Statement by the Director General: Doc. S/24/10 (18 Jun. 2019) para. 18; see also, <https://migrationnetwork.un.org/>.

¹⁷⁹ Preamble and Article 1: International Organization for Migration, *Constitution and Basic Texts* (2nd edn., 2017); as of 30 April 2021, IOM had 173 member States. For examples of IOM services, see Citizenship and Immigration Canada, ‘Evaluation of Canada’s membership in the International Organization for Migration’, Evaluation Division (Feb. 2011) 2, 5, 13. Geiger, M., ‘Ideal partnership or marriage of convenience? Canada’s ambivalent relationship with the International Organization for Migration’ (2018) 44 *Journal of Ethnic and Migration Studies* 1639.

¹⁸⁰ IOM, Council, 110th Session, Annual Report for 2018: Doc. C/110/4, paras. 35, 128–34, 203–7, 213–17, 223–5.

¹⁸¹ Ibid., paras. 2–12. The overall situation is hardly clarified by IOM Council Resolution No. 1309 (24 Nov. 2015), which proclaims IOM to be a ‘non-normative organization’.

¹⁸² See, for example, Hirsch, A. L. & Doig, C., ‘Outsourcing Control: The International Organization for Migration in Indonesia’ (2018) 22 *International Journal of Human Rights* 681; Hirsch, A. L., ‘The Borders Beyond the Border: Australia’s Extraterritorial Migration Controls’ (2017) 36(3) *RSQ* 48, 71–2; Nethery, A., Rafferty-Brown, B., & Taylor, S., ‘Exporting Detention: Australia-funded Immigration Detention in Indonesia’ (2012) 26 *JRS* 88; Migreurop, ‘L’OIM, Une Organisation au Service des Frontières ... fermées’ *Les notes de migreurop*, no. 9 (May 2019): <http://www.migreurop.org/>. See also, the debate in the UK House of Lords in 2000 regarding IOM’s involvement with a group of asylum seekers whom the UK wished to remove: Hansard, HL Deb. (1 Mar. 2000) cols. 557, 563–5; and the suggestion made by the IOM Head of Mission to the House of Lords European Union Committee, that it was not bound by human rights obligations: House of Lords, European Union Committee, 11th Report of Session 2003–04, ‘Handling EU asylum claims: new approaches examined’ HL Paper 74 (30 Apr. 2004) paras. 121–4.

¹⁸³ UNGA res. 70/296, ‘Agreement concerning the Relationship between the United Nations and the International Organization for Migration’ (25 Jul. 2016) Annex, art. 2(5); UNGAOR, Seventy-first session, 3rd plenary meeting (19 Sep. 2016) ‘High-level plenary meeting on addressing large movements of refugees and migrants’: UN doc. A/71/PV.3, 5; the 1951 ‘history’ described by IOM’s then Director General William Swing at 6, leaves out the politics. On the background to UN concerns and desire to see better managed movements of people, see United Nations, ‘Report of the Special Representative of the Secretary-General on Migration’, UN doc. A/71/728 (3 Feb. 2017); United Nations, ‘In safety and dignity: addressing large movements of refugees and migrants’, UN doc. A/70/59 (21 Apr. 2016).

¹⁸⁴ UN–IOM Agreement ([n 183](#)) art. 4.

¹⁸⁵ Ashutosh, I. & Mountz, A., ‘Migration management for the benefit of whom? Interrogating the work of the International Organization for Migration’ (2011) 15 *Citizenship Studies* 21.

¹⁸⁶ Until the June 2018 election of António Vitorino (Portugal) as IOM’s Director General, there had only ever been one non-US holder of the post—Bastiaan W. Haveman of the Netherlands, who served from 1961 to 1969. In 1951, the Brussels Conference agreed that its interest and initiative in creating the Provisional Committee merited the US having the post of Director: Warren, G. L., ‘Europe’s Problem of Excess Population. Conference at Brussels on Migration and Committee for Movement of Migrants from Europe’, Department of State, *Bulletin* (4 Feb. 1952) 169, 173. See also Elie, J., ‘The Historical Roots of Cooperation Between the UN High Commissioner for Refugees and the International Organization for Migration’ (2010) 16 *Global Governance* 345.

¹⁸⁷ See, for example, UNGA res. 74/148, ‘Protection of migrants’ (18 Dec. 2019); see also Cullen, M., ‘The IOM’s New Status and its Role under the Global Compact for Safe, Orderly and Regular Migration: Pause for Thought’ *EJIL-Talk!* (29 Mar. 2019).

¹⁸⁸ Goodwin-Gill, G. S., ‘The Extra-Territorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations’ (2007) 9 *UTS Law Review* 26.

¹⁸⁹ Cf. Hirsch & Doig (n 182).

¹⁹⁰ IOM Annual Report for 2018 (n 180) para. 221 (referring back to paras. 2–29). A particularly striking indicator of *non-transparency* and *non-accountability* is apparent from IOM’s website. Any researcher interested, for example, in the development of IOM–UN relations will find their way blocked by password protection; see, <https://governingbodies.iom.int/iom-un-relations-and-related-issues>.

¹⁹¹ UN–IOM Agreement (n 183) Annex, art. 2(5).

¹⁹² See generally, IASC Principal’s Statement, ‘The Centrality of Protection in Humanitarian Action’ (17 Dec. 2013): <https://interagencystandingcommittee.org/>. But see IOM–UNHCR, Joint Letter on collaboration and the ‘distinctive roles and responsibilities’ of IOM and UNHCR (25 Jan. 2019): <https://www.refworld.org/docid/5c519a614.html>.

¹⁹³ See s. 1.

¹⁹⁴ IFRC, ‘The Fundamental Principles of the International Red Cross and Red Crescent Movement’ (Nov. 2015); ICRC, ‘Protection Policy’ (2008) 90 *International Review of the Red Cross* 751.

¹⁹⁵ See art. 9 of the First (wounded and sick, medical personnel, and chaplains), Second (including shipwrecked persons), and Third (prisoners of war) Conventions; and art. 10 of the Fourth Convention (civilian persons).

¹⁹⁶ Art. 10 of the First, Second, and Third Conventions; art. 11 of the Fourth Convention. The Conventions further provide for Protecting Powers to ‘lend their good offices’ with a view to settling disputes: art. 11 of the First, Second, and Third Conventions; art. 12 of the Fourth Convention. Compare generally art. 5, 1977 Protocol I, and see Veuthey, M., *Guérilla et droit humanitaire* (1983) 329–32.

¹⁹⁷ See, in particular, common art. 3, 1949 Geneva Conventions; art. 81, 1977 Additional Protocol I; Veuthey (n 196) 332–4. With respect to the ICRC’s functions on behalf of interned enemy civilians or other protected persons; see arts. 41, 78, 132–4, Fourth Geneva Convention (1949); art. 75, Additional Protocol 1; arts. 4–6, Additional Protocol 2.

¹⁹⁸ Art. 9 of the first three Conventions; art. 10 of the Fourth Convention.

¹⁹⁹ Veuthey (n 196) 332–3.

²⁰⁰ See IFRC, ‘Fourth Progress Report on the Implementation of the Guidelines’ (2019); IFRC, OCHA, IPU, ‘Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’ (2013). See also Ch. 12.

²⁰¹ UNGA res. 71/141 (13 Dec. 2016); *Report of the ILC*, 68th Sess., UN doc. A/71/10 (19 Sep. 2016) Ch. IV, 12–73. The ILC’s work had begun in 2008, with Eduardo Valencia-Ospina as special rapporteur.

²⁰² Draft art. 3(a).

²⁰³ See ‘Comments and observations received from Governments and international organizations’: UN doc. A/CN.4/696 (14 Mar. 2016).

²⁰⁴ Draft art. 7.

²⁰⁵ Draft art. 9(1).

²⁰⁶ Draft art. 10(1).

²⁰⁷ Draft art. 11.

²⁰⁸ Draft art. 13; Thomsen, M., ‘The obligation not to arbitrarily refuse international disaster relief: a question of sovereignty’ (2015) 16 *Melbourne Journal of International Law* 1.

²⁰⁹ UNGA res. 73/209 (20 Dec. 2018); for further views in the 6th Committee, see Summary record of the 31st Mtg. (1 Nov. 2018): UN doc. A/C.6/73/SR.31, paras. 23–88; 35th Mtg. (13 Nov. 2018): UN doc. A/C.6/73/SR.35, paras. 29–32.

²¹⁰ See, generally, and with an eye on the future, O’Donnell, T., ‘Vulnerability and the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters’ (2019) 68 *ICLQ* 573; Sivakumaran, S., ‘Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief’ (2017) 28 *EJIL* 1097; Bartolini, G., ‘A Universal Treaty for Disasters? Remarks on the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters’ (2017) 99 *International Review of the Red Cross* 1103; Giustiniani, F. Z. and others, eds., *Routledge Handbook of Human Rights and Disasters* (2018); Aronsson-Storrier, M. & da Costa, K., ‘Regulating disasters? The role of international law in disaster prevention and management’ (2017) 26 *Disaster Prevention and Management* 502; Caron, D., Kelly, M., & Telesetsky, A., eds., *The International Law of Disaster Relief* (2014).

²¹¹ See, in particular, Part III, Regional Regimes, in Costello, Foster, & McAdam (ⁿ 1). For earlier assessments of the OAU, see Bakwesegha, C. J., ‘The Role of the Organization of African Unity in Conflict Prevention, Management and Resolution’ (1995) 7 *IJRL Special Issue* 207; Oloka-Onyango, J., ‘The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis’ (1994) 6 *IJRL* 34.

²¹² See further, Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018); Sharpe, M., ‘Organization of African Unity and African Union: Engagement with Refugee Protection, 1963–2011’ (2013) 21 *African Journal of International and Comparative Law* 50.

²¹³ European Union Agency for Fundamental Rights (FRA), ‘Asylum, migration and borders’: <https://fra.europa.eu/en/themes/asylum-migration-and-borders>.

²¹⁴ For further details, see the third edition of this work, 445–6; and for relevant CSCE and OSCE texts, see Brownlie, I. & Goodwin-Gill, G. S., eds., *Basic Documents on Human Rights* (5th edn., 2006) 817 ff.

²¹⁵ ECOSOC res. 1980/43 (23 Jul. 1980). The international role of NGOs in the human rights field has been confirmed and developed, among others, through the mechanism of consultative status with ECOSOC (under art. 71 of the UN Charter) and thereby also with bodies such as the former Commission on Human Rights (since replaced by the Human

Rights Council).

²¹⁶ See further <https://www.msf.org/>.

²¹⁷ See further <https://www.hrw.org/>; <https://www.amnesty.org/en/>; and <https://www.icj.org/>.

²¹⁸ See further <https://www.ecre.org/>.

²¹⁹ See also the International Council of Voluntary Agencies: <https://www.icvanetwork.org/>.

²²⁰ See UN Commission on Human Rights, *Report on the Situation of Human Rights in the Sudan*: UN doc. E/CN.4/1994/48, paras. 34, 116.

²²¹ On behalf of UNPROFOR and international humanitarian agencies, see SC resolutions 758 (8 Jun. 1992) para. 7; 761 (29 Jun. 1992) para. 8; 770 (13 Aug. 1992) para. 6—‘UN and other personnel engaged in the delivery of humanitarian assistance’; 859 (24 Aug. 1993) para. 4.

²²² SC res. 810 (8 Mar. 1993), para. 18 (Somalia); SC res. 897 (4 Feb. 1994) para. 8.

²²³ SC res. 912 (21 Apr. 1994) preamble—expressing concern for the safety and security ‘of personnel of non-governmental organizations who are assisting in implementing the peace process and in distributing humanitarian relief’. See also SC res. 966 (8 Dec. 1994) on Angola, para. 10.

²²⁴ Stoddard, A., Harmer, A., & Czwarno, M., *Aid Worker Security Report 2017: Behind the Attacks: A Look at the Perpetrators of Violence against Aid Workers* (2017): <https://aidworkersecurity.org/sites/default/files/AWSR2017.pdf>. In terms of body count, however, States were responsible for the majority of deaths; see ‘Summary of Key Findings’, *ibid*. The Aid Worker Security Database records major violent incidents against aid workers from 1997 to the present: <https://aidworkersecurity.org/>.

²²⁵ UNGA res. 47/105 (16 Dec. 1992) para. 20—UNHCR staff and other relief workers; see also UNGA resolutions 48/116 (20 Dec. 1993) para. 22; 49/169 (23 Dec. 1994) para. 17.

²²⁶ See Executive Committee Conclusion No. 72 (1993); Executive Committee Conclusion on the Security of UNHCR Staff (1994), *Report of the 45th Session* (1994): UN doc. A/AC.96/839, para. 28; Conclusion on the Situation of Refugees, Returnees and Displaced Persons in Africa (1994): *ibid.*, para. 29(m). On a related issue, see Wiseberg, L. S., ‘Protecting Human Rights Activists and NGOs: What More Can Be Done?’ (1991) 13 *HRQ* 525.

²²⁷ Adopted by UNGA res. 49/59 (9 Dec. 1994); entered into force on 15 January 1999: 2051 UNTS 363. At 30 April 2021, 95 States had ratified the Convention.

²²⁸ Cf. *DD v Secretary of State for the Home Department* [2012] UKSC 54, paras. 41–68.

²²⁹ Art. II; 2689 UNTS 59; Arsanjani, M. H., ‘Introductory Note’, UN Audio-Visual Library of International Law: <https://legal.un.org/avl/ha/csunap/csunap.html>.

²³⁰ In many ways, UNHCR acts much as does a national consul, although formal recognition of this role was a divisive issue at the 1963 United Nations Conference on

Consular Relations and no article thereon was agreed; see UN doc. A/CONF.25/L6, setting out UNHCR's position. The 1967 European Convention on Consular Functions has gone some way to protect refugees *against* the exercise of consular functions by consuls who are nationals of the refugees' country of origin: ETS No. 61, art. 47. Art. 2(2) of the Protocol to the same convention (ETS No. 61A), moreover, expressly recognizes a protection role for the consuls of a refugee's State of habitual residence, 'in consultation, whenever possible, with the Office of the United Nations High Commissioner for Refugees'. That said, the Convention has but five parties, and the Protocol but three. See further Ch. 11.

²³¹ This in turn may cover a wide range of activities. During the height of the conflict in El Salvador in the 1980s, UNHCR 'roving protection officers' patrolled the border on the Honduras side, leading asylum seekers to refugee camps, and often interceding directly with Honduran military to prevent forced return. In other situations, protection may mean maintaining a watching brief at airports and in transit areas, to try to prevent summary removals, or interceding with legal arguments to ensure that claims generally receive substantive determination.

²³² On applicable standards with regard to immigration, see Chetail (n 177); also Goodwin-Gill, G. S. & Weckel, P., eds., *Protection des migrants et des réfugiés au XXIe siècle: Aspects de droit international/Migration and Refugee Protection in the 21st Century: International Legal Aspects* (2015); Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) Chs. IV and V.

²³³ Derogation is permitted in 'time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.

²³⁴ Thus, in view of the peremptory character of the rule of non-discrimination on the ground of race, measures taken against a particular class of foreign nationals determinable solely by reference to such characteristics would not be justified. See also, Committee on the Elimination of Racial Discrimination, 'General Recommendation 30: Discrimination against Non-Citizens', UN doc. CERD/C/64/Misc.11/rev.3; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1.

²³⁵ Art. 4(2). Cf. annexe III, Elles, *International Provisions protecting the Human Rights of Non-Citizens*: UN doc. E/CN.4/Sub.2/392/Rev.1 (1980) 57.

²³⁶ At 30 April 2021, 173 States were parties to ICCPR 66: *Multilateral Treaties Deposited with the Secretary-General*, Ch. IV: <https://treaties.un.org/>.

²³⁷ *Barcelona Traction case* (n 101) 32.

²³⁸ Cf. ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143). Art. 1 affirms that 'Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers'. The ILO Committee of Experts proposed for inclusion within this category of rights, the right to life, to protection against torture, cruel, inhuman or degrading treatment or punishment, liberty and security of the person, protection against arbitrary arrest and detention, and the right to a fair trial: *Migrant Workers*, report of the Committee of Experts, International Labour Conference, 66th Session (1980) 68–9. Art.

9(1) of this same convention requires further that illegal migrant workers, whose position cannot be regularized, should receive ‘equal treatment’ for themselves and their families in respect of rights arising out of past employment in matters of pay, social security, etc. See also, Goodwin-Gill ([n 170](#)).

[239](#) Summary reports on the risks and injuries faced by refugees are included in UNHCR’s annual ‘Notes’ on International Protection, submitted each year to the Executive Committee, and in UNHCR’s reports to the General Assembly.

[240](#) Executive Committee Conclusion No. 22 (1981), *Report of the 32nd Session*, UN doc. A/AC.96/601, para. 57(2); UNGA res. 36/125 (14 Dec. 1981). On temporary refuge, see generally [Ch. 5](#), s. 7.1.

[241](#) With respect to military attacks on refugee camps and settlements, see [Ch. 9](#), s. 1.3.

[242](#) The Executive Committee was somewhat more assertive, however, in its statement on cooperation with UNHCR: Executive Committee Conclusion No. 22 (1981) Ch. III.

[243](#) On ‘temporary protection’, see [Ch. 6](#), s. 6.

[244](#) Lord McNair, *The Law of Treaties* (1961) 78–9; see also Brownlie, I., *Principles of Public International Law* (7th edn., 2003) 34–5; Crawford, J., *Brownlie’s Principles of Public International Law* (9th edn., 2019) 48–51; Brownlie, I., *System of the Law of Nations: State Responsibility (Part I)* (1983) 241–76; *Treatment of Polish Nationals in Danzig*, PCIJ ser. A/B no. 44 at 24; *Greco-Bulgarian Communities*, PCIJ, ser. B, no. 17, 32; *Free Zones*, PCIJ ser. A, no. 24, 12; ser. A/B, no. 46, 167; art. 27, 1969 Vienna Convention on the Law of Treaties; *Advisory Opinion, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* [1988] ICJ Rep. 12.

[245](#) The International Court has stressed that failure to enact legislation necessary to ensure fulfilment of international obligations will not relieve a State of responsibility; see *Exchange of Greek and Turkish Populations*, PCIJ ser. B, no. 10, 20.

[246](#) Crawford ([n 96](#)) art. 12, Commentary, paras. 11, 129–30.

[247](#) Dupuy, P.-M., ‘Reviewing the difficulties of codification: On Ago’s classification of obligations of means and obligations of result in relation to State responsibility’ (1999) 10 *EJIL* 371, 375; thus, the doctor’s duty is to treat the patient to the standard required of doctors, but not specifically to cure.

[248](#) Crawford, J., ‘Second Report on State Responsibility’, UN doc. A/CN.4/498 (17 Mar. 1999) para. 57, cited by Dupuy ([n 247](#)) 378.

[249](#) Dupuy ([n 247](#)) 379.

[250](#) Crawford ([n 96](#)) Introduction, 22.

[251](#) See also the discussion in Crawford ([n 248](#)) paras. 69–76.

[252](#) 500 UNTS 95.

[253](#) Art. 2(1)(c): 660 UNTS 195.

[254](#) 999 UNTS 171 and 1057 UNTS 407. Some States have made reservations to this article, on the basis of its inconsistency with the freedom of expression recognized in art. 19.

See *Multilateral Treaties deposited with the Secretary-General*, Ch. 4: <https://treaties.un.org/>, recording reservations by Australia, Belgium, Denmark, Finland, Iceland, Ireland, Luxembourg, Malta, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom, and the United States; and declarations by France, Liechtenstein, and Thailand.

²⁵⁵ *United States Diplomatic and Consular Staff in Tehran* ([n 105](#)) 30–1.

²⁵⁶ See also art. 24, ILO Constitution, whereby every Member State ‘binds itself effectively to observe within its jurisdiction any Convention to which it is a party’; 1949 Geneva Conventions, common art. 1: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’

²⁵⁷ The ILC invoked particularly clear statements of the principle submitted by Poland and Switzerland to the Preparatory Committee of the 1930 Hague Conference for the Codification of International Law; cited in *Yearbook of the ILC* (1977) ii, 23.

²⁵⁸ Art. 2(2), ICCPR 66; See also, OAS Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural (Protocol of San Salvador) (14 Nov. 1988) art. 2: ‘If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality’: OAS Treaty Series, No. 69; (1989) 28 *ILM* 156.

²⁵⁹ Art. 2(1)(d), ICERD 66.

²⁶⁰ See, generally, Lauterpacht, H., *The Development of International Law by the International Court* (1958) 257, 282; art. 31(1), 1969 Vienna Convention on the Law of Treaties; McNair ([n 244](#)) 540–1.

²⁶¹ See *Tolls on the Panama Canal* (1911–12); Hackworth, *Digest*, vi, 59 (views of the United States); *German Interests in Polish Upper Silesia* (Merits) PCIJ (1926) Ser. A, no. 7, 19. The Permanent Court’s reference in the *German Settlers in Poland* case to the necessity for ‘[e]quality in fact ... as well as ostensible legal equality in the sense of absence of discrimination in the words of the law’: PCIJ (1923) Ser. B, no. 6, 24, is founded on an equivalent principle. See further *Yearbook of the ILC* (1977) ii, 23–7.

²⁶² *Ireland v United Kingdom* (1978) 2 EHRR 25, paras. 236 ff. Art. 1 ECHR 50 provides: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined.’ Cf. *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, where the European Court found, among others, a violation of art. 13 (requiring an effective remedy for everyone whose rights and freedoms are violated), in a case in which discrimination on the ground of sex was the result of norms incompatible in this respect with the European Convention. Since the Convention was not then incorporated into UK law, there could be no ‘effective remedy’ (paras. 92, 93); see also the reservations expressed by Judge Bernhardt on this point in a concurring opinion.

²⁶³ The local remedies rule is firmly based in general international law, and also figures in human rights instruments; see, for example, art. 26, ECHR 50; arts. 11(3), 14(7)(a) ICERD

66; art. 41(1)(c) ICCPR 66 and art. 5(2)(b), Optional Protocol thereto.

²⁶⁴ One expert noted that the United Kingdom had no written constitution and that the Covenant was not part of its internal legal order; if there were no laws, he wondered how the Committee could determine the degree of compliance with the Covenant: Mr Movchan, expert from the Soviet Union: UN doc. CCPR/C/SR.147, paras. 8, 9; a more lively account appears in United Nations press releases HR/1792–4 (25–6 Apr. 1979). At the time, the Soviet Union figured among those States which, despite the apparently express requirement of art. V of the Genocide Convention, had not found it necessary to enact specific legislation: Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide* (1978): UN doc. E/CN.4/Sub. 2/416, para. 501. Another expert believed that art. 2(2) required the adoption of specific measures and that it was not sufficient to state that existing laws were consonant with the Covenant: Mr Sadi, expert from Jordan: UN doc. CCPR/C/SR.147, para. 13.

²⁶⁵ Mr Richard (United Kingdom): UN doc. CCPR/C/SR.147, para. 18 and SR.149, para. 18; also Mr Cairncross (United Kingdom): *ibid.*, SR.147, para. 32.

²⁶⁶ 967 HC Deb. cols. 1363–81 (25 May 1979).

²⁶⁷ 392 HL Deb. cols. 799–819 (22 May 1978). The debate arose out of a UNHCR note to the British government proposing various reforms, in particular, that ‘all those provisions of the 1951 Convention and the 1967 Protocol which are not provided for in the existing law’, should be specifically incorporated; and that there should be established ‘a formal procedure for the determination of refugee status by an independent body’ in accordance with UNHCR Executive Committee recommendations: *ibid.*, cols. 815–6 (Lord Wells-Pestell).

²⁶⁸ 967 HC Deb. col. 1376 (25 May 1979) (Mr Raison). A similar argument was stated the previous year in the Executive Committee by the UK representative, Mr Gould, who noted that ‘the States Parties to the 1951 Convention and the 1967 Protocol were under a duty to comply with those instruments and it was entirely for them to decide whether the provisions of those texts should for that purpose be incorporated in their national law’: UN doc. A/AC.96/SR.302, para. 17, commenting on UN doc. A/AC.96/555, para. 6; also UN doc. A/AC.96/553, paras. 517–18.

²⁶⁹ Executive Committee Conclusion No. 8 (1977).

²⁷⁰ 967 HC Deb. cols. 1379–80 (25 May 1979).

²⁷¹ That the situation of refugees and asylum seekers in the United Kingdom continued to be unsatisfactory may be inferred from the enactment of the Asylum and Immigration Appeal Act 1993, and from a comparison of its provisions and the relevant immigration rules with those prevailing formerly.

²⁷² Similar considerations may apply to other human rights instruments that have an impact on State powers to expel or refuse admission to non-nationals, such as art. 3 CAT 84; or art. 7 ICCPR 66. Many States now incorporate such bases for protection, either as part of refugee status procedures or independently.

²⁷³ See Ch. 7, s. 5.4.

²⁷⁴ Nuclear Tests (*Australia v France*) Case [1974] ICJ Rep. 253, 268, para. 46; see also *Case Concerning Border and Transborder Armed Actions* [1988] ICJ Rep. 69, para. 94; *Case Concerning Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* Preliminary Objections [1998] ICJ Rep. 275, 296, para. 38. For background, see O'Connor, J. F., *Good Faith in International Law* (1991). O'Connor notes: ‘The elaboration of the concept of *bona fides* in Roman law as involving a *legal* obligation to do what a decent, fair and conscientious man would do in particular circumstances contributed very largely to the association of good faith, in a wider ethical sense, with *pacta sunt servanda*. In relation to keeping promises and agreements, good faith acquired the meaning of not only the obligation to observe literally the undertakings given, but also the advertence to the real intentions of the parties or to the “spirit” of the agreement.’ *Ibid.*, 39.

²⁷⁵ See Simma and others (n 83) 166–80; Kolb, R., *Good Faith in International Law* (2017); See also 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by consensus in UNGA res. 2625 (XXV) (24 Oct. 1970) para. 3.

²⁷⁶ Virally, M., ‘Review Essay: Good Faith in Public International Law’ (1983) 77 *AJIL* 130, 133. See also Rosenne, S., *Developments in the Law of Treaties 1945–1986* (1989) 135–6: ‘Its normative content is to be distinguished from the role of good faith against the broader background of international relations ... Without denying ... that good faith, as a concept, is also one of public and of private morality, the view that it is *only* a moral or a metaphysical concept is one that cannot be entertained.’

²⁷⁷ *Certain Norwegian Loans* [1957] ICJ Rep. 9. See also, Lauterpacht (n 260) 163; Rosenne (n 276) 139–40.

²⁷⁸ Fitzmaurice, G., ‘The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law’ (1950) 27 *BYIL* 1, 12–13.

²⁷⁹ McNair (n 244) 540, 550: ‘A State may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of treaty; in such cases, a tribunal demands good faith and seeks for the reality rather than the appearance.’ Among various examples, he suggests that, ‘the making of regulations by one party which in substance destroyed or frustrated the right of the other party would be a breach of good faith and of the treaty’.

²⁸⁰ *Free Zones* case (Merits) (1930) PCIJ Ser. A/B, 46, 167.

²⁸¹ RIAA, vol. XI, 167, 188 (1910), emphasis in original. See also, *Rights of US Nationals in Morocco* [1952] ICJ Rep. 176.

²⁸² In the *Roma Rights* case (n 234), for example, the Court was of the view that the principle of good faith could not ‘create’ an international obligation; the extent to which good faith nevertheless has a normative impact on discretion or State action in otherwise unregulated areas remains open. Cf. Byers, M., ‘Abuse of Rights: An Old Principle, A New Principle, A New Age’ (2002) 47 *McGill Law Journal* 389.

²⁸³ See the *Roma Rights* case (n 234); and further, Goodwin-Gill, G. S., ‘State

Responsibility and the ‘Good Faith’ Obligation in International Law’, in Fitzmaurice, M. & Sarooshi, D., eds., *Issues of State Responsibility before International Judicial Institutions* (2004) 75.

²⁸⁴ Arbel, E., Dauvergne, C., & Millbank, J., eds., *Gender in Refugee Law: From the Margins to the Centre* (2014); Freedman, J., *Gendering the International Asylum and Refugee Debate* (2nd edn., 2015); Crawley, H., *Refugees and Gender: Law and Process* (2001); Dauvergne, C., ‘Women in Refugee Jurisprudence’, in Costello, Foster, & McAdam (n 1); Anderson, A. & Foster, M., ‘A Feminist Appraisal of International Refugee Law’, in Costello, Foster, & McAdam (n 1); Dauvergne, C. & Lindy, H., ‘Excluding Women’ (2019) 31 *IJRL* 1; Peroni, L., ‘The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm’ (2018) 18 *Human Rights Law Review* 347; Crawley, H., ‘[En]gendering International Refugee Protection: Are We There Yet?’, in Burson, B. & Cantor, D. J., eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016); Firth, G. & Mauthe, B., ‘Refugee Law, Gender and the Concept of Personhood’ (2013) 25 *IJRL* 470; Bartolomei, L., Eckert, R., & Pittaway, E., ‘“What Happens There ... Follows Us Here”: Resettled but Still at Risk: Refugee Women and Girls in Australia’ (2014) 30(2) *Refugee* 45; Anker, D. E., ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133.

²⁸⁵ On piracy, see Ch. 6, s. 2.1.

²⁸⁶ See, for example, Pittaway, E. & Bartolomei, L. A., ‘Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women’ (2001) 19(6) *Refugee* 21. For a recent illustration, see Dawson, J. & Gerber, P., ‘Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum based on Sexual Orientation?’ (2017) 29 *IJRL* 292.

²⁸⁷ See ‘Refugee Women and International Protection’: EC/SCP/39 (1985); *Report of the Sub-Committee: UN doc. A/AC.96/671* (9 Oct. 1985) paras. 8–19; Executive Committee Conclusion No. 39 (1985), *Report of the 36th Session*, UN doc. A/AC.96/673, para. 115(4); also, Bhabha, J., ‘Demography and Rights: Women, Children and Access to Asylum’ (2004) 16 *IJRL* 227. On gender as a basis for persecution and the social group question, see further Ch. 3, s. 4.2.4.4.

²⁸⁸ Edwards, A., ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2000’ (2010) 29(2) *RSQ* 21, 22. See also UNHCR, ‘From 1975 to 2013: UNHCR’s Gender Equality Chronology’ (2013): <https://www.refworld.org/docid/53a2a5f54.html>

²⁸⁹ See UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/713 (15 Aug. 1988) para. 36; ‘Note on International Protection’, UN doc. A/AC.96/728 (2 Aug. 1989) paras. 30–6; also, Johnsson, A. B., ‘The International Protection of Women Refugees’ (1989) 1 *IJRL* 221; Kelley, N., ‘Report on the International Consultation on Refugee Women, held in Geneva, 15–19 November 1988’ (1989) 1 *IJRL* 233.

²⁹⁰ See UNHCR, ‘UNHCR Policy on Age, Gender and Diversity’ (Mar. 2018). At times, this resulted in unhelpful essentializing about women’s experiences, including the conflation of women–children–sexual violence–vulnerability: Edwards ([n 288](#)) 44. See further Kneebone, S., ‘Women within the Refugee Construct: “Exclusionary Inclusion” in Policy and Practice—the Australian Experience’ (2005) 17 *IJRL* 7; Firth & Mauthe ([n 284](#)).

²⁹¹ See, for example, the Global Compact on Refugees, UN doc. A/73/12 (Part II) (2 Aug. 2018) para. 74: ‘States and relevant stakeholders will seek to adopt and implement policies and programmes to empower women and girls in refugee and host communities, and to promote full enjoyment of their human rights, as well as equality of access to services and opportunities—*while also taking into account the particular needs and situation of men and boys*’ (emphasis added).

²⁹² UNHCR, ‘Policy on Refugee Women’: UN doc. A/AC.96/754 (20 Aug. 1990).

²⁹³ ‘Note on Refugee Women and International Protection’: EC/SCP/59 (28 Aug. 1990).

²⁹⁴ Such measures should include not only counselling and assistance to victims of sexual violence and prosecution and punishment of offenders, but also basic preventive steps, such as adequate lighting in camps, or planting thorn bushes around women’s areas.

²⁹⁵ UNHCR ([n 292](#)) paras. 29–60; *Report of the Sub-Committee*: UN doc. A/AC.96/758 (2 Oct. 1990); Executive Committee Conclusion No. 64 (1990), *Report of the 41st Session*, UN doc. A/AC.96/760, para. 23.

²⁹⁶ UNHCR, *Handbook for the Protection of Women and Girls* (2008).

²⁹⁷ ‘Note on Certain Aspects of Sexual Violence against Women’: UN doc. A/AC.96/822 (12 Oct. 1993). Originally issued as a ‘conference room paper’, it was reissued as a session document at the express request of the Executive Committee: *Report of the 44th Session*: UN doc. A/AC.96/821, para. 21(m).

²⁹⁸ Executive Committee Conclusion No. 73 (1993) on Refugee Protection and Sexual Violence. Guidelines drafted in 1995 were updated in 2003: UNHCR, ‘Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response’ (May 2003): <https://www.refworld.org/docid/3edcd0661.html>

²⁹⁹ UNGA res. 48/104 (20 Dec. 1993); Charlesworth, H., ‘The Declaration on the Elimination of All Forms of Violence against Women’ (1994) *ASIL Insight*, No. 3. The Declaration recognizes that some groups, such as refugee women, women belonging to minority groups, indigenous women, and women in situations of armed conflict, are especially vulnerable. See also UNHCR, Guidelines on International Protection No. 7: ‘The application of Article 1A(2) of the 1951 Convention/1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked’, HCR/GIP/06/07 (7 Apr. 2006).

³⁰⁰ Executive Committee Conclusion No. 105 on Women and Girls at Risk (2006) para. b.

³⁰¹ UNHCR ([n 296](#)).

³⁰² See UNHCR, ‘Report on the High Commissioner’s Five Commitments to Refugee Women’, EC/55/SC/CRP.17 (13 Jun. 2005); UNHCR, ‘Operational Protection in Camps and

Settlements: A reference guide of good practices in the protection of refugees and other persons of concern' (2006) 14 (age, gender, and diversity mainstreaming) 79 (sexual- and gender-based violence-prevention and response). See also, ECOSOC res. 2005/31, 'Mainstreaming a Gender Perspective into All Policies and Programmes in the United Nations System' (26 Jul. 2005).

³⁰³ Global Compact on Refugees ([n 291](#)) para. 74.

³⁰⁴ Ibid., para. 75.

³⁰⁵ Global Compact for Safe, Orderly and Regular Migration ([n 135](#)) para. 15(g).

³⁰⁶ Gottardo, C. & Cyment, P., 'The Global Compact for Migration: What Could It Mean for Women and Gender Relations?' (2019) 27 *Gender and Development* 67, 72.

³⁰⁷ Ibid.

³⁰⁸ 1924 Geneva Declaration of the Rights of the Child, adopted 26 September 1924, League of Nations OJ Spec. Supp. 21, 43. Generally, see Pobjoy, J., 'Child Refugees', in Costello, Foster, & McAdam ([n 1](#)); Ressler, E., Boothby, N., & Steinbock, D., *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements* (1988).

³⁰⁹ See, for example, the 1959 UN Declaration on the Rights of the Child and the 1974 UN Declaration on the Protection of Women and Children in Emergencies and Armed Conflicts, and the many statements by UNGA, the UN Committee on the Rights of the Child, and UNHCR, cited in Pobjoy, J. M., *The Child in International Refugee Law* (2017) 13–14 fns 1–3.

³¹⁰ See, for example, the 1949 Geneva Conventions and their 1977 Additional Protocols.

³¹¹ See the detailed discussion in Pobjoy ([n 309](#)) 16–22, including (at 18) the US proposal to include unaccompanied children as an enumerated protection category (now referenced in Recommendation B of the Final Act of the Conference of Plenipotentiaries).

³¹² See further below.

³¹³ Pobjoy ([n 309](#)) 21 (fn omitted). Crock notes that '[u]nder international law, child migrants have suffered from a form of double institutional blindness born of their minority and status as non-citizens': Crock, M. E., 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child', in Mahmoudi, S. and others, eds., *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (2015) 222; see also 'Joint General Comment No. 3 (2017)' of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the context of International Migration', UN doc. CMW-C/GC/3–CRC/C/GC/22, para. 3.

³¹⁴ See Cohn, I., 'The Convention on the Rights of the Child: What it Means for Children in War' (1991) 3 *IJRL* 291; under CRC 89, there is thus no possibility to derogate from arts. 37 or 40 (torture, arbitrary detention, administration of justice guarantees); McCallin, M., 'The Convention on the Rights of the Child: An Instrument to Address the Psychosocial

Needs of Refugee Children' (1990) 2 *IJRL Special Issue* 82; Cohen, C. P., 'The Rights of the Child: Implications for Change in the Care and Protection of Refugee Children' (1991) 3 *IJRL* 675.

³¹⁵ See UNHCR, 'Family Protection Issues': EC/49/SC/CRP.14 (4 Jun. 1999), in (1999) 11 *IJRL* 583.

³¹⁶ Art. 2 CRC 89. On the capacity of the Convention to protect children from *refoulement*, see Ch. 7, s. 5.

³¹⁷ Pobjoy (n 309) 31.

³¹⁸ *Ibid.*, 15. Crock argues that in Australian law, the rights of a refugee/asylum-seeking child are seen as secondary to his or her status as a non-citizen: Crock, M.E., 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' (2013) 20 *Australian International Law Journal* 20.

³¹⁹ Pobjoy (n 309) 16. On the role of CRC 89 as an aid in interpreting the Refugee Convention, see Crock, M. & Yule, P., 'Children and the Convention relating to the Status of Refugees', in Crock, M. & Benson, L. B., eds., *Protecting Migrant Children: In Search of Best Practice* (2018). On the use of the CRC 89 in the protection of refugee children, see Bierwirth, C., 'The Protection of Refugee and Asylum-Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child' (2005) 24(2) *RSQ* 98.

³²⁰ A complete account of the provisions intended to benefit children during armed conflict is beyond the scope of the present analysis. Some 25 articles in the Geneva Conventions and the Additional Protocols deal with the special protection of children.

³²¹ See also Additional Protocol II, art. 4, confirming the obligation to provide children with the requisite care and aid, and referring expressly to education, family reunion, limitations on recruitment, and temporary evacuation.

³²² See Singer, S., 'The Protection of Children during Armed Conflict Situations' (1986) 252 *International Review of the Red Cross* 133.

³²³ Art. 23(1) ICCPR 66; and art. 10(3) ICESCR 66, respectively.

³²⁴ Art. 3(1) CRC 89; see also art. 4, 1990 African Charter on the Rights and Welfare of the Child. The UN Committee on the Rights of the Child emphasizes that 'best interests' is a threefold concept incorporating a substantive right, a fundamental, interpretative legal principle, and a rule of procedure: Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)': UN doc. CRC/C/GC/14 (29 May 2013) para. 6. In response to Executive Committee Conclusion No. 107 (2007) on children at risk, UNHCR has developed detailed guidance on assessing the best interests of the child at all stages of displacement, both individually and collectively: *Guidelines on Assessing and Determining the Best Interests of the Child* (Nov. 2018): <https://www.refworld.org/docid/5c18d7254.html> (superseding the 2008 version); and it has sought to 'mainstream' child protection in its policies and programmes: UNHCR, 'International Protection of Children of Concern':

EC/61/SC/CRP.13 (31 May 2010). See further UNHCR, *A Framework for the Protection of Children* (26 Jun. 2012): <https://www.refworld.org/docid/4fe875682.html>.

³²⁵ For the work of the Committee on the Rights of the Child, see <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>.

³²⁶ Global Compact on Refugees ([n 291](#)) para. 76.

³²⁷ For a summary of the protection principles relevant to children on the move, see Bhabha, J. & Dottridge, M., ‘Recommended Principles to Guide Actions concerning Children on the Move and Other Children affected by Migration’ (Jun. 2016) https://www.ohchr.org/Documents/HRBodies/CMW/Recommended-principle_EN.pdf.

³²⁸ UNHCR, ‘Children on the Move: Background Paper’, High Commissioner’s Dialogue on Protection Challenges (28 Nov. 2016) para. 23.

³²⁹ UNHCR, ‘Note on Refugee Children’: E/SCP/46 (9 Jul. 1987) para. 8.

³³⁰ Executive Committee Conclusion No. 47; see also Executive Committee Conclusion No. 59. The Executive Committee has referenced children in its conclusions every year since 1991, although none as comprehensively as that adopted in 1987 (although note Executive Committee Conclusion No. 105 (2006) on women and girls). See also ‘UNHCR Policy on Refugee Children’: EC/SCP/82 (6 Aug. 1993); ‘Programming for the Benefit of Refugee Children’: EC/SC.2/CRP.15 (25 Aug. 1993); ‘Report of the Working Group on Refugee Women and Refugee Children’: EC/SCP/85 (5 Jul. 1994).

³³¹ UNHCR, ‘Guidelines on Refugee Children’ (1988) para. 25: <https://www.refworld.org/docid/5a65bb9d4.html>.

³³² UNHCR, ‘Refugee Children: Guidelines on Protection and Care’ (1994) 19: <https://www.refworld.org/docid/3ae6b3470.html>. Also, ‘UNHCR Policy on Refugee Children’: EC/SCP/82 (6 Aug. 1993)—identifying the primary goals as ensuring the protection and healthy development of refugee children and durable solutions appropriate to immediate and long-term developmental needs (para. 25); ‘Report of the Working Group on Refugee Women and Refugee Children’: EC/SCP/85 (5 Jul. 1994).

³³³ UNHCR Guidelines ([n 332](#)) 121–49; see also, UNHCR, ‘Report on the High Commissioner’s Five Global Priority Issues for Refugee Children’, Standing Committee, 36th meeting, EC/57/SC/CRP.16 (6 Jun. 2006); ‘Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities’, Valid International, Oxford, UK, EPAU/2002/02 (May 2002).

³³⁴ UNHCR Guidelines ([n 332](#)) 128–9. Close cross-border cooperation is also essential, but may be difficult to arrange in highly politicized or conflict situations. Computerized tracing systems are now in place, and other agencies, such as the International Committee of the Red Cross (ICRC), have considerable long-term experience in tracing family members separated as a result of conflict; coordination with such agencies is essential in order to enhance the prospects of finding separated family members. See Restoring Family Links: <https://familylinks.icrc.org/en/Pages/home.aspx>; also, ICRC, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (Jan. 2004):

https://www.unicef.org/protection/IAG_UASCs.pdf; UNGA res. 56/136, ‘Assistance to unaccompanied refugee minors’ (16 Dec. 2001); UNHCR, ‘Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum’ (Feb. 1997); <https://www.refworld.org/docid/3ae6b3360.html>.

³³⁵ See Cohn, I. & Goodwin-Gill, G.S., *Child Soldiers* (1994) 77–8, 152–3.

³³⁶ UNHCR Guidelines ([n 332](#)) 122.

³³⁷ Jastram, K. & Newland, K., ‘Family unity and Refugee Protection’, in Feller, Türk, & Nicholson ([n 77](#)) 555; Pobjoy ([n 309](#)) 231–2.

³³⁸ Recognizing this basic premise, the UNHCR/UNICEF guidelines on evacuation of children from conflict areas emphasize that the first priority is to enable families to meet the needs of children in their care; and the second, if evacuation is considered necessary, ‘that children be evacuated as part of a family unit, children being kept with their primary care givers’: Inter-Agency (Ressler, E.), ‘Evacuation of Children from Conflict Areas: Considerations and Guidelines’, UNICEF & UNHCR (1992) 23. Where evacuation without parents occurs, records must be kept and the operation closely monitored with a view to bringing about family reunion as soon as possible.

³³⁹ ‘Evacuation of Children’ ([n 338](#)) 22.

³⁴⁰ UNHCR Guidelines ([n 332](#)) 130–1. Adoption is also not to be carried out if it is against the expressed wishes of the child or the parent; or if ‘voluntary repatriation in conditions of safety and dignity appears feasible in the near future and options in the child’s country of origin would provide better for the psychological and cultural needs of the child than adoption in the country of asylum or a third country’: *ibid.*, 131. See also McLeod, M., ‘Legal Protection of Refugee Children separated from their Parents: Selected Issues’ (1989) 27 *International Migration* 295.

³⁴¹ However, children may also have lacked education prior to displacement: see UNESCO, ‘Migration, Displacement and Education: Building Bridges not Walls: Global Education Monitoring Report’ (2nd edn., 2018) 58.

³⁴² Art. 22 CSR 51. See also art. 22(2), which calls for ‘[t]reatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships’). Zimmermann and Dörschner consider that the term ‘elementary’ in art. 22(1) can be ‘regarded as synonymous with the concepts of “elementary” or “primary” education as used by the [UDHR 48, ICESCR 66 and CRC 89]’, and that it refers ‘to the education of children only’: Zimmermann, A., & Dörschner, J., ‘Article 22’, in Zimmermann, A., ed., *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (2011) 1036–7.

³⁴³ See, for example, arts. 22, 28 CRC 89, providing that primary education shall be ‘compulsory and available free to all’; secondary education ‘available and accessible to every

child’, including through States taking ‘appropriate measures such as the introduction of free education and offering financial assistance in case of need’; and higher education ‘accessible to all on the basis of capacity by every appropriate means’; art. 26 UDHR 48; art. 13, ICESCR 66; art. 10, CEDAW 79; art. 5(e)(v), ICERD 66; art. 24, CRPD 06.

³⁴⁴ UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/1189 (1 Jul. 2019) para. 22. See also, UNHCR, *Turn the Tide: Refugee Education in Crisis* (2018) 8, 10: <https://www.unhcr.org/turnthetide/>; UNHCR, *Left Behind: Refugee Education in Crisis* (2017): <https://www.unhcr.org/left-behind/>. The Executive Committee has recognized the need of refugee children to pursue post-primary education and in 1987 recommended that the High Commissioner consider providing this within its general assistance programme: see Executive Committee Conclusion No. 47 (1987) para. (p); also, Executive Committee Conclusion No. 100 (2004) para. (l)(viii).

³⁴⁵ See New York Declaration for Refugees and Migrants, UNGA res. 71/1 (19 Sep. 2016) para. 81 (‘[a]ccess to quality education, including for host communities, gives fundamental protection to children and youth in displacement contexts, particularly in situations of conflict and crisis’). Inadequate access to education is identified as an ‘environmental risk factor’; see Executive Committee Conclusion No. 107 (5 Oct. 2007) para. (c); also, Executive Committee Conclusion Nos. 59 (1989) para. (f) and 104 (2005) para. (n)(iii) (recognizing ‘the link between education and durable solutions’); and Executive Committee Conclusion No. 77 (1995) para. (n) (recognizing ‘the role refugee community education can play in national reconciliation’).

³⁴⁶ New York Declaration (ⁿ 345) para. 32 (pledging to ‘prioritize budgetary provision to facilitate this’). See also paras. 81–2.

³⁴⁷ Global Compact on Refugees (ⁿ 291) paras. 68–9, 75.

³⁴⁸ UNESCO (ⁿ 341) 54, 61. On inclusion in national systems, see UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/1167 (7 Jul. 2017) para. 50; ‘Note on International Protection’, UN doc. A/AC.96/1178 (4 Jul. 2018) para. 36; UNHCR, ‘Note on International Protection’, UN doc. A/AC.96/1189 (1 Jul. 2019) para. 22; UNHCR, ‘Note on International Protection’ UN doc. A/AC.96/1200 (10 Jul. 2020) para. 35. See further the 2017 Djibouti Declaration on Refugee Education, in which IGAD States agree to ‘[i]ntegrate refugees into national education policies, strategies, programs and plans of action’, and to integrate refugee and returnee education into National Education Sector Plans by 2020: paras. 18, 24. See also ‘Nairobi Declaration and Call for Action on Education: Bridging continental and global education frameworks for the Africa We Want’ (Apr. 2018) para. 4(g); and Sustainable Development Goal 4 (‘Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all’).

³⁴⁹ Art. 2, 1993 Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: <http://www.hcch.net>. This treaty gives effect to art. 21, CRC 89, adding a number of safeguards and procedures intended to ensure the best interests of the child. At 30 April 2021, 103 States were party to the Convention.

³⁵⁰ See, for example, the extensive scope of art. 4 of the 1993 Convention ([n 349](#)); also, UNGA res. 41/85, ‘Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally’ (3 Dec. 1986).

³⁵¹ 1980 Convention on the Civil Aspects of International Child Abduction: <http://hcch.net>; Pérez-Vera, E., ‘Convention on the Civil Aspects of International Child Abduction, Explanatory Report’ (1980).

³⁵² Hague Conference on Private International Law, Special Commission on the Implementation of the Convention of 29 May 1993 (17–21 Oct. 1994) Working Doc. No. 39 (21 Oct. 1994).

³⁵³ *Ibid.*, para. 1.

³⁵⁴ With respect to tracing and repatriation, cooperation with other national and international bodies, particularly UNHCR, is recommended: *ibid.*, para. 4 further proposes that ‘the States shall facilitate the fulfilment, in respect to children referred to in this Recommendation, of the protection mandate of the United Nations High Commissioner for Refugees’.

³⁵⁵ *Ibid.*, para. 2.

³⁵⁶ *Ibid.*, para. 3.

³⁵⁷ UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08 (22 Dec. 2009). See also UNHCR, ‘Children on the Move’ ([n 328](#)) para. 15; Pobjoy ([n 309](#)) 79–100.

³⁵⁸ UNHCR, Guidelines on International Protection No. 8 ([n 357](#)) para. 2; Pobjoy ([n 309](#)) 101–56.

³⁵⁹ Executive Committee Conclusion No. 105 (2006); see also UNHCR ([n 296](#)).

³⁶⁰ Executive Committee Conclusion No. 107 (2007).

³⁶¹ Executive Committee Conclusion No. 111 (2013).

³⁶² Executive Committee Conclusion No. 113 (2016).

³⁶³ Executive Committee Conclusion No. 107 (2007), Preamble. See also UNHCR & UNICEF, *Safe and Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe* (Oct. 2014).

³⁶⁴ UNHCR, *A Framework for the Protection of Children* (2012); UNHCR, *Action against Sexual and Gender-Based Violence: An Updated Strategy* (Jun. 2011); UNHCR, *Education Strategy, 2012–2016* (2012); UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014–2019* (2014); UNHCR, *Global Action Plan to End Statelessness, 2014–24* (Nov. 2014).

³⁶⁵ Committee on the Rights of the Child, ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, UN doc. CRC/GC/2005/6 (2005). See also Bhabha, J. & Crock, M., *Seeking Asylum Alone: A*

Comparative Study (2007); UNHCR & UNICEF ([n 363](#)). Note also the guarantees for unaccompanied minors in art. 25, EU Asylum Procedures Directive.

[366](#) Committee on the Rights of the Child, ‘General Comment No. 12 (2009): The Right of the Child to be Heard’: UN doc. CRC/C/GC/12 (20 Jul. 2009); Pobjoy ([n 309](#)) 16–22, 44–78.

[367](#) Committee on the Rights of the Child, ‘General Comment No. 14’ ([n 324](#)); Pobjoy ([n 309](#)) 223–38.

[368](#) Joint General Comment No. 3 ([n 314](#)); ‘Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the context of International Migration in Countries of Origin, Transit, Destination and Return’: UN doc. CMW/C/GC/4-CRC/C/GC/23 (16 Nov. 2017).

[369](#) Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted by UNGA res. 66/138 (19 Dec. 2011), entered into force 14 April 2014. At 30 April 2021, 47 States were party to the Optional Protocol.

[370](#) *G v G sub nom Re G (a child)* [2021] UKSC 9.

[371](#) It was assumed that the child, who had been named as a defendant on his mother’s asylum application, was also applying for protection, regardless of whether the child was objectively understood to be making an application or had been named as a defendant.

[372](#) New York Declaration ([n 345](#)) para. 32. States specifically recommitted to complying with their obligations under CRC 89 (para. 32). They also acknowledged that detention for the purposes of determining migration status was ‘seldom, if ever, in the best interest of the child’, and that they would ‘work towards the ending of this practice’ (para. 33).

[373](#) Global Compact on Refugees ([n 291](#)) para. 13.

[374](#) Global Compact for Safe, Orderly and Regular Migration ([n 135](#)) para. 15(h): ‘promot[ing] existing international legal obligations in relation to the rights of the child, and uphold[ing] the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children’.

[375](#) Global Compact on Refugees ([n 291](#)) para. 76. See also the 2019 ASEAN Declaration on the Rights of Children in the context of Migration, which *inter alia* reaffirms States’ commitment to protect the rights of children and ensure that the best interests of the child is a primary consideration in migration matters (para. 1).

[376](#) Art. 1, 2006 Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008): 2515 UNTS 3. See generally Motz, S., *The Refugee Status of Persons with Disabilities* (2021); Crock, M., ‘Protecting Refugees with Disabilities’, in Costello, Foster, & McAdam ([n 1](#)).

[377](#) Crock, M. and others, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (2017) 3. See also Mitchell, D. & Karr, V., eds., *Crises, Conflict and Disability: Ensuring Equality* (2014); Mirza, M., ‘Disability and Forced Migration’, in

Fiddian-Qasmiyah and others ([n 44](#)). In *SHH v United Kingdom*, App. No. 60367/10 (29 Jan. 2013) the applicant argued inter alia that, if returned to Afghanistan, he would be at greater risk of indiscriminate violence on account of his disability. The European Court of Human Rights found that there was insufficient evidence to substantiate this (para. 87). By contrast, the joint dissenting opinion of Judges Ziemele, Björgvinsson, and De Gaetano noted that while ‘there is no doubt that a disability per se, similar to a serious illness per se, would not automatically raise an issue under, or engage, Article 3 [of the ECHR] … the Court must look into the character of the disability within the context of the specific facts of a given case’ (at para. 4). In their view, the national decision-makers did not do this sufficiently (para. 7).

[378](#) Crock and others ([n 375](#)) 4, 5.

[379](#) For analysis of disability in the context of the refugee definition and refugee status determination processes, see Motz ([n 374](#)); Crock, M., Ernst, C., & McCallum, R., ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24 *IJRL* 735.

[380](#) Executive Committee Conclusion No. 110 on Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by UNHCR, UN doc. A/AC.96/1095 (12 Oct. 2010) preamble.

[381](#) UNHCR, ‘The Protection of Older Persons and Persons with Disabilities’, doc. EC/58/SC/CRP.14 (6 Jun. 2007) paras. 10–12.

[382](#) Executive Committee Conclusion No. 110 ([n 378](#)); UNHCR, ‘The Protection of Older Persons and Persons with Disabilities’ ([n 379](#)) paras. 15, 18.

[383](#) On the challenges facing resettled refugees with disabilities, see, for example, Refugee Council of Australia and others, *Barriers and Exclusions: The Support Needs of Newly Arrived Refugees with a Disability* (Feb. 2019); Mirza, M., ‘Resettlement for Disabled Refugees’ (2010) 35 *FMR* 30.

[384](#) UNHCR, ‘The Protection of Older Persons and Persons with Disabilities’ ([n 379](#)) para. 2.

[385](#) Ibid., para. 14.

[386](#) Crock and others ([n 375](#)) 3; see also Stein, M. A. & Lord, Janet E., ‘Enabling Refugee and IDP Law and Policy: Implications of the UN Convention on the Rights of Persons with Disabilities’ (2011) 28 *Arizona Journal of International and Comparative Law* 401; Peterson, V., ‘Understanding Disability under the Convention on the Rights of Persons with Disabilities and Its Impact on International Refugee and Asylum Law’ (2014) 42 *Georgia Journal of International and Comparative Law* 687; Hart, N. and others, ‘Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts’ (2014) 40 *Monash University Law Review* 148.

[387](#) Executive Committee Conclusion No. 110 ([n 378](#)). Note also, the 2016 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, adopted at the World Humanitarian Summit: <http://humanitariandisabilitycharter.org/>. This recognizes ‘the multiple and intersecting forms of discrimination that further exacerbate the exclusion of all

persons with disabilities in situations of risk and humanitarian emergencies ... and regardless of their status, including migrants, refugees or other displaced persons' (para. 1.8). See further, <https://www.un.org/development/desa/disabilities/issues/whs.html>.

³⁸⁸ For more on identifying disability, see Smith-Khan, L. and others, 'To "Promote, Protect and Ensure": Overcoming Obstacles to Identifying Disability in Forced Migration' (2015) 28 *JRS* 38; Crock, M. & Smith-Khan, L., 'Swift and Systematic? Identifying and Recording Disability in Forced Migration', in Altman, B.M., ed., *International Measurement of Disability: Purpose, Method and Application* (2016).

³⁸⁹ See UNHCR, *UNHCR Policy on Age, Gender and Diversity* (Mar. 2018) (n 291); see also, UNHCR, *Working with Persons with Disabilities in Forced Displacement* (2019).

International Cooperation, Protection, and Solutions

‘Protection’ is useful shorthand to describe the complex of obligations derived from general international law and from international refugee and human rights law. ‘Protection’ is often an end in itself, for example, insofar as it can ensure that refugees are not sent back to a risk of serious harm, but it also has a goal beyond that moment, which is a durable solution in which refugees can live in safety and with dignity, not subject to arbitrary expulsion, discrimination, or alienation. ‘Solutions’, in turn, is the overarching objective of the international refugee regime itself, premised upon international cooperation to solve humanitarian problems, which is among the purposes and guiding principles of the United Nations. Translating that principle into concrete action has always been one of the greatest challenges facing States and their institutions, such as UNHCR, even as certain elements of *any* durable solution—such as equality, non-discrimination, or security—remain clearly grounded in the law. The resulting tension between political principle and legal obligation, even mediated by the very purpose of law itself, becomes a source of uncertainty, leaving refugees too often and too long in the limbo of exile. This chapter looks at the rights background which undergirds the situation of the displaced, and then examines the three traditional durable solutions of voluntary repatriation, local integration, and resettlement, alongside labour mobility and other complementary pathways that may secure refugees admission to, and inclusion in, a State.

1. Refugee rights in camps, in settlements, and at large

Refugee camps, settlements, and centres need to be places of safety, which are accessible but also ensure the security of refugees. This means taking account of the possibility of armed attacks, whether from within State territory or outside.¹ Internal policing may also be required, as well as external protection against harassment or forced recruitment,² and with the majority of refugees now living in urban areas, the wider demands of security and non-discrimination may also need to be addressed.³

As a matter of international law, the primary responsibility to ensure and protect the rights of refugees falls on the State where the refugees are present.⁴ The standard of treatment due is to be determined by reference to the State's treaty commitments, including any reservations, and to its obligations in general international law. In practice, however, the rights actually enjoyed may be largely contingent not only on the conditions under which refugees are admitted, but also on the level of international assistance provided by States through UNHCR, other international organizations, and NGOs. In addition, the factual situation may be affected by perceptions as to the final outcome of the refugee movement in question, and whether refugees are expected to be able to return relatively quickly or will be resettled in third States. In the interim, the entitlement of refugees effectively to claim rights which are due in theory is often substantially qualified.

Today, more refugees live in urban areas than in camps,⁵ and the Global Compact on Refugees recognizes the need to adjust the delivery of humanitarian aid accordingly.⁶ UNHCR's 2009 policy on urban refugees is 'based on the principle that the rights of refugees and UNHCR's mandated responsibilities towards them are not affected by their location, the means whereby they arrived in an urban area or their status (or lack thereof) in national legislation'.⁷ However, much is dependent upon host governments, which may deny refugees the right to work, neglect to issue status documents, or provide them at such a high cost that they are difficult to obtain.⁸ Partnerships between UNHCR and local authorities are needed to meet the particular challenges of identifying and assisting refugees in urban areas.⁹ Moreover, a refugee's capacity to claim his or her rights may be equally uncertain in camps or settlements whether they are managed by the government, administered by United Nations agencies such as UNHCR, or 'protected' by peacekeeping forces acting under UN or regional organization authority.

The question of responsibility in such cases is problematic. The State may be primarily responsible in its capacity as territorial sovereign, but its capacity to act with regard to a large refugee community settled in part of its territory, even if only temporarily, may be undermined by a lack of resources; in consequence, it may have delegated responsibility for day-to-day management to UNHCR and simply not be present in the settlements. This raises some critical legal questions, to which ready answers are not yet available. Recent investigative research has nevertheless set the agenda and usefully thrown light on the issues, particularly

so far as they may engage the legal responsibility of international organizations where refugee rights are violated.

As shown above,¹⁰ UNHCR's international personality derives from that of the United Nations itself, but is implicit also in its Statute and in its activities on the international plane. In principle, therefore, it is capable of being bound by human rights obligations, even as States nevertheless retain their own liability.¹¹ As Clapham explains:

[i]nternational organizations are capable of violating international obligations with regard to human rights; and where those organizations remain unaccountable for such violations, states retain their own international obligations to ensure respect for human rights. The acts and omissions of international organizations may thus give rise to both international human rights violations by the organization and, in some circumstances, also for the relevant states. This is so where the 'international organization aids or assists, or directs or controls, a State in the commission of a wrongful act'.¹²

Clapham also shows how general principles of liability have long been accepted in the practice of the UN, particularly in the resolution of claims of a private law character arising in the course of peacekeeping operations. Nevertheless, the UN is 'not a State and does not possess the juridical and administrative powers necessary to independently discharge many of the obligations provided for under international humanitarian law'.¹³ Operations involving UN forces are often the subject of detailed agreements with States, but the situation may well be less clear where a UN agency assumes certain governmental functions over a certain population in a certain territory.

The legal responsibility of UNHCR in camp management situations has been highlighted in a number of analyses, including by Wilde who draws strongly, and by analogy, on the long history of 'international territorial administration'.¹⁴ Whereas earlier criticisms of institutional accountability mechanisms focused on general issues of mandate performance,¹⁵ the more recent approach is very much rights-based and centred on the individual refugee as rights-holder. So far as such analysis draws on direct experience in camps and settlements, it is also anchored in the manifest need of the refugee to have access to an effective remedy, whether the alleged violator of rights is from within the refugee community, an NGO, or an international organization.¹⁶

As Wilde and others have shown, there is no reason in principle why human rights cannot be integrated into any UN or international administration of

territory.¹⁷ Indeed, this was partially achieved in Kosovo,¹⁸ for example, although qualified by certain remaining immunities for military and police officials.¹⁹

Likewise, the work of the International Law Commission (ILC) on the responsibility of international organizations draws closely on the articles already agreed on the responsibility of States.²⁰ The articles adopted in 2011 take the premise of responsibility as a given, and encompass organizations ‘established by treaty or other instrument governed by international law and possessing [their] own international legal personality’.²¹ Articles 6 to 9 set out the principle of attribution in familiar terms, to provide that the ‘conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization’.²² Conduct will continue to be so attributed, even though it ‘exceeds the authority of that organ or agent or contravenes instructions’.²³ The articles provide also for responsibility in connection with the act of a State (or another international organization), for example, where the international organization aids or assists the State in committing an internationally wrongful act, if it ‘does so with knowledge of the circumstances of the internationally wrongful act’, and ‘the act would be internationally wrongful if committed by that organization’.²⁴ The articles also acknowledge the principle that a *State* may be responsible for acts of an international organization, for example, where it has accepted responsibility, or has led the injured party to rely on its responsibility.²⁵

As in the case of State responsibility, the articles contemplate circumstances precluding wrongfulness, such as *force majeure*, where ‘[t]he occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, mak[es] it materially impossible in the circumstances to perform the obligation.’²⁶ One example mentioned during the drafting process was that of a failure by States to pay their contributions, with the consequence that the international organization cannot meet its obligations generally, or in relation to its mandate.²⁷ However, nothing ‘precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law’.²⁸ With crimes against humanity and torture (and direct return to torture also) now recognized as among the body of such norms, any room for manoeuvre or excuses for conduct which might be justified on grounds precluding wrongfulness are clearly constrained for an organization such as UNHCR.

Nevertheless, though welcome as developments towards more accountable international organizations, the articles remain written at a highly theoretical level, being part of the corpus of secondary or framework rules, as distinct from those primary obligations that directly regulate conduct. It may be difficult to see exactly how they will work down to the grass roots, and ensure, among others, that the refugee as rights-holder is assured an effective remedy against any violation. Wilde identifies the issue of responsibility as arising most acutely in the context of so-called ‘development refugee camps’, that is, refugee settlements located in developing States which do not have the capacity to fulfil their protection responsibilities without the assistance of international organizations.²⁹ He argues that in such circumstances, UNHCR acts much as a de facto sovereign, and in an operational context largely divorced from treaty or general rules.³⁰ Taking UNHCR’s sufficient legal personality as a starting point, he considers that human rights law is not only compatible with its mandate, but ‘actually an essential component of the obligation to promote durable solutions’.³¹ First and foremost, this means truly representative systems of consultation, which may be particularly hard to put in place in a first, emergency phase, at least in a formal sense. As Farmer shows, drawing on experience in Guinea, it is difficult to secure local protection whenever refugees do not have a clearly defined and provable status.³² She, too, sees ‘rights-based refuge’ as not yet having succeeded in incorporating basic accountability mechanisms and access to justice, as the violence and violations faced by refugee women clearly show.³³ Although the Guinean government, UNHCR, and NGOs together exercised ‘State-like’ functions, yet they did not do enough and do not coordinate their efforts. For example, UNHCR did not provide adequate ration and identification cards; the government had taken steps to incorporate women’s rights, but many women refugees in particular did not know what had been done or how to access justice; and NGO field offices seemed far less aware of the rights-based approach than were head offices. In each case, ‘all fail[ed] to guard the human rights of women refugees in similar ways: lack of enforcement of laws and policy designed to protect women, limited access to justice, and ineffective accountability mechanisms’.³⁴ Host States cannot alone be responsible for the human rights of refugees, however, and what is needed is a ‘multi-layered accountability system’, with an obligation to promote durable solutions.³⁵ In Farmer’s view, the law to apply is that which would apply to the host State, so far as UNHCR adopts the State’s role towards refugees.³⁶ It is at

the point of implementation and effectiveness, however, that the thesis begins to show its fault lines. It takes little account of the continuing authority of the territorial State, which was nowhere more evident perhaps than in the 1996 ‘returns’ of Rwandans from Tanzania.³⁷ In addition, the language of international human rights instruments is not obviously and automatically applicable to international organizations; not surprisingly, many obligations are framed expressly with the State in mind, with all its powers of police and enforcement. Refugee camps are also commonly in evolution, if not necessarily in a planned way, from emergency reception, shelter, and assistance locations, through to more settled communities of greater or less permanence. Even for the State, in situations that may reasonably be classified as ‘emergency’ at one or other stage, exactly what human rights are due is not always clear.³⁸

This presents its own challenges and functional issues. The *general* obligation of a present and administering international organization to ensure and protect human rights is clear; what is now needed is a more finely tuned approach geared closely to UNHCR, and in the form of an oversight body.³⁹ At the practical level, where refugee lives are lived, more must be done to build capacity and strengthen access to *domestic* courts.⁴⁰ Refugees need a forum in which to bring complaints, while UNHCR operations in turn require separate and independent auditing.⁴¹ Equally, both UNHCR and refugees could benefit from strengthening the capacity of the former to protect the latter, even through the use of local institutions, especially when host States seek to limit rights in situations of mass influx.

In many respects, the analogy with international territorial administration or State-like activity is helpful in understanding just how deeply UNHCR and other actors are embedded in refugees’ daily lives, particularly in camps and settlements. It is clear, too, that the camp environment can foster human rights violations and administration otherwise than in accordance with the rule of law. As Farmer puts it, ‘state-like functioning and ... rights-based rhetoric should be accompanied by refugee-driven accountability mechanisms’.⁴² The basis of obligation, however, can be more simply stated, and resides firstly in the fact, and secondly in the degree, of control;⁴³ in the nature of things, legal responsibility is also unlikely to reside exclusively in the hands of just one party. Moreover, certain functions, such as those of the police and courts, or of discipline or punishment, are inappropriate for international organizations or NGOs, and not necessarily best left in refugees’ own hands, again for want of

representative capacity and overall accountability.⁴⁴ Ensuring responsibility to international human rights standards and holding both organizations and individuals to account is necessarily a multifaceted exercise. Experience nevertheless suggests as a minimum that basic human rights, as well as refugee rights, should be referenced in every UNHCR–State agreement or memorandum of understanding. Depending on the circumstances, consideration should also be given to local justice mechanisms as means of redress, with appropriate international support to strengthen capacity where necessary. Agreements between UNHCR and NGOs or between States and NGOs will likewise need to recall the basic principles of accountability and indicate how complaints are handled and redress is sought.

Where UNHCR itself is allegedly responsible for programmes, policies, or actions that result in violations of refugees' rights, it may not be appropriate in all circumstances to have recourse to legal process, save as a last resort. Depending on the nature of the grievance in question, the general emphasis may be on efficient and effective remedies, perhaps through a permanent 'Refugee and Human Rights Commissioner' or ombudsperson. Again, however, the process must be known and accessible, and the office holder must be clearly independent and impartial, and ideally should also be able to engage in inquiry and investigation on his or her own initiative.

Finally, a welcome and long-overdue move in recent years has been the recognition of the importance of incorporating refugee voices in decision-making and policy processes, nationally, regionally, and internationally. The Global Compact on Refugees expressly encourages a participatory approach, including by 'ensuring the inclusion of [refugees'] perspectives on progress' achieved at the four-yearly Global Refugee Fora.⁴⁵ New refugee-led bodies have been created, such as the Global Refugee-Led Network, which connects refugee-led groups from six regions and aims to enhance inclusion and 'bolster refugees' ability to make meaningful contributions to decision-making processes'.⁴⁶

2. Solutions

A refugee movement necessarily has an international dimension, but neither general international law nor treaty obliges any State to accord durable solutions.⁴⁷ Indeed, some consider such a development undesirable, as tending to relieve the country of origin of its responsibility to establish the conditions

permitting return, while also ‘institutionalizing’ exile at the expense of human rights.⁴⁸ The 1986 General Assembly initiative on cooperation to avert new flows of refugees both reaffirmed ‘the right of refugees to return to their homes in their homelands’, but also the right of those not wishing to return to receive adequate compensation.⁴⁹ The former continues to hold primary position in the hierarchy of solutions, but the right of refugees to compensation still has a fairly weak normative base in international law and, like the putative duty to provide solutions, possibly little to recommend it. The subject of damages for the expulsion of foreign nationals remains contested, notwithstanding a number of positive developments, but is on somewhat firmer ground given the institution of diplomatic protection; it is still controversial,⁵⁰ however, with regard to refugees and there are only few positive precedents.⁵¹ Although the principle of compensating the victims of violations of human rights has much to commend it, introducing a financial substitute for State and community obligations risks lending respectability to ethnic, religious, and ideological cleansing.⁵² As early as 1939, Jennings concluded that refugee-producing States had legal and financial responsibilities to refugee-receiving States, and that conduct resulting in ‘the flooding of other states with refugees’ was illegal and made worse by situations ‘where the refugees are compelled to enter the country of refuge in a destitute condition’.⁵³ While legal theory and practice have still not developed to this point, there is much to commend the argument that receiving States or competent international institutions should be permitted to draw on the assets of refugee-producing States to fund humanitarian assistance programmes and offset other losses incurred.⁵⁴

The fact that, apart from the duty of the State to readmit its nationals, solutions fall generally outside the area of legal obligation, justifies close attention to the policies and positions of States, particularly as revealed in statements in the UNHCR Executive Committee and in their practice. UNHCR’s primary responsibility is to provide international protection to refugees and to seek ‘permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of … refugees, or their assimilation within new national communities’.⁵⁵ It is to provide for protection by, among others, ‘[a]ssisting … efforts to promote voluntary repatriation or assimilation’, and by ‘[p]romoting the admission of refugees, not excluding those in the most destitute categories’; finally, the High Commissioner is authorized to ‘engage in such

additional activities, including repatriation and resettlement’ as the General Assembly may determine.⁵⁶ The latter reference to ‘activities’ supposes an operational dimension to UNHCR which, since the 1960s and early 1970s, has also provided assistance and de facto protection to repatriating refugees and internally displaced persons, and assistance to local populations affected by a refugee influx.

Notwithstanding the weight of rule and principle, UNHCR’s capacity to obtain protection and asylum for refugees is often closely linked to, if not contingent on, its success in promoting solutions.⁵⁷ Evidently, the absence of or failure to provide solutions will have a destabilizing effect on populations, likely leading to further displacement, or to what some States have characterized as irregular movements.⁵⁸

2.1 Local integration

Although there is some authority for the proposition that a recognized refugee has an expectation of ‘asylum’, in the sense of admission to residence,⁵⁹ the practice of States also provides evidence of resistance to local integration, particularly in situations of mass influx. Indeed, this has led some to describe it as the ‘forgotten’,⁶⁰ ‘under-reported’,⁶¹ or ‘evaded’⁶² solution. In essence, it implies the granting to a refugee of ‘some form of durable legal status that allows him or her to remain in the country of asylum on an indefinite basis, and fully to participate in the social, economic, and cultural life of the host community.’⁶³

The UNHCR Executive Committee adopted a Conclusion on Local Integration in 2005, but took the opportunity to reiterate the traditional hierarchy of solutions, when it reaffirmed:

that voluntary repatriation, local integration and resettlement are the traditional durable solutions, and that all remain viable and important responses to refugee situations; *reiterat[ed]* that voluntary repatriation, in safety and dignity, where and when feasible, remains the most preferred solution in the majority of refugee situations; *[and noted]* that a combination of solutions, taking into account the specific circumstances of each refugee situation, can help achieve lasting solutions.⁶⁴

The Executive Committee also emphasized that there is no obligation to accord a solution by way of local integration, even for States party to the relevant refugee instruments. Local integration ‘is a sovereign decision and an option to be exercised by States guided by their treaty obligations and human rights

principles, and that the provisions of this Conclusion are for the guidance of States and UNHCR when local integration is to be considered’.

It is difficult to reconcile the absoluteness of this statement with the obligations which many States have expressly accepted, for example, in articles 2 to 34 of the 1951 Convention and articles II and III of the 1969 OAU Convention. Neither instrument, of course, contains obligations in regard to specific solutions; the OAU Convention comes nearest, so far as States undertake to ‘use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of ... refugees’, and to accord temporary residence where the refugee ‘has not received the right to reside in any country’.⁶⁵ The fact is, however, that the continuing gap between *non-refoulement* and a solution lies very much at the heart of the problems facing the 15.7 million refugees in protracted situations worldwide, who find themselves without any immediate or even medium-term prospect of an end to their plight.⁶⁶

In its 2005 resolution on UNHCR, the General Assembly also endorsed the approach to local integration in terms of ‘a sovereign decision’, even as it acknowledged that allowing local integration contributes to burden- and responsibility-sharing.⁶⁷ This view was echoed in the 2018 Global Compact on Refugees.⁶⁸ The Global Compact further notes that local integration is ‘a dynamic and two-way process’ between refugees and their host society, which in low- and middle-income countries requires additional financial and technical support from the international community.⁶⁹

2.2 Voluntary repatriation

The UNHCR Statute calls upon the High Commissioner to facilitate and to promote voluntary repatriation, consistently described as ‘the preferred solution’ in most refugee situations.⁷⁰ One of the unresolved theoretical paradoxes of UNHCR’s institutional responsibilities is the extent to which its duty to provide international protection pervades the field of cessation of refugee status and voluntary return. Formal categories frequently provide inadequate descriptions of refugee realities, and in practice it is often difficult to be certain whether circumstances have changed to such a degree as to warrant formal termination of refugee status, even supposing that it was ever formally recognized.⁷¹ The assessment of change involves subjective elements of appreciation, in a continuum where the fact of repatriation may be the sufficient *and* necessary condition, bringing the situation or status of the refugee to an end.⁷² Moreover, in

the uncertain and fluid dynamics that characterize mass exodus, this fact of return can itself be an element in the change of circumstances, contributing to the re-emergence or consolidation of stability and to national reconciliation.⁷³

Voluntary repatriation has both institutional and human rights dimensions, and its aim is to restore the rights an individual had in the country of origin prior to being displaced.⁷⁴ Both the facilitation and the promotion of voluntary repatriation fall within the province of UNHCR,⁷⁵ while the right to return to one's own country locates such efforts squarely in a human rights context.⁷⁶ To ignore this dimension and the legal implications arising from the concept of nationality would be to condone exile at the expense of human rights. Voluntary repatriation also involves a dimension of *responsibility*, namely, the responsibility of the international community to find solutions without 'institutionalizing' exile to such a degree that it disregards the interests of individuals and communities.⁷⁷

A particular legal context for protection in repatriation is offered by the 1969 OAU Convention,⁷⁸ which stresses its essentially voluntary character, the importance of country of origin and country of refuge collaboration, of amnesties and non-penalization, as well as assistance to those returning. Because repatriation may itself cause serious practical difficulties, the General Assembly has authorized UNHCR's involvement in rehabilitation and reintegration programmes,⁷⁹ and a fund for durable solutions was at one time proposed, to assist developing countries to meet some of the costs.⁸⁰ A potentially active UNHCR role is anticipated in Executive Committee conclusions adopted in 1980 and 1985, the first of which, closely modelled on the OAU Convention, looks towards *facilitation*, rather than the promotion of return movement.⁸¹ These conclusions recognize that voluntary repatriation is generally the most appropriate solution, while stressing the necessity for arrangements to establish voluntariness in both individual and large-scale movements. Visits to the country of origin by refugees or refugee representatives for the purpose of informing themselves of the situation are seen as useful,⁸² and formal guarantees for the safety of returnees are also called for, together with mechanisms to ensure the dissemination of relevant information.⁸³ The Executive Committee considered that 'UNHCR could appropriately be called upon—with the agreement of the parties concerned—to monitor the situation of returning refugees'.⁸⁴

The Executive Committee looked at voluntary repatriation again in 1985⁸⁵ and 2004.⁸⁶ The right of the individual to return was accepted as a fundamental

premise, but linked to the principle of the free, voluntary, and individual nature of all repatriation movements. This was reiterated again in 2016.⁸⁷ UNHCR's mandate was considered broad enough to enable it to take initiatives, including those which might promote favourable conditions. Some, indeed, considered that UNHCR had a responsibility to begin the dialogue, although others cautioned against its becoming entangled in political issues. UNHCR involvement with returnees was recognized as a legitimate concern, particularly where return takes place under amnesty or similar guarantee, although legal difficulties might arise with the government of the country of origin.⁸⁸

2.2.1 Facilitating and promoting

The duty to provide international protection justifies a cautious distinction between *facilitation* and *promotion*.⁸⁹ The former presupposes an informed and voluntary decision by an individual, while the latter anticipates varying degrees of encouragement by outside bodies. For UNHCR, the principal consideration in a promotion context must be the interests of the refugee, and the protection of his or her rights, security, and welfare.⁹⁰ The individual's right to return stands together with other acquired rights; it does not just become a duty to leave, and a danger in agency-sponsored repatriation operations is that protection ultimately may be compromised. Some critics have challenged UNHCR's role and activities, so far as they appear to support State-inspired policies of 'containment', or promote 'preventive protection' oriented more to reducing admissions and costs, than to ensuring the interests of refugees.⁹¹ The promotion of (voluntary) repatriation by governments is seen as suspect, particularly when presented in the context of 'safe return', rather than on the basis of the voluntary choice of the individual.

UNHCR's protection responsibilities require it to obtain the best available information regarding conditions in the country of origin, and an accurate analysis of the extent to which the causes of flows have modified or ceased. Such information must in turn be shared with refugees and governmental and non-governmental agencies involved, including repatriation commissions and implementing partners. UNHCR's responsibility to provide international protection clearly obliges the Office to refrain from *promotion* where circumstances have not changed, or where instability and insecurity continue;⁹² similarly, UNHCR ought to oversee the application of guarantees or assurances that are integral to the process of return (by being there, by close contact with

returnees and implementing agencies, and by activating regional political and human rights mechanisms); and also to contribute morally and materially to successful reintegration in the national community.⁹³

Countries of origin and countries of asylum may themselves cooperate to facilitate the return of refugees, either with or without UNHCR involvement.⁹⁴ For example, although overtaken by persistent conflict, a 1988 agreement between Afghanistan and Pakistan recognized that all refugees should have the opportunity to return in freedom, free choice of domicile and freedom of movement, the right to work and to participate in civic affairs, and the same rights and privileges as other citizens. Pakistan, in turn, agreed to facilitate ‘voluntary orderly and peaceful repatriation’, and mixed commissions were also to be established.⁹⁵

Although it can provoke logistical demands often difficult to meet, recognizing the primacy of the refugee’s own decision generally makes good sense, even to the extent of *facilitating* repatriation in circumstances which, objectively considered, may be far from ideal.⁹⁶ It often does not matter what UNHCR, NGOs, or even States want; if refugees themselves choose to return, so they will, even to situations that outsiders consider highly insecure and undesirable. The virtue of voluntariness lies in the fact that it is an inherent safeguard against *forced* return, while being one manifestation of the ‘right to return’, to be exercised within a human rights framework, and whether or not Convention refugees in the strict sense are involved. Put another way, voluntariness (the choice of the individual) is justified because in the absence of formal cessation, the refugee is the best judge of when and whether to go back; because it allows for the particular experiences of the individual, such as severe persecution and trauma, to receive due weight; and finally, because there is a value in individual choice. The voluntary character of repatriation is the necessary correlative to the subjective fear which gave rise to flight; willingness to return negates that fear, but it requires equal verification.⁹⁷

Voluntary repatriation will continue as the preferred solution to refugee problems, both as a matter of principle (it reflects the right of the citizen to return), and on the ground of self-interest (most States of refuge prefer to limit their obligations to refugees). The success of voluntary repatriation will depend on political factors, however, including the clearly expressed wish of the country of origin that the refugees should return, and on the personal choice of the refugees themselves. The situation of Rohingya refugees from Myanmar has

long been blighted by the government's evident unwillingness to accept responsibility, let alone establish the conditions which would permit return in safety.⁹⁸ Independence, successful secession, an amnesty, or other change of circumstances may indicate that the basis for a claim to refugee status has been removed, and the State of refuge must decide whether this is a sufficient or necessary reason for requiring the individual to quit national territory. This may be justified, for example, where the period of refuge has been relatively short, or where sheer numbers alone have meant that only temporary protection could be accorded. In other cases, however, the former refugee should benefit from standards generally applicable to resident non-citizens, including respect for any 'acquired right of residence' deriving from lengthy stay, integration, local connections, establishment of business, marriage, and so forth.⁹⁹

2.2.2 Safe return

From having been a description of the preferred consequence or effect of repatriation, the notion of 'safe return' has come to occupy an interim position between the refugee deciding voluntarily to go back home and any other non-national who, having no claim to international protection, faces deportation or is otherwise required to leave.¹⁰⁰ In 1994, the Executive Committee linked temporary protection (admission to safety, respect for basic human rights, protection against *refoulement*) to 'safe return when conditions permit'.¹⁰¹ This reflects States' acceptance of an intermediate category in need of protection, but raises questions as to both the obligation to protect and the modalities governing termination of protection. The former has been considered above, while the latter remains controlled by international law only at its outermost boundary. In particular, although the State remains bound by such provisions as prohibit torture or cruel, inhuman, or degrading treatment, international law, understandably enough, does not prescribe any particular courses of action that States, acting together or in cooperation with organizations such as UNHCR, are expected to take with a view to promoting and ensuring safety.¹⁰²

Increasingly, 'safe return' has become part of the policy thinking of governments, but the central issue in the distinction between voluntary repatriation and safe return is, who decides?¹⁰³ International law provides no clear answers to situations involving large movements of people in flight from complex situations of risk. If the conditions that caused flight have fundamentally changed, the 'refugee' is no longer a 'refugee' and, all things

being equal, can be required to return home like any other foreign national. That a ‘refugee’ may voluntarily repatriate seems to imply a decision to return while the conditions for a well-founded fear of persecution continue to exist. State proponents of ‘safe return’ effectively substitute ‘objective’ (change of) circumstances for the refugee’s subjective assessment, thereby crossing the refugee/non-refugee line. For these reasons, Zieck argues that voluntary repatriation should be ‘reimagined’, such that ‘return would only be an option when there are no valid objections to return anymore in the sense of the definition of refugee’, namely ‘no return of any refugee before the end to their refugee status following the application of the cessation clauses pertaining to changed circumstances in the country of origin’.¹⁰⁴

So far as safe return *may* have a role to play in the construction of policy, its minimum conditions will include a transparent process based on credible information, which involves States, UNHCR as the agent of the interest of the international community,¹⁰⁵ and a representative element from among the refugees or displaced themselves. These or equivalent means seem most likely to ensure that the element of risk is properly appreciated, so reducing the chance of States acting in breach of their protection obligations.

2.3 Resettlement

Resettlement is about refugees moving from a country of first asylum or transit to another, or ‘third’, State. Resettlement policy aims to achieve a variety of objectives, the first and perhaps most fundamental being to provide a durable solution for refugees unable to return home or to remain in their country of immediate refuge.¹⁰⁶ A further goal is to relieve the strain on receiving countries, sometimes in a quantitative way, at other times in a political way, by assisting them in relations with countries of origin. Resettlement is described in the Global Compact on Refugees as ‘a tangible mechanism for burden- and responsibility-sharing and a demonstration of solidarity, allowing States to help share each other’s burdens and reduce the impact of large refugee situations on host countries’.¹⁰⁷ In recent years, some States have additionally portrayed resettlement as a means of ‘reducing the irregular and dangerous routes that are used to obtain ... protection, [and] preventing the smuggling networks to profit from it’.¹⁰⁸ As UNHCR’s Executive Committee has made clear, however, ‘[i]t is important that resettlement not be considered as a quid pro quo for states continuing to accept new arrivals. The meeting of a state’s obligation to provide

asylum should not become dependent upon the provision of resettlement assistance.’¹⁰⁹

Secondary benefits of resettlement include its capacity to engender public support for refugees in the resettlement country;¹¹⁰ the social, economic, and financial contributions made by refugees to that country;¹¹¹ and the significant potential for the development of a resource base for the return of professional and skilled personnel at some future time when repatriation may become viable.

Successive refugee crises around the world have underlined the necessity for States to go beyond financial assistance and to offer resettlement opportunities. This ‘least preferred option’¹¹² may be dictated by a variety of factors, including political, economic, and ethnic pressures on the State of first admission, and concern for the security of the refugees themselves. For example, the representative of Thailand told the General Assembly in 2007 that ‘[w]hile voluntary repatriation, rather than resettlement, should be the preferred solution in dealing with displacement, the international community should share responsibility for providing third-country resettlement where repatriation was not feasible.’¹¹³ States, however, have very different perceptions as to the desirability of various solutions. Broadly, these demonstrate (a) an emphasis on regional responsibility and local integration; (b) an emphasis on global responsibility and a broadening of the resettlement burden; or (c) a resistance to local integration, with a corresponding emphasis on extra-regional resettlement. Certain States have at times expressly undertaken responsibility, as countries of first admission, to accept for local integration a proportion of asylum seekers, provided that other States lighten the burden by offering appropriate resettlement opportunities.¹¹⁴

Not surprisingly, the self-same reasons that may be advanced against resettlement by certain States (for example, their physical, demographic, and socio-economic limitations, together with the potential for ‘culture shock’ and problems of adjustment for resettled refugees), are relied on by other States unwilling to accept refugees for local integration.¹¹⁵ Economic and social problems which are alleged to be caused by large numbers of refugees, in both developing and developed countries,¹¹⁶ as well as political and security factors, can likewise militate against local acceptance.¹¹⁷

At the individual level, however, resettlement can still mean the difference between life and death. Refugees may be denied basic human rights in the country of first refuge; their lives and freedom may be threatened by local elements motivated by racial, religious, or political reasons, or by attacks and

assassinations directed from outside. The authorities, in turn, may be unable or unwilling to offer effective protection and in such circumstances, resettlement becomes not the solution of last resort, but the principal objective.

Given the protective function of resettlement and its contribution towards global responsibility-sharing, UNHCR continually seeks to increase the number of places worldwide, including through ‘expertise and other technical support, twinning projects, human and financial resources for capacity development, and the involvement of relevant stakeholders.’¹¹⁸ In a discussion paper entitled ‘The Strategic Use of Resettlement’, submitted to UNHCR’s Executive Committee in 2003, it was again stressed that ‘voluntary return and repatriation must always be viewed as the preferred durable solution’. This was not only because return ‘signals a positive change in the conditions of the country of origin to the benefit of the refugees returning there, as well as to the benefit of those who never left’, but also because ‘only a minority of the world’s refugees can be expected to secure a durable solution through third country resettlement’.¹¹⁹ The Executive Committee’s 2016 conclusion on international cooperation again called for the ‘further expansion and strategic use of resettlement as an important instrument of protection and of responsibility- and burden-sharing at a global level’.¹²⁰

However, only a small number of countries provide places on a regular basis and regard resettlement as an important and effective means of making concrete the rhetoric of solidarity and cooperation.¹²¹ UNHCR has consistently stressed the need to ‘address the widening gap between the number of refugees in need of resettlement and the places made available by countries around the world’.¹²² Emergency or special resettlement schemes responding to particular humanitarian crises, such as that in Syria in 2015–16, can provide important additional support,¹²³ but they do not displace the need for enhanced, regular schemes. UNHCR has also expressed concern that some States are using resettlement as a migration management tool, thereby further constraining UNHCR’s ability to secure protection for the most vulnerable refugees.¹²⁴

In 2014, as part of so far uncompleted reforms, the European Commission proposed a Regulation on resettlement, to harmonize processes and procedures in the region by introducing ‘common standard procedures and common eligibility criteria and exclusion grounds … as well as a common protection status to be granted to resettled persons’.¹²⁵ If ever adopted,¹²⁶ it is hoped that it would provide for the legal and safe arrival of third-country nationals and stateless persons in need of international protection to the territory of the Member States;

contribute to reducing the risk of large-scale irregular movements of refugees and asylum seekers; and aid international resettlement initiatives.¹²⁷

2.4 Complementary pathways to admission

Complementary pathways to admission refer to the various ways in which governments can facilitate safe outcomes for refugees that go beyond the traditional three durable solutions. In 2016, UNHCR's Executive Committee called on States 'to consider creating, expanding or facilitating access to complementary and sustainable pathways to protection and solutions',¹²⁸ and the Global Compact on Refugees suggested that these might include effective procedures and clear referral pathways for family reunification, private or community sponsorship programmes additional to regular resettlement; humanitarian visas, humanitarian corridors, and other humanitarian admission programmes; educational opportunities through scholarships and student visas; and labour mobility opportunities, particularly for refugees with skills needed in third countries.¹²⁹ While some of these are permanent measures, Hathaway criticizes the fact that others provide only a short-term immigration status 'that clearly only delay[s] rather than actually solve[s] the challenge of finding a durable solution'.¹³⁰

Among these, private or community sponsorship has been used in Canada since 1978 to enable individuals, groups, and institutions (such as schools, universities, churches, and companies) to sponsor refugees for resettlement, in addition to the resettlement places provided by the government. Sponsors agree to provide care, lodging, settlement assistance, and support for the refugee's first year in Canada, or until the refugee becomes self-sufficient (whichever comes first).¹³¹ The scheme is said to 'build powerful bonds between sponsors and refugees; strengthen host communities; and foster positive attitudes towards refugees and resettlement'; in addition, it enables 'relatively early, positive integration and settlement outcomes, thanks in part to the social support [refugees] receive from sponsors'.¹³²

'Protected entry procedures' enable asylum seekers to apply for protection in a safe third country either from within their own State, or in a transit country.¹³³ 'Protected entry procedures' describe any arrangement that enables an individual to approach the diplomatic missions of States abroad and apply for asylum or another form of international protection, and for States to grant an entry permit if the claim warrants it. In the past, a number of European countries allowed

asylum seekers to apply for asylum at embassies abroad, which were either referred back to capitals for decision or in some cases assessed on the spot.¹³⁴ Such practices have fallen out of favour because of the resources required, the potentially large numbers of qualifying applicants, and concerns that applicants may have inferior access to information, legal assistance, appeal processes, and so on.¹³⁵

Less resource-intensive measures falling short of full refugee status determination can still provide important protection safeguards. For example, on a discretionary and exceptional basis, French consulates have issued visas to asylum seekers in crisis zones to enable them to travel to France to apply for protection.¹³⁶ In 2004, the European Commission noted that a protected entry mechanism could be facilitated at the EU level as an ‘emergency strand’ of wider resettlement programmes in order to safeguard immediate and urgent protection needs.¹³⁷ UNHCR welcomed this as something that could ‘strengthen protection and may well complement anti-trafficking and anti-smuggling programmes by enabling refugees to find safety without having to rely on smugglers and traffickers’.¹³⁸ UNHCR acknowledged that such procedures might be useful where resettlement would be ‘too slow or otherwise inappropriate for particularly deserving or urgent cases’, although both the substantive and procedural aspects of the Commission’s proposal required further clarification.¹³⁹

With the influx of Syrian refugees and other groups in search of protection into Europe in 2015–16, protected entry procedures received renewed attention as a means of reducing the need for asylum seekers to undertake dangerous, irregular journeys.¹⁴⁰ In 2015, a coalition of faith-based organizations established Italy’s ‘humanitarian corridors’ initiative, whereby Italian consulates in Lebanon, Morocco, and Ethiopia were authorized to issue a small number of humanitarian visas to people at risk, enabling them to travel safely to Italy to apply for asylum.¹⁴¹ France, Belgium, and Andorra created similar schemes,¹⁴² as did States in a number of other regions. For instance, in September 2013, Brazil introduced a humanitarian visa allowing Syrian asylum seekers to travel safely to Brazil to have their protection claim assessed there;¹⁴³ Argentina also initiated a programme to provide visas to Syrian citizens and their families, and to Palestinians who had been under the protection of UNRWA but were affected by the Syrian conflict.¹⁴⁴ The European Parliament has considered creating a European Humanitarian Visa which would apply through the EU,¹⁴⁵ but given that States on the whole have shown limited interest in developing protected

entry procedures,¹⁴⁶ it remains to be seen whether a formalized, self-standing EU policy is politically feasible.

In 2020, the Grand Chamber of the European Court of Human Rights held that ECHR 50 was not engaged by a Syrian family who had unsuccessfully applied for humanitarian visas at the Belgian consulate in Beirut, Lebanon. The mere fact that the Belgian authorities had made a decision about their entry into Belgian territory was insufficient to bring them within Belgium's territorial jurisdiction (within the meaning of article 1 ECHR 50), and there were no exceptional circumstances that suggested that Belgium was exercising extraterritorial jurisdiction in relation to them.¹⁴⁷

Although not a complete answer for refugees in search of solutions, protected entry procedures provide an important complementary mechanism. With the right political will, they could operate far more systematically and effectively than they do at present.¹⁴⁸

Finally, labour mobility (or labour migration) is sometimes described as a fourth durable solution. It has been suggested as a means of ensuring that refugees have 'enduring access to meaningful rights and sustainable livelihoods',¹⁴⁹ especially for those living in protracted situations who are unable to access other durable solutions. It can provide refugees with a safe and lawful route to economic opportunities elsewhere, thereby enhancing self-sufficiency, reducing aid dependency,¹⁵⁰ and improving their longer-term integration prospects.¹⁵¹ All too frequently, however, refugees are hampered from accessing regular migration pathways on account of visa requirements and fees.

2.5 Assistance and development

A distinction has sometimes been drawn between UNHCR's protection and assistance functions, particularly in light of the additional humanitarian activities periodically entrusted to it. In practice, however, protection and assistance activities have tended to mingle, as programmes were extended beyond local integration, employment, and self-sufficiency projects to cover returnees and the internally displaced as well. There is no necessary, hard, and fast division between the humanitarian role of meeting material needs, and a legal interest in security and welfare; at times a clear rights element may be present, for example in the provision of adequate food.¹⁵²

By 1989, 'refugee aid and development'¹⁵³ had become well established in the relief and assistance vocabulary, as a way of linking refugees and host

communities. Integration programmes and large-scale repatriations almost always involve some sort of contribution to development: from roads, water supplies, and schools, to employment, the provision of seeds, farming equipment, and livestock.¹⁵⁴ Such concerns have more recently been encapsulated in the notion of the ‘humanitarian–development nexus’, which recognizes the links between poverty, conflict, violence, and displacement, and the need for both the humanitarian and the development sectors to work in a more coordinated manner ‘to overcome long-standing attitudinal, institutional, and funding obstacles’.¹⁵⁵ Both sectors acknowledge that a simultaneous response, with a medium-to long-term horizon, is far preferable to an initial humanitarian response followed by a development effort when the situation becomes protracted.¹⁵⁶ This approach seeks to foster economic opportunities for refugees and their host communities, who are regarded as economic agents rather than passive recipients of aid.¹⁵⁷

For agencies such as UNHCR, the question is to determine how far responsibility extends, and to ascertain respective agency competence for promoting conditions conducive to voluntary repatriation or local integration. The 2016 New York Declaration for Refugees and Migrants,¹⁵⁸ together with the Comprehensive Refugee Response Framework (CRRF),¹⁵⁹ provides UNHCR’s framework for pursuing cooperation on its humanitarian–development objectives.¹⁶⁰ It seeks to include a wide range of public and private actors to combine humanitarian and development interventions from the onset of a crisis, and to include refugees in service provision and development plans, while also addressing the longer-term development impacts on host communities.¹⁶¹ The Executive Committee’s 2016 conclusion on international cooperation encourages States to strengthen ‘linkages among stakeholders and between humanitarian and development action, through comprehensive, multi-year, multi-partner strategies, planning and programming, supported by predictable financial assistance’.¹⁶² UNHCR has developed significant partnerships with the World Bank,¹⁶³ the UN Development Programme, the International Labour Organization, and the Organisation for Economic Co-operation and Development, among others, and there has been a ‘programmatic shift towards reinforcing the resilience and self-reliance of refugees and host communities through a more development-oriented approach’.¹⁶⁴ UNHCR’s Executive Committee has also encouraged the ‘mobilization of private sector investment in support of refugee communities and host countries’.¹⁶⁵

3. International cooperation

The general principle of cooperation with respect to people moving across borders flows from the obligations assumed by member States under the Charter of the United Nations, and as members of the international community.¹⁶⁶ Commenting on the typhus epidemic in Poland after the First World War and the resulting need for collective measures, Schwarzenberger observed that '[n]o compulsion exists for a State to join in any such cooperative effort. It is its own self-interest which prompts it to do so.'¹⁶⁷ However, although today the institutions of international cooperation are more comprehensive, more universal, and more firmly established, the underlying truth remains, emphasizing the degree to which cooperation in practice still depends upon the formal consent of States.

The *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* outlines the basic approach:

States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences.¹⁶⁸

The principle of cooperation in the present context reflects recognition of the inherently *international* dimension to the movements of people across borders.

Increasing numbers of refugees notwithstanding, the 1984 United Nations International Conference on Population found 'broad agreement' that through international cooperation within the framework of the UN an attempt should be made to avert the causes of new flows of refugees, with due regard to the principle of non-intervention in the internal affairs of sovereign States. There was nevertheless a 'need for *continuing international cooperation in finding durable solutions ... and for the provision of support and assistance to first countries of asylum*'.¹⁶⁹

The Comprehensive Plan of Action (CPA) on the problems in South-East Asia contemplated measures to deter clandestine departures from the country of origin, including mass media activities and regular consultation between the countries concerned; encouragement of regular departure

(emigration/immigration) programmes; provisions for reception and temporary refuge for new arrivals; regionwide refugee status determination procedures; resettlement undertakings for long-stayers and for new arrivals found to be refugees; and return in safety and dignity for those found not to be in need of international protection. To ensure continued coordination and adaptation, a Steering Committee was established, consisting of representatives of governments making specific commitments under the CPA.¹⁷⁰

The undertakings given on such occasions, considered together with the actions thereafter introduced at the national and regional levels, are thus necessarily elements in the evolution of rules with respect to international cooperation in the relief and resolution of the problems of refugees and the displaced.

One of the most striking instances of a formal obligation to assist featured in article 254 of the 1989 Lomé IV Convention, concluded between the European Community and African, Caribbean, and Pacific (ACP) countries.¹⁷¹ This was succeeded by the 2000 Cotonou Agreement, which was revised in June 2005 and again in June 2010.¹⁷² Article 60(g) declares that financing may include support to, ‘humanitarian and emergency assistance including assistance to refugees and displaced persons, interventions linking short-term relief and rehabilitation with long-term development in crisis or post-crisis situations, and disaster preparedness’. Article 72 lays down the general principle that:

1. Humanitarian, emergency and post-emergency assistance *shall* be provided in situations of crisis. Humanitarian and emergency assistance *shall* aim to save and preserve life and to prevent and relieve human suffering wherever the needs arise. Post-emergency assistance *shall* aim at rehabilitation and linking the short-term relief with longer term development programmes.
2. Situations of crisis, including long-term structural instability or fragility are situations posing a threat to law and order or to the security and safety of individuals, threatening to escalate into armed conflict or to destabilise the country. Situations of crisis may also result from natural disasters, man-made crises such as wars and other conflicts or extraordinary circumstances having comparable effects related, *inter alia*, to climate change, environmental degradation, access to energy and natural resources, or extreme poverty.
3. The humanitarian, emergency and post-emergency assistance *shall* be maintained for as long as necessary to deal with the needs resulting from these situations for the victims, thereby linking relief, rehabilitation and development.¹⁷³

Article 72A further describes the aim of humanitarian and emergency actors as being, among others, to ‘address the needs arising from the displacement of people (refugees, displaced persons and returnees) following natural or man-made disasters so as to meet, for as long as necessary, all the needs of refugees and displaced persons (wherever they may be) and facilitate action for their voluntary repatriation and reintegration in their country of origin’. It adds that: ‘Assistance may be granted to ACP States or regions taking in refugees or returnees to meet acute needs not covered by emergency assistance.’ Examples such as this show States’ recognition of the need to cooperate, in particular, to ensure that movements across borders do not place an undue or disproportionate burden on receiving States. However, article 13 of the 2000 Cotonou Agreement pursues another, and by no means unrelated theme, declaring that migration ‘shall be the subject of an in-depth dialogue within the framework of the ACP–EU Partnership’, and that the parties ‘reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion’. Paragraphs (2) and (3), however, emphasize that the primary focus of this article is on those legally residing or legally employed.

While paragraph (4) puts ‘normalising migratory flows’ into a development context, paragraph (5) targets illegal immigration, prevention, return and readmission.¹⁷⁴ In practice, as a number of non-governmental organizations have pointed out, the ‘dialogue’ seems to have led in particular to the penalization of *emigration*, contrary to article 13(1) of the Universal Declaration of Human Rights.¹⁷⁵

The connection today is probably inescapable and it is reasonable to infer that the emphasis on migration and development will be even stronger in the proposed revision. However, so far as the Cotonou Agreement also focuses on the situation of refugees and others displaced across an international border, it may provide support for the principles of cooperation and solidarity acknowledged, if imperfectly realized, in the Preamble to the 1951 Convention. Despite multiple proposals over time,¹⁷⁶ a mechanism to systematically, equitably, and predictably allocate responsibilities between States at a global level has still not been agreed. A significant level of practical cooperation nevertheless exists, even if material contributions and political or moral support for the displaced waver and formal obligations are elusive.¹⁷⁷ Certainly, the principles of cooperation and international solidarity have been consistently endorsed within the UNHCR’s Executive Committee¹⁷⁸ and the General Assembly, most significantly, in its adoption of the 2016 New York Declaration¹⁷⁹ and the 2018 Global Compacts on refugees and migration.¹⁸⁰

3.1 The New York Declaration and the Global Compacts

In the non-binding New York Declaration, adopted in 2016 as a resolution of the General Assembly, States expressed their profound solidarity with those who are forced to flee; reaffirmed their obligations to fully respect the human rights of refugees and migrants; underlined the centrality of international cooperation to the refugee protection regime; and recognized the burdens that large movements of refugees place on national resources, especially in the case of developing countries. States also agreed to work towards a Global Compact on Refugees, and a Global Compact for Safe, Orderly and Regular Migration, which were drafted over an 18-month period and adopted in late 2018.

The objective of both compacts is to build consensus on principles and practices to improve international cooperation on, and management of, human mobility.¹⁸¹ The Refugee Compact ‘intends to provide a basis for predictable and equitable burden- and responsibility-sharing’,¹⁸² while the Migration Compact

aims to foster ‘international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone’.¹⁸³

3.1.1 Refugee Compact

The Refugee Compact builds on the established legal framework affirmed in the New York Declaration, which stressed that the principle of *non-refoulement* must be upheld and that measures at the border must be ‘without prejudice to the right to seek asylum’,¹⁸⁴ even while acknowledging States’ interests in border control and management. The Refugee Convention and Protocol are acknowledged as ‘the foundation of the international refugee protection regime’,¹⁸⁵ and references to international human rights law and international humanitarian law can be read as a clear commitment to ‘ensure … protection for all who need it’.¹⁸⁶

The Refugee Compact has four overarching goals, namely to: ‘(i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity’.¹⁸⁷ Its focus is on large-scale refugee movements and protracted displacement and it incorporates the CRRF which was included in the New York Declaration. The CRRF and the Compact’s Programme of Action cover reception and admission, as well as support for immediate and ongoing needs (for host countries and communities) and for durable solutions. The CRRF, was piloted from early 2018 onwards in Chad, Djibouti, Ethiopia, Kenya, Rwanda, Uganda, Zambia, Somalia, Belize, Costa Rica, Guatemala, Honduras, Mexico, Panama, and Afghanistan (with Afghanistan also implementing it in relation to returnees).¹⁸⁸

The potential of the Programme of Action resides not so much in States having bound themselves to concrete contributions, as in the *mechanisms* that are proposed—the institutionalization of processes to make burden- and responsibility-sharing more equitable and predictable, including in relation to early warning and preparedness, immediate reception, safety and security, registration and documentation; and in meeting long-term needs, such as education, livelihoods, health, special measures for women and girls, children, adolescents and youth, food security, registration of births, the avoidance of statelessness, and, of course, solutions.

UNHCR has described the Refugee Compact as marking ‘an evolution in governance’ of refugee protection.¹⁸⁹ Whether its objectives can be achieved will depend on whether States are willing to translate their political commitments into

action on the ground. Importantly, both compacts contain concrete frameworks for action to which States can be held to account, at least politically, through new formal review mechanisms. The Refugee Compact establishes the Global Refugee Forum, to be held every four years (from 2019),¹⁹⁰ at which States will be asked to announce concrete pledges and contributions towards the Refugee Compact's objectives, including through financial, material, and technical assistance, resettlement places, and complementary pathways for admission.¹⁹¹ There will also be an interim high-level officials' meetings every two years (from 2021), and new indicators to measure success towards the achievement of the Refugee Compact's four objectives.¹⁹² Assessment will require input from all 'relevant stakeholders',¹⁹³ which must include the voices of refugees and civil society in a truly representative manner.

It is in its apparent lack of firm accountability provisions that the Refugee Compact has been criticized,¹⁹⁴ and for leaving to States individually the opportunity to do what they want, to 'cherry-pick' issues of interest in which to invest resources, rather than contributing generally, on the basis of established need. In this respect, the proposed support model looks little different from the current system of budget building through voluntary contributions. There have long been disparities between what is needed and what is actually forthcoming.

However, the emphasis on multi-stakeholder partnerships and the role proposed for a wider range of stakeholders and funding models takes the Refugee Compact beyond traditional approaches to protection. It draws attention away from humanitarian assistance and on to development assistance. This is critically important, because while humanitarian assistance engages international donors and organizations in what are essentially short-term, self-contained, life-saving operations, with a focus on providing food, water, medication, and shelter, development assistance involves national and local governments, is long term, integrated with national plans and systems, and aims to reduce poverty through job creation, education, and the development of health and related infrastructure. The Refugee Compact aspires to find new ways in which to bring together donors, humanitarian and development agencies, the private sector, civil society, and refugees themselves in order to achieve sustainable outcomes. Certainly, it tends in the right direction—in bridging the humanitarian–development divide, in expanding the constituency of 'stakeholders', in emphasizing resilience and self-reliance for refugees and host communities, and in maintaining a rights focus.

Whether it will turn out to be a watershed in the search for solutions, however, remains to be seen.

3.1.2 Migration Compact

As the first comprehensive global agreement on migration, the Migration Compact is framed as ‘a milestone in the history of the global dialogue and international cooperation on migration’.¹⁹⁵ It seeks to build consensus on principles and practices to improve migration management and the rights of migrants. Like the Refugee Compact, it is not itself legally binding, but it references the existing international legal framework within which State rights may be exercised and duties fulfilled. Accordingly, border management requires due process, protection of human rights, and special attention to the needs of children;¹⁹⁶ immigration detention is subject to due process, must not be arbitrary but based in law, and be necessary and proportionate;¹⁹⁷ and if migrants’ access to basic services is differentiated from that of citizens, it must be based in law and proportionate, and the difference in treatment must pursue a legitimate aim and be consistent with international human rights law.¹⁹⁸ The Migration Compact also endorses fundamental principles of protection, ruling out collective expulsion, and requiring that no one be expelled where ‘there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm’.¹⁹⁹ It seeks to enhance the effectiveness of particular international legal regimes, such as combatting the smuggling and trafficking of people.²⁰⁰

The Migration Compact locates itself centrally in the debate over mobility, poverty, and development, stressing the ideal that migration should be regular and a matter of choice, not desperation.²⁰¹ For this reason, it stresses the importance of minimizing the adverse drivers and structural factors that compel people to leave their homes,²⁰² with efforts linked to the 2030 Agenda for Sustainable Development and initiatives on disaster risk reduction, climate change, violence, the rule of law, and good governance. When people do move, however, those with particular vulnerabilities should be identified,²⁰³ mobility should be linked to decent work,²⁰⁴ discrimination should be eliminated,²⁰⁵ and inclusion and social cohesion should be facilitated and encouraged.²⁰⁶ In addition, migrants and diasporas should be enabled to contribute fully to sustainable development by, among other things, the integration of migration into development planning.²⁰⁷

The Migration Compact affirms the importance of saving lives and establishing coordinated international efforts on missing migrants.²⁰⁸ It underscores the need to manage borders in an integrated, secure, and coordinated manner, ensuring that migrants have proof of legal identity and adequate documentation, and that there are appropriate screening mechanisms in place.²⁰⁹ It addresses the importance of cooperation in the return and readmission of those who do not need international protection, or who do not have any other legal basis to enter and remain.²¹⁰ It encourages the use of flexible pathways for regular migration and recommends the mutual recognition of skills and qualifications.²¹¹

As with the Refugee Compact, the Migration Compact recognizes that such an ambitious agenda will require a ‘whole-of-government’ and ‘whole-of-society’ approach,²¹² in this case bringing in migrants, civil society, migrant and diaspora organizations, faith-based organizations, local organizations and communities, the private sector, trade unions, parliamentarians, national human rights institutions, the Red Cross and Red Crescent movement, academia, the media, and other relevant interest groups.²¹³

In terms of support, monitoring, and review, the agenda calls for a capacity-building mechanism in the UN; a network on migration under the UN Secretary-General to ensure effective and coherent system-wide support to implementation, follow-up, and review; and a formal, periodic review forum.²¹⁴ The Secretary-General is called upon to report biennially to the General Assembly, and the Global Platform on Migration and Development is to provide a platform for implementation, highlighting good practices and innovative approaches.²¹⁵ The necessary progress review is to be State-led, which might appear to suggest a bias towards national policies and decision-making that has long stood in the way of effective international cooperation. Similarly, the High-Level Dialogue on International Migration and Development will be ‘repurposed’ and renamed the ‘International Migration Review Forum’, serving as the intergovernmental global platform meeting every four years from 2022, and charged with producing an ‘inter-governmentally agreed’ Progress Declaration.²¹⁶ The participation of all relevant stakeholders will be a critical element in determining whether goals have been achieved commensurate with principle. As the Migration Compact itself acknowledges, ‘success rests on the mutual trust, determination and solidarity of States to fulfil the [Compact’s] objectives and commitments’, and while it ‘is a milestone’, it is ‘not the end to our efforts’.²¹⁷

National self-interest may yet prevail when States are confronted with displacement at their borders, but national goals will often be best achieved through cooperation with others. The international dimensions to the refugee phenomenon were recognized from the start, when the General Assembly accepted that no State should have to bear responsibility on its own. It took another 70 years for that self-evident truth to be accepted as no less applicable in the context of migration.²¹⁸ Arguably, an emerging principle requires States to cooperate, in accordance with the principles of international solidarity and burden-sharing; to promote solutions, for example, by dealing with causes; and to provide local integration or resettlement for people in distress or who, owing to a well-founded fear of being persecuted for reasons of race, religion, national or ethnic origin, social group, or political opinion, are unable or unwilling to return to their own country.²¹⁹

¹ See Mtango, E.-E., ‘Military and Armed Attacks on Refugee Camps’, in Loescher, G. & Monahan, L., eds., *Refugees and International Relations* (1989) 87.

² The UNHCR Executive Committee first looked at the question of military attacks in 1982, following a number of raids in southern Africa. The debate turned out to be protracted, and controversial, with varying emphasis placed upon the necessity to maintain the civilian and humanitarian character of such camps. For background, see UNHCR, ‘Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere’: EC/SCP/23 (Oct. 1982); *Report of the Sub-Committee*: UN doc. A/AC.96/613 (1982) paras. 12–21; *Report of the 33rd Session* (1982): UN doc. A/AC.96/614, paras. 42(i), 63, 70(3); *Report of the Sub-Committee*: UN doc. A/AC.96/629 (1983) paras. 13–16; *Report of the 34th Session* (1983): UN doc. A/AC.96/631, paras. 93–5, 97(4); *Report by Ambassador Felix Schnyder, ‘Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere’*: EC/SCP/26 (Mar. 1983); also EC/SCP/31 (Aug. 1983); EC/SCP/27 (Jun. 1983); ‘Draft Principles on Military Attacks’: EC/SCP/32 (Sep. 1983); EC/SCP/34 and Add.1 (July 1984); *Report of the Sub-Committee*: UN doc. A/AC.96/649 (1984) and Add.1, paras. 6–13; EC/SCP/38 (1977); *Report of the Sub-Committee*: UN doc. A/AC.96/671 (9 Oct. 1985) paras. 20–6; *Report of the 37th Session* (1986): UN doc. A/AC.96/688 and Corr.1 (1986) para. 129; ‘Note’ on Military and Armed Attacks on Refugee Camps and Settlements: EC/SCP/47 (10 Aug. 1987); *Report of the Sub-Committee*: UN doc. A/AC.96/700 (5 Oct. 1987) paras. 21–30; *Report of the 38th Session*: UN doc. A/AC.96/702 (22 Oct. 1987) para. 206: Executive Committee Conclusion No. 48 (1987) on Military and Armed Attacks on Refugee Camps and Settlements. In its 1988 ‘Note on International Protection’: UN doc. A/AC.96/713, paras. 24–36, UNHCR observed that the effect of the 1987 Conclusion was yet to be felt,

provided statistics of attacks in one African country (para. 28), and suggested various remediable measures, such as relocation (paras. 31–4). See Goodwin-Gill, G. S., ‘Refugee identity and protection’s fading prospect’, in Nicholson, F. & Twomey, P., *Refugee Rights and Realities* (1999) 220.

³ For instance, in 2019, around 700 refugees and asylum seekers camped outside UNHCR’s offices in Pretoria requesting resettlement and protection, in light of increasing hostility and xenophobic attacks in the country: Krige, J. & Panchia, Y., ‘South Africa: Monthlong UNHCR Sit-In Ends in Violent Eviction’ *Al Jazeera* (17 Nov. 2019) <https://www.aljazeera.com/news/2019/11/south-africa-month-long-unhcr-sit-ends-violent-eviction-191117082249020.html>.

⁴ This elementary point of principle now figures regularly in General Assembly resolutions; see, for example, UNGA res. 75/163, ‘Office of the United Nations High Commissioner for Refugees’ (16 Dec. 2020) para. 6.

⁵ In 2018, the proportion of refugees living in urban areas was estimated to be 61 per cent, with Turkey hosting the largest urban refugee population: see UNHCR, *Global Trends: Forced Displacement in 2018* (2019) 56; UNHCR, *Global Trends: Forced Displacement in 2019* (2020). See also (2010) 34 *FMR*, focusing on adaptation to urban displacement; Verdirame, G. & Pobjoy, J. M., ‘The End of Refugee Camps’, in Juss, S. S., ed., *The Ashgate Research Companion to Migration Law, Theory and Policy* (2013); Kagan, M., ‘Why Do We Still Have Refugee Camps?’ UrbanRefugees.org (11 Aug. 2013) <http://www.urban-refugees.org/debate/why-do-we-still-have-refugee-camps/>; Verdirame, G. & Pobjoy, J. M., ‘A Rejoinder’ UrbanRefugees.org (29 Aug. 2013) <http://www.urban-refugees.org/debate/rejoinder/>; Betts, A. and others, ‘Refugee Economies in Uganda: What Difference Does the Self-Reliance Model Make?’ (Refugee Studies Centre, Oxford, 2019).

⁶ See Global Compact on Refugees: UN doc. A/73/12 (Part II) (2 Aug. 2018) paras. 66, 78–9 (also addressing the needs of refugees in rural areas outside of camps). Host cities and municipalities are invited to ‘share good practices and innovative approaches to responses in urban settings’, with the support of UNHCR and other stakeholders: para. 38. The drafting of the Global Compact stimulated the High Commissioner’s Dialogue on Protection Challenges 2018, ‘Protection and solutions in urban settings: engaging with cities’ (18–19 Dec. 2018): see Summary Report <https://www.unhcr.org/en-au/5c76a8964>.

⁷ UNHCR, ‘UNHCR policy on refugee protection and solutions in urban areas’ (Sep. 2009) 3 (‘UNHCR Urban Refugee Policy’). The principal objectives of the policy are ‘to ensure that cities are recognized as legitimate places for refugees to reside and exercise the rights to which they are entitled’ and ‘to maximize the protection space available to urban refugees and the humanitarian organizations that support them’ (5). See also Morand, M. and others, ‘The Implementation of UNHCR’s Policy on Refugee Protection and Solutions in Urban Areas: Global Survey—2012’ (UNHCR Policy Development and Evaluation Service, 2012); UNHCR, ‘UNHCR Policy on Alternatives to Camps’: UNHCR/HCP/2014/9 (22 Jul. 2014) 6 (‘extend[ing] the principal objectives of the urban refugee policy to all operational contexts’); and Crisp, J., ‘Finding Space for Protection: An Inside Account of the Evolution

of UNHCR's Urban Refugee Policy' (2017) 33(1) *Refugee* 87.

⁸ See Buscher, D., 'New Approaches to Urban Refugee Livelihoods' (2011) 28 (2) *Refugee* 17, 19 (on the ability to work and residence permits); and Morand and others (n 7) 20–3 (on documentation) and 35–6 (on countries that do not permit refugees to work or that maintain policies making it difficult to obtain work permits). UNHCR was the primary provider of documentation in nine of the 24 countries surveyed, and its documentation was recognized by authorities in 'about half of those countries': Morand and others (n 7) 20.

⁹ Crisp, J., Morris, T., & Refstie, H., 'Displacement in Urban Areas: New Challenges, New Partnerships' (2012) 36(1) *Disasters* S23, S24–S25, S39. See also Guterres, A., 'Protection Challenges for Persons of Concern in Urban Settings' (2010) 34 *FMR* 8; Morand and others (n 7). UNHCR's 2009 policy notes that an 'appropriate resource base' and 'effective cooperation and support from a wide range of other actors, especially those host governments and city authorities in the developing world that so generously host the growing number of urban refugees' are necessary to meet its objectives: UNHCR Urban Refugee Policy (n 7) 3.

¹⁰ See Ch. 9, s. 1.1.

¹¹ Clapham, A., *Human Rights Obligations of Non-State Actors* (2006) 109, citing the European Court of Human Rights in *Waite and Kennedy v Germany* (2000) 30 EHRR 261, para. 67. See also Report of the International Law Commission, 58th Session (2006): UN doc. A/61/10, 284–6.

¹² Clapham (n 11) 109–10.

¹³ *Ibid.*, 119, quoting UN official Ralph Zacklin.

¹⁴ See Wilde, R., 'Quis custodiet ipsos custodes? Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject to International Human Rights Law' (1998) 1 *Yale Human Rights and Development Law Journal* 107; Wilde, R., 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 *AJIL* 583; Wilde, R., 'The Complex Role of the Legal Adviser When International Organizations Administer Territory' (2001) 95 *American Society of International Law Proceedings* 251; Wilde, R., *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008); Wilde, R., 'Representing International Territorial Administration: A Critique of some Approaches' (2004) 15 *EJIL* 71. See further Verdirame, G., *The UN and Human Rights: Who Guards the Guardians?* (2011); Janmyr, M., *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (2014); Kinchin, N., 'The Implied Human Rights Obligations of UNHCR' (2016) 28 *IJRL* 251; Verdirame, G. & Harrell-Bond, B., *Rights in Exile: Janus-Faced Humanitarianism* (2005); Gilbert, G., 'The Role, Rights and Responsibilities of UNHCR in Situations of Acute Crisis', in Dolgopol, U. & Gardam, J. G., eds., *The Challenge of Conflict: International Law Responds* (2006); Pallis, M., 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 *New York University Journal of International Law and Politics* 869; Stahn, C., 'International Territorial Administration in the former

Yugoslavia: Origins, Development and Challenges Ahead' (2001) 61 *ZaöRV* 107.

¹⁵ For example, with regard to UNHCR's engagement in extra-mandate activities that compromised the right to seek asylum, or where UNHCR appeared to 'promote' the return of refugees to unsafe conditions.

¹⁶ See, for example, Hovell, D., 'Due Process in the United Nations' (2016) 110 *AJIL* 1.

¹⁷ 'International administration of territory does not appear as an end in itself—not international administration of territory for territorial administration's sake—but rather a means to an end, namely, to secure the well-being of the "people" or the "population", and the inhabitants living under the rule of law in a democratic society': *Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Rep. 403, Separate Opinion of Judge Cançado Trindade, 575.

¹⁸ See s. 2, UNMIK Regulation No. 1999/1, as amended by Regulation No. 2000/59, on observance of internationally recognized standards. The Media Appeals Board of Kosovo expressly took into account both ICCPR 66 and ECHR 50, as well as the relevant jurisprudence. UNMIK Regulation No. 2006/12 established the Human Rights Advisory Panel (HRAP) to 'examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of ... human rights' (s. 1.2). Its findings were advisory only. The Panel issued its Final Report in 2016, noting that '[b]y far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel's recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from this activity, as UNMIK failed to ever take any meaningful action in relation to the Panel's recommendations ... Due to UNMIK's failure to follow any of the Panel's recommendations, the HRAP process has obtained no redress for the complainants. As such, they have been victimized twice by UNMIK: by the original human rights violations committed against them and again by receiving no compensation through this process': *The Human Rights Advisory Panel History and Legacy: Kosovo, 2007–2016, Final Report* (30 Jun. 2016) Executive Summary, 17.

¹⁹ Clapham (ⁿ 11) 130–1.

²⁰ On State responsibility, see UNGA res. 56/83 (12 Dec. 2001) Annex. For a detailed analysis of the application of these principles in the context of refugee camps, see Janmyr (ⁿ 14).

²¹ UNGA res. 66/100, 'Responsibility of international organizations', Annex, art. 2; for later developments, see UNGA res. 72/122 (7 Dec. 2017). See generally Boon, K., 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (Spring 2011) 37 *Yale JIL Online* 1.

²² ILC, Draft Articles on the Responsibility of International Organizations, with Commentaries, in *Report of the International Law Commission*, 63rd Session (2011) art. 6.

²³ Ibid., art. 8.

²⁴ Ibid., art. 14 and commentary .

²⁵ Ibid., arts. 58–62 and commentary.

²⁶ Ibid., art. 23 and commentary. See also Janmyr (n 14) 194–5.

²⁷ ‘Fourth Report on Responsibility of International Organizations’, Giorgio Gaja, Special Rapporteur: UN doc. A/CN.4/564 (28 Feb. 2006) para. 31.

²⁸ ILC draft articles (n 22) art. 26 and commentary.

²⁹ Wilde (n 14) 109–10. Janmyr (n 14) describes these as ‘unable or unwilling’ States.

³⁰ Wilde (n 14) 111, 113. See also Janmyr (n 14) Ch. 5; Slaughter, A. & Crisp, J., ‘A Surrogate State? The Role of UNHCR in Protracted Refugee Situations’ *UNHCR New Issues in Refugee Research*, Research Paper No. 168 (2009).

³¹ Wilde (n 14) 118–19.

³² Farmer, A., ‘Refugee Responses, State-Like Behavior, and Accountability for Human Rights Violations: A Case Study of Sexual Violence in Guinea’s Refugee Camps’ (2006) 9 *Yale Human Rights and Development Law Journal* 44.

³³ Ibid., 46.

³⁴ Ibid., 72. Farmer also sees a de facto State quality in the refugee camps: ibid., 72–81, drawing not so much on ‘international territorial administration’, as on Fukuyama’s criteria for determining the strength of a State or State-like institution: Fukuyama, F., *State Building: Governance and World Order in the 21st Century* (2004).

³⁵ Farmer (n 32) 119. The desirability of adopting such an approach as a matter of policy is probably clear, even as one may have reservations about translating UNHCR’s institutional responsibilities (cf. UNHCR Statute, para. 1) into the language of obligation.

³⁶ For (extensive) suggestions as to the applicable law, see ibid., 120.

³⁷ See Ch. 5, s. 2.4.2. By contrast with the instances of international territorial administration detailed in Wilde’s later writings, the territorial State is capable at any moment of resuming control of refugee camps and settlements. Moreover, it is able to, and does, determine the conditions of UNHCR access in a context which may well find the agency anxious to secure presence, if not regardless, then at the price of certain rights. As Türk and Eyster write, ‘UNHCR often ends up in a state substitution role, albeit with inadequate means and no control over areas of state power and governance’: Türk, V. & Eyster, E., ‘Strengthening Accountability in UNHCR’ (2010) 22 *IJRL* 159, 164. UNHCR’s role ‘is to ensure *that governments* take the necessary action to protect refugees within their territory or seeking to enter their territory’: 163 (emphasis added).

³⁸ Verdirame (n 14) 240–1 even goes so far as to suggest that refugee camps are always illegal.

³⁹ Farmer (n 32) 82, 83. See also Türk & Eyster (n 37).

⁴⁰ Legally, art. 16(1) of the 1951 Convention provides that a refugee shall have ‘free access to the courts of law on the territory of all Contracting States’, while art. 16(2) guarantees a habitually resident refugee ‘the same treatment as a national in matters pertaining to access to the Courts’. As a matter of principle, strengthening refugees’ access to

domestic courts has the theoretical advantage of underlining the overall responsibility of the territorial State, while also strengthening the link between international human rights law and national implementation. It also reduces the separation between refugees and host communities which can lead to a loss of accountability. In practice, however, host States may be reluctant to facilitate access to domestic institutions. See da Costa, R., '*The Administration of Justice in Refugee Camps: A Study of Practice*' UNHCR Legal and Protection Policy Research Series, PPLA/2006/01 (Mar. 2006) 6.

⁴¹ At its 51st meeting in June 2011, UNHCR's Standing Committee established the Independent Audit and Oversight Committee 'to serve in an expert advisory capacity to assist the High Commissioner and the Executive Committee in exercising their oversight responsibilities in accordance with relevant best practices, industry standards and the financial and staff regulations and rules applicable to UNHCR': 'Establishment of an Independent Audit and Oversight Committee': EC/62/SC/CRP.24/Rev.2 (2011) para. 1.

⁴² Farmer (n 32) 84.

⁴³ See, for example, *R (Al-Skeini) v Secretary of State for Defence* [2006] 3 WLR 508, [2005] EWCA Civ 1609; *R (Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26; *Al-Skeini v United Kingdom*, App. No. 55721/07 (7 Jul. 2007) (applicants' deceased relatives fell within UK jurisdiction; breach of art. 2 ECHR 50 procedural obligation to investigate).

⁴⁴ For general literature on camp justice, see McConnachie, K., *Governing Refugees: Justice, Order and Legal Pluralism* (2014); da Costa (n 40); Dunlop, E., *The Administration of Justice in Protracted Refugee Situations: A Study of UNHCR's International Obligations* (MSt thesis, University of Oxford, 2012); Griek, I., 'Traditional Systems of Justice in Refugee Camps: The Need for Alternatives' (2006) 27(2) *Refugee Reports* 1.

⁴⁵ Global Compact on Refugees (n 6) para. 106; see also paras. 13, 75, 77.

⁴⁶ Individuals and organizations are invited to pledge to support the meaningful participation of those with lived experience in decisions affecting them Pledges are made in accordance with the commitments in goal 6 of the Grand Bargain (2016). See also Harley, T. & Hobbs, H., 'The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy' (2020) 32 *IJRL* 200; Harley, T., 'Refugee Participation Revisited: The Contributions of Refugees to Early International Refugee Law and Policy' (2021) 40 *RSQ* 5; Betts, A., Pincock, K., & Easton-Calabria, E., 'Refugees as Providers of Protection and Assistance' (Refugee Studies Centre Research in Brief 10, Dec. 2018).

⁴⁷ The traditional three durable solutions are local integration, voluntary repatriation, and resettlement. For a critical overview, see Chimni, B. S., 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) *RSQ* 55. Migration (or mobility) has been posited as a fourth solution (see text to n 149 below); while the Global Compact on Refugees includes 'complementary pathways to admission' as another durable solution, which is now also reflected as a category on UNHCR's website: Global Compact on Refugees (n 6) paras. 94–6; UNHCR, 'Solutions'

<https://www.unhcr.org/en-au/solutions.html>; s. 2.4 below.

⁴⁸ See views expressed by Australia in 1981 on the German Federal Republic's initiative regarding international cooperation to avert new flows of refugees: *Report of Secretary-General*: UN doc. A/36/582 (23 Oct. 1981) 5. Similar sentiments were expressed by other countries, including Belgium (at 9), Egypt (at 15), Qatar (at 36), with varying emphasis depending on each State's perception of the initiative. Cf. Executive Committee Conclusions No. 67 (1991) para. (g)—resettlement ‘only as a last resort’; and No. 68 (1992) para. (s)—voluntary repatriation as ‘the preferred solution’. For later discussion of some of the issues, see Anker, D., Fitzpatrick, J., & Shacknove, A., ‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ (1998) 11 *Harvard Human Rights Journal* 295.

⁴⁹ UNGA res. 35/124 (11 Dec. 1980); UNGA res. 36/148 (16 Dec. 1981). On ‘return’ in the Palestinian context, see Ch. 3, s. 3.2; Ch. 6, s. 1.2.

⁵⁰ Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 278–80. For a discussion of recent jurisprudence, see ILC, Draft Articles on the Expulsion of Aliens, with Commentaries (2014), in particular, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep. 639.

⁵¹ The indemnification of the victims of Nazi persecution by the Federal Republic of Germany is one of the few relevant precedents, as is the payment by the Government of Uganda, through UNHCR, of compensation to ‘Asians of undetermined nationality’ expelled in 1972; Goodwin-Gill (n 50) 216 fn. 1.

⁵² But see Lee, L. T., ‘The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications’ (1993) 6 *JRS* 65; Lee, L. T., ‘The Right to Compensation: Refugees and Countries of Asylum’ (1986) 80 *AJIL* 532; Garry, H. R., ‘The Right to Compensation and Refugee Flows: A “Preventative Mechanism” in International Law?’ (1998) 10 *IJRL* 97; Cantor, D. J., ‘Restitution, Compensation, Satisfaction: Transnational Reparations and Colombia’s Victims’ Law’ *UNHCR New Issues in Refugee Research*, Research Paper No. 215 (2011).

⁵³ Jennings, R. Y., ‘Some International Law Aspects of the Refugee Question’ (1939) 20 *BYIL* 98.

⁵⁴ Goodwin-Gill, G. S. & Can Sazak, S., ‘Footing the Bill: Refugee-Creating States’ Responsibility to Pay’ *Foreign Affairs* (29 Jul. 2015) <https://www.foreignaffairs.com/articles/africa/2015-07-29 footing-bill>.

⁵⁵ Statute, para. 1. UNGA res. 428(V) (14 Dec. 1950), adopting the Statute, also calls upon governments to assist ‘the High Commissioner in his efforts to promote ... voluntary repatriation’. See generally Luca, D., ‘La notion de “solution” au problème des réfugiés’ (1987) 65 *Revue de droit international* 1; Fonteyne, J.-P., ‘Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees’ (1983) 8 *AustYBIL* 162.

⁵⁶ Statute, paras. 8, 9 respectively.

⁵⁷ Cf. Executive Committee General Conclusions on International Protection (1990) para.

20(e); No. 50 (1988) para. 22(e), noting the ‘close nexus between international protection and solutions’. See, more recently, Comprehensive Refugee Response Framework (CRRF) para. 9: Annex 1 to UNGA res. 71/1, ‘New York Declaration for Refugees and Migrants’ (19 Sep. 2016): ‘We recognize that millions of refugees around the world at present have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection. The success of the search for solutions depends in large measure on resolute and sustained international cooperation and support.’

⁵⁸ See Executive Committee Conclusion No. 58 (1989) para. (b), noting that irregular movements are largely due to ‘the absence of educational and employment possibilities and the non-availability of long-term durable solutions by way of voluntary repatriation, local integration and resettlement’.

⁵⁹ Among the most significant provisions of the EU Qualification Directive (original and recast) are art. 13, which provides that ‘Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee’; art. 21, which confirms that ‘Member States shall respect the principle of *non-refoulement* in accordance with their international obligations’; and art. 24(1): ‘As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit’. Effectively, a refugee recognized in the EU now has a ‘right of asylum’.

⁶⁰ Jacobsen, K., ‘The Forgotten Solution: Local Integration for Refugees in Developing Countries’ UNHCR *New Issues in Refugee Research*, Working Paper No. 45 (2001).

⁶¹ Fielden, A., ‘Local Integration: An Under-reported Solution to Protracted Refugee Situations’ UNHCR *New Issues in Refugee Research*, Research Paper No. 158 (2008).

⁶² Hovil, L., ‘Local Integration’, in Fiddian-Qasmiyah, E. and others, eds., *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 488. However, Hovil argues that while local integration is evaded by policymakers, ‘among refugees, it is very much remembered and acted upon’ and is often ‘the most viable’ of the traditional three durable solutions.

⁶³ Hathaway, J. C., *The Rights of Refugees* (2nd edn., 2021) 1206 (fn omitted). Hathaway suggests that ‘the rights which are said to be the hallmarks of the solution of local integration are essentially the same rights which are actually owed during the currency of refugee status itself’ (1207, fn omitted).

⁶⁴ Executive Committee Conclusion No. 104 on Local Integration (2005).

⁶⁵ Art. II(1), (5).

⁶⁶ UNHCR 2020 (n 5) 22. Khan and Ziegler argue that ‘rather than local integration, it is naturalization, coupled with effective State protection, that constitutes a “durable solution” on a par with resettlement and repatriation’, but note the ‘shift away from naturalization’ in State practice: Khan, F. & Ziegler, R., ‘Refugee Naturalization and Integration’, in Costello, C., Foster, M., & McAdam, J., eds., *The Oxford Handbook of International Refugee Law* (2021) 1047 (fns omitted), 1048 (respectively). Hathaway, too, argues that ‘local integration’ has been substituted ‘for the Refugee Convention’s authentic standard of “naturalization” ’:

Hathaway ([n 63](#)) 1129.

⁶⁷ UNGA res. 60/129 (16 Dec. 2005) paras. 15, 16; Mangala Munuma, J., ‘Le partage de la charge des réfugiés quand l’urgence s’impose’ (2001) 113 *RDDE* 183; Noll, G., ‘Prisoners’ Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union’ (1997) 40 *German Yearbook of International Law* 405; Hilbold, P., ‘Quotas as an Instrument of Burden-Sharing in International Refugee Law: The Many Facets of an Instrument Still in the Making’ (2017) 15 *International Journal of Constitutional Law* 1188.

⁶⁸ Global Compact on Refugees ([n 6](#)) paras. 86, 97.

⁶⁹ *Ibid.*, paras. 98, 99.

⁷⁰ *Ibid.*, para. 87, referring also to UNGA res. 72/150 (19 Dec. 2018) para. 39; Executive Committee Conclusions No. 90 (2001) para. (j); No. 101 (2004); No. 40 (1985); Global Compact on Refugees ([n 6](#)) para. 87.

⁷¹ For a critique of the notion of safe return, see Bradley, M., ‘Is Return the Preferred Solution to Refugee Crises?’, in Miller, D. & Straehle, C., eds., *The Political Philosophy of Refuge* (2019); Chimni, B. S., ‘The Meaning of Words and the Role of the UNHCR in Voluntary Repatriation’ (1993) 5 *IJRL* 442; Chimni, B. S., ‘Perspectives on Voluntary Repatriation: A Critical Note’ (1991) 3 *IJRL* 541; Chimni ([n 47](#)); Long, K., *The Point of No Return: Refugees, Rights and Repatriation* (2013). Hathaway argues that in practice, voluntary repatriation ‘has proven dangerously fungible, often legitimating the premature loss of refugee status’: Hathaway ([n 63](#)) 1129, referring to Zieck, M., *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (1997) 119. For Hathaway’s critique, see 1150 ff.; see 327–9 for examples.

⁷² See further Ch. 4, s. 3. Zieck observes that ‘[v]oluntary repatriation is implemented during the time when the refugee is *ex definitio* unrepatriable, and therefore entitled to protection against *refoulement*. Since the refugee is at the material time unrepatriable, it is clear that the decision to exercise the right to return must be a voluntary one.’ See Zieck, M., ‘Reimagining Voluntary Repatriation’, in Costello, Foster, & McAdam ([n 66](#)) 1069 (fn omitted). However, this theoretical approach does not sit easily with the dynamics of a refugee situation.

⁷³ See generally Goodwin-Gill, G. S. ‘Voluntary Repatriation: Legal and Policy Issues’, in Loescher & Monahan ([n 1](#)) 255; Hofmann, R., ‘Voluntary Repatriation and UNHCR’ (1984) 44 *ZaöRV* 327; Barutciski, M., ‘Involuntary Repatriation when Refugee Protection is no longer necessary: Moving forward after the 48th Session of the Executive Committee’ (1998) 10 *IJRL* 236; Hathaway, J. C., ‘The Meaning of Voluntary Repatriation’ (1997) 9 *IJRL* 551; Chetail, V., ‘Voluntary Repatriation in Public International Law: Concepts and Contents’ (2004) 23(3) *RSQ* 1; Wolman, A., ‘Chinese Pressure to Repatriate Asylum Seekers: An International Law Analysis’ (2017) 29 *IJRL* 82; Zieck, M., ‘Voluntary Repatriation: Paradigm, Pitfalls, Progress’ (2004) 23(3) *RSQ* 33; Bradley, M., *Refugee Repatriation: Justice, Responsibility and Redress* (2013); Zieck ([n 72](#)).

⁷⁴ Chetail ([n 73](#)) 31.

⁷⁵ Statute, paras. 1, 8(c); UNGA res. 428(V) (14 Dec. 1950) para. 2(d); Executive Committee General Conclusion on International Protection No. 65 (1991) para. 21(j).

⁷⁶ See UDHR 48, arts. 9, 13(2); ICERD 65, art. 5; ICCPR 66, art. 12; Executive Committee General Conclusion on International Protection No. 74 (1994) para. 19(v); UNGA res. 49/169 (23 Dec. 1994) para. 9. Stavropoulou, M., ‘Bosnia and Herzegovina and the Right to Return in International Law’, in O’Flaherty, M. & Gisvold, G., eds., *Post-War Protection of Human Rights in Bosnia and Herzegovina* (1998) 123; Chetail (n 73) 40; Gilbert, G., ‘The International Law of Voluntary Repatriation’ (2018) <https://www.unhcr.org/en-lk/5ae079557.pdf>. Source countries are sometimes less than enthusiastic about the return of those who have fled, however. When it sought UNHCR’s assistance with repatriation in 1975, the Provisional Revolutionary Government of South Vietnam emphasized that authorization for return fell within the government’s sovereign rights, and that each case would need to be examined: UN doc. A/AC.96/521 (1975) para. 105 (Observer for the Democratic Republic of Vietnam). In 1974, the Chilean government legislated to prohibit the return of Chileans on various grounds, such as national security, and a 1978 amnesty left generally unchanged the legal situation of Chilean exiles wishing to repatriate: UN doc. A/33/331 (1978) para. 433; also E/CN.4/1310, paras. 129–38 (Study of Reported Violations of Human Rights in Chile, Feb. 1979). See also the *Report of the Independent International Fact-Finding Mission on Myanmar*: UN doc. A/HRC/42/50 (2019), esp. paras. 91–4, noting (at para. 92) that the ‘vast majority’ of Rohingya refugees ‘are unlikely to return until and unless the gross violations of international human rights end and the Government of Myanmar implements effective guarantees to acknowledge or recognize their citizenship’.

⁷⁷ On ‘international cooperation’ as a principle of international law, see s. 3. The Global Compact on Refugees (n 6) para. 88 states: ‘the international community as a whole will contribute resources and expertise to support countries of origin, upon their request, to address root causes, to remove obstacles to return, and to enable conditions favourable to voluntary repatriation.’ A number of States have also called for international cooperation to facilitate voluntary repatriation and reintegration (for example, Bangladesh has ‘stressed the importance of translating the burden-sharing principle into concrete financial measures and measures to facilitate repatriation’: UN doc. A/AC.96/SR.689 (7 Oct. 2015) para. 20). For further examples, see Dowd, R. & McAdam, J., ‘International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?’ (2017) 66 *ICLQ* 863, 878–9.

⁷⁸ OAU Convention, art. V.

⁷⁹ See, for example, UNGA resolutions 2956(XXVII) (12 Dec. 1972); 3143(XXVIII) (14 Dec. 1973); 3271(XXIX) (10 Dec. 1974); 3454(XXX) (9 Dec. 1975); 31/35 (30 Nov. 1976); 33/26 (29 Nov. 1978); 34/60 (29 Nov. 1979); 35/41 (25 Nov. 1980); 51/71 (12 Dec. 1996); 52/103 (12 Dec. 1997); 59/172 (20 Dec. 2004); 69/152 (18 Dec. 2014); 69/154 (18 Dec. 2014). See further UNHCR, *Policy Framework and Implementation Strategy: UNHCR’s Role in Support of the Return and Reintegration of Displaced Populations* (Aug. 2008).

⁸⁰ See UN doc. A/AC.96/569 (1979) and summary of debate in the Executive Committee: UN doc. A/AC.96/SR.312, paras. 48–9 (30th Session, 1979); A/AC.96/SR.322, paras. 66–73 and SR.323, paras. 14–36 (31st Session, 1980). Some States feared that UNHCR might become involved in developmental activities better left to other international agencies; see A/AC.96/SR.305, para. 16 and SR.319, para. 25 (statements by the Netherlands representative in 1979 and 1980).

⁸¹ See Executive Committee Conclusion No. 18 (1980); UNHCR, ‘Note on Voluntary Repatriation’: EC/SCP/13 (27 Aug. 1980); *Report of the Sub-Committee*: UN doc. A/AC.96/586 (8 Oct. 1980) paras. 17–29.

⁸² Cf. Executive Committee General Conclusion on International Protection No. 74 (1994) para. 19(v).

⁸³ *Report of the Sub-Committee*: UN doc. A/AC.96/586 (1980) paras. 23–4. The 1979 Arusha Conference on the Situation of Refugees in Africa recommended that appeals for repatriation and related guarantees be made known by every possible means: UN doc. A/AC.96/INF.158 (1979) paras. 3, 4. The importance of adequate information was also recognized in the 1946 IRO Constitution. Annex I: Definitions, Part I, Section C, para. 1.

⁸⁴ Executive Committee Conclusion No. 18 (1980) para. (h).

⁸⁵ See Executive Committee Conclusion No. 40 (1985); UNHCR, ‘Voluntary Repatriation’: EC/SCP/41 (1 Aug. 1985); *Report of the Sub-Committee*: UN doc. A/AC.96/671 (9 Oct. 1985); *Report of the Executive Committee*: UN doc. A/AC.96/673 (22 Oct. 1985) paras. 100–6; and for the summary records of debate, see UN docs. A/AC.96/SR.385–400.

⁸⁶ Executive Committee Conclusion No. 101 on Legal Safety Issues in the Context of [Voluntary Repatriation of Refugees \(2004\)](#).

⁸⁷ Executive Committee Conclusion No. 112 on International Cooperation from a Protection and Solutions Perspective (2016) para. 6. It went on to provide that: ‘voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin, in order not to impede the exercise of the right of refugees to return to their own countries’ (para. 7). On the timing aspect, see Zieck ([n 72](#)) 1069–70; 1072–75.

⁸⁸ In brief, Executive Committee Conclusion No. 40 (1985) also stresses the voluntary and individual character of repatriation and the necessity for it to be carried out in conditions of safety, preferably to the refugee’s former place of residence; emphasizes the inseparability of causes and solutions, and that the primary responsibility of States to create conditions conducive to return; and notes that the UNHCR mandate is broad enough to allow it to promote dialogue, act as intermediary, facilitate communication, and actively pursue return in appropriate circumstances.

⁸⁹ Cf. Executive Committee General Conclusion on International Protection No. 74 (1994) para. (y), underscoring UNHCR’s role in ‘promoting, facilitating, and coordinating voluntary repatriation … including ensuring that international protection continues to be

extended to those in need until such time as they can return in safety and dignity'.

⁹⁰ Ibid., para. 19(ii), endorsing the High Commissioner's efforts with respect to reducing or eliminating the threat of landmines.

⁹¹ Zieck also critiques the notion of return in situations where the life or physical integrity of refugees in the country of asylum is threatened, such that return is the safer option, on the basis that this involves an unacceptable trade-off between protection and solutions: Zieck ([n 73](#)) 40, in response to UNHCR Global Consultations on International Protection, 'Voluntary Repatriation': EC/GC/02/5 (25 Apr. 2002) para. 29.

⁹² The issue of coercion and pressure to return calls for close monitoring, and was central to the controversy that surrounded the second phase of repatriation from Djibouti to Ethiopia in 1986 and 1987; see Goodwin-Gill ([n 73](#)) 255, 277–80. See also with respect to Bangladesh and Myanmar, Médecins sans Frontières/Artsen zonder Grenzen, 'Awareness Survey: Rohingya Refugee Camps, Cox's Bazar District, Bangladesh, 15 March 1995' (1995); and for States' comments: UN doc. A/AC.96/SR.473 (1992) para. 32 (Australia); SR.476, paras. 45–51 (Bangladesh); SR.477, paras. 12–15 (Myanmar).

⁹³ Cf. Executive Committee General Conclusion on International Protection No. 65 (1991) para. 21(j), urging States, among others, to allow their citizens to return 'in safety and dignity to their homes without harassment, arbitrary detention or physical threats'.

⁹⁴ At times, UNHCR may enter into a tripartite repatriation agreement with the country of origin and the country of asylum: see, for example, Global Compact on Refugees ([n 6](#)) para. 88; UNHCR, *Handbook: Voluntary Repatriation: International Protection* (1996).

⁹⁵ See Bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Voluntary Return of Refugees (1988) 27 *ILM* 585; also Afghanistan–Pakistan–Union of Soviet Socialist Republics–United States: Accords on the Peaceful Resolution of the Situation in Afghanistan (1988) 27 *ILM* 577, 585. Cf. US Committee for Refugees, 'Left out in the Cold: The perilous homecoming of Afghan refugees' (Dec. 1992). For other examples of agreements touching on the repatriation of refugees, see India–Sri Lanka: Agreement to Establish Peace and Normalcy in Sri Lanka, Colombo (1987) 26 *ILM* 1175; South Africa–UNHCR, Memorandum of Understanding on the Voluntary Repatriation and Reintegration of South African Returnees (1992) 31 *ILM* 522.

⁹⁶ See Executive Committee Conclusion No. 40 (1985) para. (h), recognizing the importance of 'spontaneous return'.

⁹⁷ See Goodwin-Gill ([n 73](#)) 255, where these ideas are developed more fully, with illustrations from a number of repatriation programmes. From a practical perspective, establishing the views of large numbers of refugees can pose problems of logistics and principle, touching issues of information and representative (or not) decision-making. Furthermore, the ideal presented here is often at risk in practice, for example, through inadequately monitored and verified programmes of so-called assisted voluntary return, which States may contract out to organizations outside the protection framework. See, for example, Gordon, M., 'The Boat that Changed it All' *Sydney Morning Herald* (20 Aug.

2011) <https://www.smh.com.au/national/the-boat-that-changed-it-all-20110819-1j2o2.html>; Holmes, O. & Doherty, B., ‘Australia offers to pay Rohingya refugees to return to Myanmar’ *Guardian* (18 Sep. 2017) <https://www.theguardian.com/world/2017/sep/19/australia-offers-pay-rohingya-refugees-return-myanmar>.

⁹⁸ See also the *Report of the Independent International Fact-Finding Mission on Myanmar* ([n 76](#)); Robertson, P., ‘Two Years On: No Home for the Rohingya’ Human Rights Watch (28 Aug. 2019) <https://www.hrw.org/news/2019/08/28/two-years-no-home-rohingya>; Beech, H., ‘Massacred at Home, in Misery Abroad, 730,000 Rohingya Are Mired in Hopelessness’ *New York Times* (22 Aug. 2019) <https://www.nytimes.com/2019/08/22/world/asia/rohingya-myanmar-repatriation.html>.

⁹⁹ See further [Ch. 11](#), s. 5.2.

¹⁰⁰ See also [n 71](#) above.

¹⁰¹ Executive Committee General Conclusion on International Protection No. 74 (1994) paras. 19(r), (u).

¹⁰² Cf. the potential (but out of context) implications for ‘safe return’ arguments of the House of Lords’ reasoning on ‘internal flight’ and refugee status in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 WLR 397.

¹⁰³ Durieux, J.-F. & Hurwitz, A., ‘How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees’ (2005) 47 *German Yearbook of International Law* 105, 154–5.

¹⁰⁴ Zieck ([n 72](#)) 1078.

¹⁰⁵ Executive Committee General Conclusion on International Protection No. 74 (1994) para. 19(u) calls on UNHCR, among other matters, to provide guidance on the implementation of temporary protection, ‘including advice ... on safe return once the need for international protection has ceased’.

¹⁰⁶ See generally Executive Committee Conclusions No. 22 (1981) paras. (3), (4); No. 67 (1991); No. 79 (1996) paras. (q)–(t); No. 85 (1998) paras. (gg)–(jj); No. 90 (2001) paras. (j)–(n); No. 99 (2004) paras. (r), (v), (x); No. 100 (2004) para. (m); No. 102 (2005) para. (s); No. 105 (2006) para. (p)(ii); No. 107 (2007) para. (h)(xviii); No. 108 (2008) paras. (o)–(q); No. 109 (2009) paras. (g)(iii), (i); No. 112 (2016) para. 10; UNHCR, *UNHCR Resettlement Handbook* (2011).

¹⁰⁷ Global Compact on Refugees ([n 6](#)) para. 90. For a particularly coherent account of resettlement policy from the perspective of UNHCR, see Troeller, G. G., ‘UNHCR Resettlement as an Instrument of International Protection’ (1991) 3 *IJRL* 564; also, Bach, R. L., ‘Third Country Resettlement’, in Loescher & Monahan ([n 1](#)) 313; Salomon, K., *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (1991) Ch. 5; van Selm, J., ‘Refugee Resettlement’, in Fiddian-Qasmiyah and others ([n 62](#)); Kneebone, S. & Macklin, A., ‘Resettlement’, in Costello, Foster, & McAdam ([n 66](#)).

¹⁰⁸ Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation

(EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final—2016/0225 (COD).

¹⁰⁹ UNHCR, ‘The Strategic Use of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement)’: EC/53/SC/CRP.10/Add. 1 (3 Jun. 2003) para. 22. In accordance with para. 91 of the Global Compact on Refugees ([n 6](#)), UNHCR developed ‘The Three-Year (2019–2021) Strategy on Resettlement and Complementary Pathways’ (Jun. 2019). Hathaway writes: ‘This use of resettlement as a means to avoid the duty to receive refugees arriving at a state’s territory—exercising discretion rather than honoring obligations—is very, very different from the concept of resettlement as understood and advocated by the drafters of the Refugee Convention’: Hathaway ([n 63](#)) 1194 (fn omitted).

¹¹⁰ UNHCR, ‘The Strategic Use of Resettlement’ ([n 109](#)) para. 4; see also [UNHCR, UNHCR Resettlement Handbook](#) ([n 106](#)) 4.

¹¹¹ UNHCR, ‘The Strategic Use of Resettlement’ ([n 109](#)).

¹¹² ‘Least preferred’ by whom?

¹¹³ UNGAOR, Third Committee, 70th session, 41st Meeting: UN doc. A/C.3/70/SR.41 (4 Nov. 2015) para. 58 (Thailand). See additional examples in Dowd & McAdam ([n 77](#)) 877–8.

¹¹⁴ This view has been expressed by Australia and adopted in regard to refugees disembarked on its shores after rescue at sea. In the Executive Committee, Australia has also stated that ‘the burden of resettling refugees and displaced persons should not be restricted to a small group of wealthy countries’: UN doc. A/AC.96/SR.680 (1 Oct. 2014) para. 6.

¹¹⁵ See, for example, the views expressed by the Netherlands: UN doc. A/AC.96/SR.295 (1978) para. 2 and by UNHCR: UN doc. A/AC.96/SR.299 (1978) para. 13; see also UN doc. A/AC.96/SR.618 (2008) para. 46 (Islamic Republic of Iran); UN doc. A /C.3/66/SR.38 (2011) para. 21 (Kenya). On problems of adjustment faced by resettled refugees, see Chan, K. B. & Indra, D. M., eds., *Uprooting, Loss and Adaptation: The Resettlement of Indo-Chinese Refugees in Canada* (1987); Beach, H. & Ragvald, L., *A New Wave on the Northern Shore: The Indochinese Refugees in Sweden* (1982); Bartolomei, L., Eckert, R., & Pittaway, E., ‘“What Happens There ... Follows Us Here”: Resettled but Still at Risk: Refugee Women and Girls in Australia’ (2014) 30(2) *Refugee* 45; Fifth Seminar on Adaptation and Integration of Permanent Immigrants, Geneva (6–10 Apr. 1981) (1981) 19 *International Migration* 1; Rutledge, P. J., *The Vietnamese Experience in America* (1992).

¹¹⁶ See statements by Austria: UN doc. A/AC.96/SR.296 (1978) para. 1, SR.300 (1979) para. 29, and SR.325 (1980) paras. 46–7; and by Italy: SR.307 (1979) para. 48. On occasion, a commitment to resettlement has also been linked to attempts to ‘cap’ the numbers of spontaneous asylum seekers (see proposals by Denmark: UN doc. A/AC.96/SR.432 (1988) paras. 7–16); Australia’s resettlement programme operates in this way: McAdam, J. & Chong, F., *Refugee Rights and Policy Wrongs: A Frank, Up-to-Date Guide by Experts* (2019) 63–5.

¹¹⁷ These factors have been stressed repeatedly by first refuge countries; see statements by Djibouti: UN doc. A/AC.96/SR.307 (1979) para. 63 and SR.319 (1980) para. 54; Malaysia:

SR.306 (1979) para. 81; and Indonesia: SR.308 (1979) para. 42. The settlement problems of refugees may be further exacerbated by the break-up of families; see Executive Committee Conclusion No. 24 (1981) para. 7 on tracing and family reunion. Family unity and the right to respect for family life and to protection of the family are recognized in most human rights instruments; see UDHR 48, art. 16(3); ICCPR 66, arts. 17, 23; ECHR 50, art. 8; see also Recommendation B, Final Act of the 1951 Convention. The Indo-China refugee problem highlighted the need to take account of traditional extended family relationships; incorporating recognition of such relationships in resettlement programmes can in turn cause problems, however, especially where other migrant groups perceive themselves disadvantaged by comparison.

¹¹⁸ Global Compact on Refugees ([n 6](#)) para. 91. As part of the Global Compact, UNHCR devised a three-year strategy (2019–21) to this end. See also the New York Declaration ([n 57](#)), in which States note that they ‘intend’ to expand the number and range of legal pathways available to refugees, ‘urge’ States that do not have resettlement programmes to establish them and encourage others to expand them, and will ‘consider’ expanding complementary admission pathways: paras. 77–9. Similar provisions are reflected in the CRRF ([n 57](#)) paras. 14–16.

¹¹⁹ UNHCR, ‘The Strategic Use of Resettlement’ ([n 109](#)) para. 5. See also ‘Resettlement as an Instrument of Protection: Traditional Problems in achieving this Durable Solution and New Directions in the 1990s’: EC/SCP/65 (9 Jul. 1991).

¹²⁰ Executive Committee Conclusion No. 112 (2016) para. 10.

¹²¹ See UNGA res. 73/151 (17 Dec. 2018) para. 53, recognizing ‘the need to further increase the number of resettlement places and the number of countries with regular resettlement programmes’. In 2018, UNHCR submitted resettlement cases to 29 States globally: UNHCR, ‘UNHCR Projected Global Resettlement Needs 2020’ (Jul. 2019) 12. UNHCR’s Three-Year Strategy aims in part to encourage more countries to participate in resettlement and to scale up resettlement programmes: UNHCR, ‘The Three-Year Strategy’ ([n 109](#)) 10. The United States’ annual intake of refugees was seriously reduced in the aftermath of the events of 11 September 2001, and from 2017, it was taken to its lowest level ever by the Trump Administration.

¹²² See, for example, Volker Türk (Assistant High Commissioner for Protection), Statement to the 69th Session of the Executive Committee of the High Commissioner’s Programme (4 Oct. 2018) (fn omitted). Only around 35 States offer resettlement places annually, and the overall number was affected significantly by the US’s reduction of the number of places offered under the Trump Administration: Hirschfeld Davis, J., ‘Trump to Cap Refugees Allowed into U.S. at 30,000, a Record Low’ *New York Times* (17 Sep. 2018) <https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html>; cf. The White House, ‘Fact Sheet on the Leaders’ Summit on Refugees’ (20 Sep. 2016) <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees>.

¹²³ Wood, T. & Higgins, C., *Special Humanitarian Intakes: Enhancing Protection through Targeted Refugee Resettlement* (Kaldor Centre for International Refugee Law, Policy Brief 7, Dec. 2018); Global Compact on Refugees ([n 6](#)) para. 92; UNHCR, ‘Resettlement and Other Admission Pathways for Syrian Refugees’ (30 Apr. 2017) <https://www.refworld.org/docid/59786cf14.html>.

¹²⁴ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/1178 (4 Jul. 2018) para. 51.

¹²⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM/2016/0468 final—2016/0225 (COD) recital (11) Concerns have been expressed about ‘two different and conflicting approaches’ to the regulation’s primary aim: ‘as a humanitarian pathway for the most vulnerable or as a migration management tool’: Bamberg, K., ‘The EU Resettlement Framework: From a Humanitarian Pathway to a Migration Management Tool?’, Discussion Paper, European Migration and Diversity Programme (26 Jun. 2018) 3. In 2003, UNHCR’s Executive Committee noted that ‘[c]ollective decision-making, particularly by states in geographic proximity’, would help to avoid abuses of the system such as repeat asylum claims and forum shopping: UNHCR, ‘The Strategic Use of Resettlement’ ([n 109](#)) para. 28. While resettlement is generally envisaged as a solution for individuals, Executive Committee Conclusion No. 109 (2009) para. (g) mentions the potential for ‘a group resettlement referral methodology’ in protracted refugee situations.

¹²⁶ As at May 2021, reforms were stalled: European Parliament, ‘Legislative Train: Towards a New Policy on Migration: EU Resettlement Framework’ (05. 2021).

¹²⁷ Proposal ([n 125](#)) art. 3. In 2017, the CJEU upheld a decision by the Council of the EU to relocate 120,000 people in clear need of international protection from Italy and Greece to other EU Member States, over a two-year period (pursuant to Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, OJ L 248/80): see Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* (CJEU, 6 Sep. 2017). Infringement procedures were launched against the Czech Republic, Hungary, and Poland for remaining in breach of their obligations: European Commission, ‘Relocation: Commission Launches Infringement Procedures against the Czech Republic, Hungary and Poland’ Press release (14 Jun. 2017).

¹²⁸ Executive Committee Conclusion No. 112 (2016) para. 11.

¹²⁹ Global Compact on Refugees ([n 6](#)) paras. 94, 95; see also New York Declaration ([n 57](#)) para. 79. See also OECD & UNHCR, ‘Safe Pathways for Refugees: OECD–UNHCR Study on Third Country Solutions for Refugees: Family Reunification, Study Programmes and Labour Mobility’ (2018); UNHCR, ‘The Three-Year Strategy’ ([n 109](#)): ‘These new approaches would not replace resettlement, but rather add to the pool of possible solutions on offer, as we need to preserve resettlement as a critical tool for protecting the most

vulnerable': Assistant High Commissioner for Protection ([n 122](#)). See also Wood, T., *The Role of 'Complementary Pathways' in Refugee Protection* (Kaldor Centre for International Refugee Law, Nov. 2020); Wood & Higgins ([n 123](#)); Gilbert, G. & Rüsch, A. M., *Creating Safe Zones and Safe Corridors in Conflict* (Kaldor Centre for International Refugee Law, Policy Brief 5, Jun. 2017). On in-country processing, which allows would-be refugees to apply for protection within their own country, see Higgins, C., 'Complementary Pathways: Protected Entry Procedures' (Kaldor Centre for International Refugee Law, Research Brief, last updated Mar. 2021); Higgins, C., *Safe Journeys and Sound Policy: Expanding Protected Entry for Refugees* (Kaldor Centre for International Refugee Law, Policy Brief 8, Nov. 2019).

¹³⁰ Hathaway ([n 63](#)) 1129.

¹³¹ Government of Canada, 'Private Sponsorship of Refugees Program' <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program/section-2.html>.

¹³² Global Refugee Sponsorship Initiative, 'Community Sponsorship' <http://refugeesponsorship.org/community-sponsorship>. In 2016, Canada and UNHCR created the Global Refugee Sponsorship Initiative to encourage other countries to devise similar programmes: <http://refugeesponsorship.org/>. In recent years, the United Kingdom, New Zealand, and Australia have established sponsorship programmes, although each operates differently and on a much smaller scale than the Canadian model. In 2018, UNHCR created a Division of Resilience and Solutions to strengthen the organization's engagement in pursuing solutions, including through collaboration with development partners: UNHCR, 'Note on International Protection': UN doc. A/AC.96/1178 (4 Jul. 2018) para. 43. See special volume on private sponsorship: (2019) 35(2) *Refuge*; also Labman, S. & Pearlman, M., 'Blending, Bargaining, and Burden-Sharing: Canada's Resettlement Programs' (2018) 19 *Journal of International Migration and Integration* 439.

¹³³ See also [Ch. 8](#).

¹³⁴ For example, at times Austria, Denmark, France, the Netherlands, Spain, Switzerland, and the United Kingdom had formalized procedures in place, based on the legacy of protective passports from the 1940s. Switzerland was the last of these countries to abolish its protected entry procedures (in 2012), but it does offer a limited humanitarian visa for people still within their country who are in imminent and serious danger of bodily harm: Swiss State Secretariat of Migration, 'FAQ: Frequently Asked Questions': <https://www.sem.admin.ch/sem/en/home/themen/einreise/faq.html>. See generally Noll, G., 'From "Protective Passports" to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate', *UNHCR New Issues in Refugee Research*, Working Paper No. 99 (2003); Noll, G., 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 *IJRL* 542; Noll, G., Fagerlund, J., & Liebaut, F., *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (2002); Gatrell, P., 'The Nansen Passport: The Innovative Response to the Refugee Crisis that Followed the Russian Revolution' *The Conversation* (6 Nov. 2017); European Council on

Refugees and Exiles (ECRE), *Protection in Europe: Safe and Legal Access Channels* (Feb. 2017) <https://www.ecre.org/wp-content/uploads/2017/04/Policy-Papers-01.pdf>; Higgins (n 129). On humanitarian visas, see Iben Jensen, U., *Humanitarian Visas: Option or Obligation?* Study for the LIBE Committee, European Parliament Directorate General for Internal Policies (2014)

[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU\(2014\)509986](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986)

¹³⁵ Noll, Fagerlund, & Liebaut (n 134) 84; Gammeltoft-Hansen, T. & Gammeltoft-Hansen, H., ‘The Right to Seek—Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) 10 *EJML* 439, 456–7.

¹³⁶ Beneficiaries of this mechanism have included victims of the Haiti earthquake, Iraqi Christians, and Syrians: European Union Agency for Fundamental Rights, *Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox* (FRA Focus Document, Feb. 2015) 10 http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf. Additionally, France enabled Syrians to travel to France to apply for asylum: UNHCR, ‘Finding Solutions for Syrian Refugees: Resettlement and Other Forms of Admission of Syrian Refugees’ (27 Nov. 2014) 1 ANSA, ‘Thousands of Migrants Arrived through Humanitarian Corridors’ *InfoMigrants* (10 Jan. 2019).

¹³⁷ Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: ‘Improving Access to Durable Solutions’, COM(2004) 410 final (4 Jun. 2004) para. 35.

¹³⁸ UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/989 (7 Jul. 2004) para. 31. See also UNHCR, ‘Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers, Convention Plus Issues Paper, FORUM/CG/SM/03 (11 Mar. 2004) para. 16. In 2006, Human Rights Watch encouraged EU Member States to ‘[i]mmediately implement “protected entry procedures” through embassies in Tripoli and resettle refugees [from Libya] identified by UNHCR as being in need of resettlement’, noting that this should be done ‘only as a supplement’ rather than as an alternative to allowing asylum seekers arriving spontaneously access to EU territory and asylum procedures: *Human Rights Watch, Stemming the Flow: Abuses against Migrants, Asylum Seekers and Refugees* (Sep. 2006) HRW Index No. E1805, section XI.

¹³⁹ UNHCR, ‘Observations on the European Commission Communication “On the Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions” (COM(2004) 410 final, 4 June 2004)’ (30 Aug. 2004) para. 11.

¹⁴⁰ See, for example, European Union Agency for Fundamental Rights (n 136); European Commission, Recommendation on legal pathways to protection in the EU: Promoting resettlement, humanitarian admission and other complementary pathways, C(2020) 6467 (23 Sept. 2020); European Parliament, Joint Motion for a Resolution on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies 2015/2660(RSP) (28 Apr. 2015);

Orchard, C. & Miller, A., ‘Protection in Europe for Refugees from Syria’ (Refugee Studies Centre, Forced Migration Policy Briefing 10, Sep. 2014); McAdam, J., *Extraterritorial Processing in Europe: Is ‘Regional Protection’ the Answer, and If Not, What Is?* (Kaldor Centre for International Refugee Law, Policy Brief 1, May 2015); Costello, C., ‘Welcome to the European Union: Notes from Lesbos’ *openDemocracy* (9 Sep. 2015); Betts, A., ‘Our Refugee System Is Failing: Here’s How We Can Fix It’ (TED Talk transcript, Mar. 2016); Noll, G. & Gammeltoft-Hansen, T., ‘Humanitarian Visas Key to Improving Europe’s Migration Crisis’ (Apr. 2016) <https://rwi.lu.se/app/uploads/2016/04/Humanitarian-Visas-policy-brief.pdf>.

¹⁴¹ A pilot programme between 2015 and 2017 enabled almost 1,000 people to enter Italy this way. Sant’Egidio, ‘Humanitarian Corridors for Refugees’ <https://www.santegidio.org/>; ECRE, ‘Humanitarian Corridors for Vulnerable Refugees to Italy Opening’ *Reliefweb* (23 Feb. 2018); Higgins, C., ‘Humanitarian Corridors: Safe Passage but Only for a Few’ *The Interpreter* (4 Aug. 2017).

¹⁴² These programmes, together with Italy’s humanitarian corridors, facilitated travel for 2,200 Syrian refugees in 2018: ANSA ([n 136](#)).

¹⁴³ Baloch, B., ‘UN Refugee Agency Welcomes Brazil Announcement of Humanitarian Visas for Syrians’ *UNHCR News* (27 Sep. 2013); Jubilut, L. L., Muiños de Andrade, C. S., & de Lima Madureira, A., ‘Humanitarian Visas: Building on Brazil’s Experience’ (2016) 53 *FMR* 76; Higgins ([n 129](#)). In a 2016 document, UNHCR referred to humanitarian visa programmes by Argentina, Brazil, France, and Switzerland. It is unclear whether these related to new schemes, or simply collated existing/past practices: UNHCR, *Global Responsibility Sharing through Pathways for Admission of Syrian Refugees* (2016) 8.

¹⁴⁴ Joint Press Release on Visit of the President of the Argentine Republic to the EU Institutions (4 Jul. 2016) para. 2; Law No. 25.871, art. 22(c) and its Regulatory Decree. Beneficiaries receive an entry visa temporary residence for two years, which can be renewed for a further year. After three years’ residence, beneficiaries may request permanent residence in accordance with Argentinian law.

¹⁴⁵ Higgins, C., ‘How a Visa for Asylum Seekers Could Grant Safe Passage to Europe’ *Refugees Deeply* (18 Jan. 2019); European Parliament, ‘Humanitarian Visas to Avoid Deaths and Improve Management of Refugee Flows’, Press release (11 Dec. 2018).

¹⁴⁶ For instance, at a high-level meeting held by UNHCR in 2016, specifically designed to secure additional and safer protection pathways for Syrian refugees, France was the only country that agreed to issue new humanitarian visas (1,500); Switzerland, Argentina, and Brazil affirmed their existing humanitarian visa commitments: UNHCR, ‘Summary of Key Outcomes: 30 March 2016 High Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees’ (14 Apr. 2016).

¹⁴⁷ *MN v Belgium*, App. No. 3599/18 (5 May 2020) paras. 112–3.

¹⁴⁸ Diedring, M., Secretary General, ECRE, ‘Legal Routes to Access Asylum in Europe Workshop’ Paper presented at the *An Open and Safe Europe—What Next?* Conference,

Brussels (30 Jan. 2014) 2 http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/docs/diedring_speaking_en.pdf; see also House of Lords European Union Committee, *Handling EU Asylum Claims: New Approaches Examined* (HL Paper 74, 11th Report of Session 2003–04) para. 89.

¹⁴⁹ Long, K. & Crisp, J., ‘Migration, Mobility and Solutions: An Evolving Perspective’ (2010) 35 *FMR* 56, 56; Long, K., ‘Rethinking “Durable” Solutions’, in Fiddian-Qasmiyah and others (n 62) 480; Long, K., ‘Extending Protection? Labour Migration and Durable Solutions for Refugees’ *UNHCR New Issues in Refugee Research*, Research Paper No. 176 (2009); Long, K., ‘Onward Migration’ and Atak, I. & Crépeau, F., ‘Refugees as Migrants’, in Costello, Foster, & McAdam (n 66). See also s. 2.4 above.

¹⁵⁰ Long, K., *From Refugee to Migrant? Labor Mobility’s Protection Potential* (Migration Policy Institute, 2015) 1, 16–17. For instance, free movement protocols agreed by the Economic Community of West African States (ECOWAS) have given residual refugee populations greater socio-economic mobility and political security: Long & Crisp (n 149) 57 (fn omitted). In 2009, an agreement between Nigeria, Liberia, Sierra Leone, and UNHCR facilitated the issue of passports by Liberia and Sierra Leone to refugees still in Nigeria; Nigeria then granted the refugees three-year renewable ECOWAS residence permits. See further Long, *ibid*, 9. See also ‘Labour Mobility for Refugees: Past and Present Examples’ (7 Sep. 2012) prepared for UNHCR/ILO, ‘Labour Mobility for Refugees Workshop’, Geneva (11–12 Sep. 2012) <https://www.unhcr.org/509a82ba9.html>.

¹⁵¹ ‘Summary Conclusions’ from UNHCR/ILO (n 150) para. 5.

¹⁵² See ICESCR 66, arts. 2, 11 and the emphasis on international cooperation. See generally Alston, P. & Tomasevski, K., eds., *The Right to Food* (1984); De Schutter, O. & Cordes, K. Y., eds., *Accounting for Hunger: The Right to Food in the Era of Globalisation* (2011); and reports of the Special Rapporteur on the Right to Food.

¹⁵³ The terminology has now changed to ‘DAR’—Development Assistance for Refugees; see *UNHCR Agenda for Protection*, Goal 5. See, for example, Betts, A., ‘Development Assistance and Refugees: Towards a North–South Grand Bargain?’ (Forced Migration Policy Briefing No. 2, Refugee Studies Centre, Oxford, Jun. 2009); Crisp, J., ‘Mind the Gap! UNHCR, Humanitarian Assistance and the Development Process’, *UNHCR New Issues in Refugee Research*, Working Paper No. 43 (2001). See also the work of the Global Forum on Migration and Development (created in 2007), and the High-Level Dialogue on International Migration and Development (created in 2006).

¹⁵⁴ For some historical examples, see the third edition of this work, Ch. 9, s. 3.4.

¹⁵⁵ UN Office for the Coordination of Humanitarian Affairs, *New Way of Working* (2017) 3. See also World Bank Group, ‘Forced Displacement and Development’ (16 Apr. 2016) <http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23713856/DC2016-0002-FDD.pdf>. The Grand Bargain—an agreement between some of the largest donors and aid organizations—seeks to enhance engagement between humanitarian and development actors by ‘working collaboratively across institutional boundaries on the basis of comparative

¹⁵⁶ World Bank Group ([n 155](#)) 5.

¹⁵⁷ *Ibid.*, 6. See also World Bank Group, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts* (2017), written in close collaboration with UNHCR; Betts and others ([n 5](#)).

¹⁵⁸ New York Declaration ([n 57](#)) esp. para. 37.

¹⁵⁹ CRRF ([n 57](#)) paras. 8, 9–12.

¹⁶⁰ UNHCR, ‘Strengthening humanitarian–development cooperation in forced displacement situations’: EC/68/SC/CRP.17 (7 Jun. 2017) paras. 6, 14, 15; see also the CRRF ([n 57](#)) paras. 8, 9–12.

¹⁶¹ UNHCR ([n 160](#)) para. 15. See also Executive Committee Conclusion No. 112 (2016) paras. 9, 12.

¹⁶² Executive Committee Conclusion No. 112 (2016) para. 12.

¹⁶³ For example, the World Bank’s IDA18 Regional Sub-Window for Refugees and Host Communities provided US\$2 billion in grants and concessional loans to low-income countries to help meet the development needs of refugees and host communities, the central idea being to bridge the longstanding gap between humanitarian assistance and development assistance. Within this initiative, parties agreed on a set of mutually reinforcing commitments (resources, policy changes, projects), under host country leadership and with a focus on outcomes. Eligibility was dependent on the country in question: (1) hosting at least 25,000 refugees (or 0.1 per cent of its population); (2) having an adequate framework for refugee protection; and (3) having an action plan or strategy with concrete steps, including possible policy reforms for long-term solutions that benefit refugees and host communities (for example, measures as policies to promote social and economic inclusion, freedom of movement, labour force participation, and so on). Nine countries were found to be eligible under the IDA18 ‘sub-window’: Bangladesh, Cameroon, Chad, Djibouti, Ethiopia, Niger, Pakistan, Republic of Congo, and Uganda; Goodwin-Gill, G. S., ‘The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region’ (2018) 30 *IJRL* 674.

¹⁶⁴ UNHCR ([n 160](#)) para. 18; see also paras. 12, 19, 20 for details of partnerships, as well as the Transitional Solutions Initiative between UNHCR, UNDP, and the World Bank.

¹⁶⁵ Executive Committee Conclusion No. 112 (2016) para. 13.

¹⁶⁶ UN Charter, arts. 1, 13(1)(b), 55, 56.

¹⁶⁷ Schwarzenberger, G., *Power Politics* (2nd rev. edn., 1954) 228. Self-interest can nevertheless be a powerful force; see [Ch. 2](#), on responses to the 1921–22 famine and epidemics in Russia.

¹⁶⁸ See UNGA res. 2625(XXV) (24 Oct. 1970) Annex, Principle (d): The duty of States to

cooperate with one another in accordance with the Charter. The resolution, which ‘approves the Declaration’, was adopted without a vote.

¹⁶⁹ 1984 United Nations International Conference on Population, Recommendation 47: UNHCR, *Note on the United Nations International Conference on Population*: UN doc. A/AC.96/INF.170 (3 Sep. 1984) (emphasis added).

¹⁷⁰ Cf. Statement of the Fourth Steering Committee: Reaffirmation of the Comprehensive Plan of Action (1991) 3 *IJRL* 367.

¹⁷¹ For text, see (1990) 29 *ILM* 783.

¹⁷² 2000/483/EC: Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part. The Cotonou Agreement was due to expire in December 2020; negotiations for its replacement began in mid-2018 and concluded successfully in April 2021. The Cotonou Agreement’s provisions have been extended until 30 November 2021. (unless the new partnership agreement is provisionally applied or enters into force before that date).

¹⁷³ Emphasis added.

¹⁷⁴ Nevertheless, the parties undertake ‘to ensure that the rights and dignity of individuals are respected’ in any procedure for the return of illegal immigrants, and that any relevant bilateral agreements should be concluded, ‘with due regard for the relevant rules of international law’: 2000 Cotonou Agreement., art. 13(5)(c).

¹⁷⁵ See Rodier, C., ‘“Emigration illégale”: une notion à bannir’ *Libération* (13 juin 2006); see also, Statewatch, ‘The fallacies of the EU-Africa dialogue on immigration: EU-African ministerial conference on immigration, 10–11 July 2006’.

¹⁷⁶ See, for example, Schuck, P. H., ‘Refugee Burden-Sharing: A Modest Proposal’ (1997) 22 *Yale Journal of International Law* 243; Hathaway, J. C. & Neve, R. A., ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115; Aleinikoff, T. A. & Cliffe, S., ‘A Global Action Platform and Fund for Forced Migrants: A Proposal’ *Netzwerk Flüchtlingsforschung* (25 Jul. 2016); Wall, P., ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 29 *IJRL* 201; Cook, B., ‘Method in Its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market’ (2004) 19 *Georgetown Immigration Law Journal* 333, 347 ff.; Kritzman-Amir, T., ‘Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law’ (2009) 34 *Brooklyn Journal of International Law* 355. UNHCR, ‘Summary of Key Outcomes: 30 March 2016 High Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees’ (14 Apr. 2016). Over the previous three years, such meetings secured offers of more than 201,000 places for Syrian refugees: Türk, V., ‘Prospects for Responsibility Sharing in the Refugee Context’ (2016) 4 *Journal on Migration and Human Security* 45, 56. For more details of responsibility-sharing efforts, see UNHCR, ‘Note on International Protection’: UN

doc. A/AC.96/1156 (12 Jul. 2016) paras. 8–9.

¹⁷⁷ Morris, N., ‘Refugees: Facing Crisis in the 1990s—A Personal View from within UNHCR’ (1990) 2 *IJRL Special Issue* 38; also, Guest, I., ‘The United Nations, the UNHCR, and Refugee Protection—A Non-Specialist Analysis’ (1991) 3 *IJRL* 585; Gottwald, M., ‘Burden Sharing and Refugee Protection’, in Fiddian-Qasmiyah and others (n 62); Türk (n 176); Garlick, M., ‘The Sharing of Responsibilities for the International Protection of Refugees’, in Costello, Foster, & McAdam (n 66); Türk, V. & Garlick, M., ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28 *IJRL* 656; Inder, C., ‘The Origins of “Burden Sharing” in the Contemporary Refugee Protection Regime’ (2017) 29 *IJRL* 523; Türk, V., ‘The Promise and Potential of the Global Compact on Refugees’ (2018) 30 *IJRL* 575; see also (2018) 30(4) *IJRL*, focused on the Global Compacts.

¹⁷⁸ See Executive Committee Conclusion No. 112 (2016); also the detailed discussion in Dowd & McAdam (n 77).

¹⁷⁹ New York Declaration (n 57).

¹⁸⁰ Global Compact on Refugees (n 6); Global Compact for Safe, Orderly and Regular Migration: UN doc. A/RES/73/195 (19 Dec. 2018). For academic analysis of both documents, see (2018) 30(4) *IJRL*.

¹⁸¹ With regard to their scope/complementarity, see McAdam, J. & Wood, T., ‘The Concept of “International Protection” in the Global Compacts on Refugees and Migration’ (2021) 23 *Interventions: International Journal of Postcolonial Studies* 191; Garlick, M. & Inder, C., ‘Protection of Refugees and Migrants in the Era of the Global Compacts: Ensuring Support and Avoiding Gaps’ (2021) 23 *Interventions: International Journal of Postcolonial Studies* 207.

¹⁸² Global Compact on Refugees (n 6) para. 3. The document was originally intended to be the Global Compact on *Responsibility Sharing* for Refugees, reinforcing ‘the centrality of the principle of responsibility-sharing in ensuring effective refugee protection’: Zero Draft of a Global Compact on Responsibility Sharing for Refugees, attachment to a letter from the co-facilitators of the UN summit, Her Excellency Dina Kawar, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations and His Excellency David Donoghue, Permanent Representative of Ireland to the United Nations to all Permanent Representatives and Permanent Observers to the United Nations (30 Jun. 2016) para. 6 <http://www.unhcr.org/events/conferences/578369114/zero-draft-global-compact-responsibility-sharing-refugees.html>. For discussion, see Dowd & McAdam (n 77).

¹⁸³ Global Compact for Migration (n 180) para. 8.

¹⁸⁴ New York Declaration (n 57) para. 27.

¹⁸⁵ Ibid., para. 65.

¹⁸⁶ Ibid., para. 66.

¹⁸⁷ Global Compact on Refugees (n 6), para. 7.

¹⁸⁸ UNHCR, ‘Report of the Seventy-Third Meeting of the Standing Committee (19–20

September 2018)’: UN doc. A/AC.96/1185 (1 Oct. 2018) paras. 41–6.

¹⁸⁹ Assistant High Commissioner for Protection ([n 122](#)).

¹⁹⁰ Triggs, G. D. & Wall, P., ‘“The Makings of a Success”: The Global Compact on Refugees and the Inaugural Global Refugee Forum’ (2020) 32 *IJRL* 283.

¹⁹¹ Global Compact on Refugees ([n 6](#)) paras. 17–18, 103.

¹⁹² Ibid., paras. 19, 102, 104.

¹⁹³ Ibid., para. 17.

¹⁹⁴ See, for example, Hathaway, J. C., ‘The Global Cop-Out on Refugees’ (2018) 30 *IJRL* 591; Aleinikoff, T. A., ‘The Unfinished Work of the Global Compact on Refugees’ (2018) 30 *IJRL* 611; Chimni, B. S., ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2018) 30 *IJRL* 630.

¹⁹⁵ Global Compact for Migration ([n 180](#)) preambular para. 6.

¹⁹⁶ Ibid., Objective 11.

¹⁹⁷ Ibid., Objective 13.

¹⁹⁸ Ibid., Objective 15.

¹⁹⁹ Ibid., Objective 21, para. 37.

²⁰⁰ Ibid., Objectives 9, 10.

²⁰¹ Ibid., para. 13.

²⁰² Ibid., Objective 2.

²⁰³ Ibid., Objective 7.

²⁰⁴ Ibid., Objective 6.

²⁰⁵ Ibid., Objective 17.

²⁰⁶ Ibid., Objective 16.

²⁰⁷ Ibid., Objective 19.

²⁰⁸ Ibid., Objective 8.

²⁰⁹ Ibid., Objectives 4, 11, 12.

²¹⁰ Ibid., Objective 21.

²¹¹ Ibid., Objectives 5, 18.

²¹² Ibid., para. 15.

²¹³ Ibid., para. 44.

²¹⁴ Ibid., paras. 14, 43, 45, 49.

²¹⁵ Ibid., paras. 46, 47.

²¹⁶ Ibid., para. 49.

²¹⁷ Ibid., para. 14.

²¹⁸ Compare UNGA res. 8(I) ‘Question of refugees’ (12 Dec. 1946) para. (c)(i) (recommending to ECOSOC that it take into account the principle that the refugee problem ‘is international in scope and nature’), and New York Declaration ([n 57](#)) para. 7, noting that,

with regard to large movements of refugees and migrants, '[n]o one State can manage such movements on its own'.

²¹⁹ For an alternative approach to international mobility, see the Model International Mobility Convention <https://mobilityconvention.columbia.edu/about>.

Treaty Standards and their Implementation in National Law

The main treaties governing the status and treatment of refugees have attracted wide, if not universal, acceptance, although they do not in fact either comprehend every refugee known to the world, or, in many cases, offer any but the most basic guarantees. Nevertheless, both the 1951 Convention and the 1967 Protocol are widely accepted; for those found to qualify, the benefits for which they call are often improved upon in actual practice, and supplemented substantially or filled out by the provisions of regional and related instruments. The Convention and the Protocol represent a point of departure in considering the appropriate standard of treatment of refugees, often exceeded, but still at base proclaiming the fundamental principles of protection, without which no refugee can hope to attain a satisfactory and lasting solution to his or her plight. The present chapter briefly examines the provisions of these and related agreements, with a view to determining the appropriate convention standards of treatment applicable to refugees and asylum seekers, whether lawfully or unlawfully in the territory of Contracting States.¹

1. The 1951 Convention and the 1967 Protocol relating to the Status of Refugees

The importance of the 1951 Convention as a statement of the minimum rights of refugees has been stressed repeatedly in the preceding chapters. Time has shown its provisions to be inadequate to deal with certain aspects of today's refugee problems,² but its principal objective was always the regulation of issues of legal status and treatment, rather than the grand design of universally acceptable solutions. The Convention has its origin in the Cold War climate of the late 1940s and early 1950s, when concern centred on refugees in Europe, and where there was already some knowledge and experience of what refugees needed if they were to settle successfully in their country of residence. The European flavour of many of the provisions can be readily understood when it is realized that of the 26 States which participated in drafting and adopting the Convention, 17 were from Europe and four more of a Western European/North American

disposition.³ What is remarkable is that the 1951 Convention still attracts both ratifications and support among States from all regions.

By resolution 429(V) of 14 December 1950, the United Nations General Assembly decided to convene a Conference of Plenipotentiaries to draft and sign a convention on refugees and stateless persons; it duly met in July 1951, but was able only to complete its work with regard to the former.⁴ The Conference took as its basis for discussion a draft prepared by the *Ad hoc Committee on Refugees and Stateless Persons*, adopted at its second session in Geneva in August 1950,⁵ save that the Preamble was that adopted by the Economic and Social Council,⁶ while article 1 was as recommended by the General Assembly and annexed to resolution 429(V). The Conference also unanimously adopted five recommendations covering travel documents, family unity, non-governmental organizations, asylum, and application of the Convention beyond its contractual scope.

As noted in Chapter 2, article 1 limited the definition of refugees by reference not only to a well-founded fear of being persecuted, but also to a dateline (those resulting from ‘events occurring before 1 January 1951’), and offered States the option of further restricting their obligations to refugees resulting from events occurring *in Europe* before the critical date. Much has been made of this option, but its purport is often overexaggerated.⁷ The principal object of the 1967 Protocol was to remove the stipulative date, but the geographical option remains.⁸ For the sake of convenience the 1967 Protocol has been referred to as ‘amending’ the 1951 Convention; in fact, it does no such thing. The Protocol is an independent instrument, not a revision within the meaning of article 45 of the Convention.⁹ States parties to the Protocol, which can be ratified or acceded to by a State without becoming a party to the Convention,¹⁰ simply agree to apply articles 2 to 34 of the Convention to refugees defined in article 1 thereof, as if the dateline were omitted.¹¹ While reservations are generally permitted under both instruments,¹² the integrity of certain articles is absolutely protected, including articles 1 (definition); 3 (non-discrimination), 4 (religion), 16(1) (access to courts), and 33 (*non-refoulement*).¹³ A number of reservations have also been of doubtful validity, and in 2007, Guatemala withdrew those to which other States had objected because of their breadth and references to domestic law.¹⁴

1.1 Required standards of treatment

As was the case with some of the inter-war arrangements,¹⁵ the objective of the 1951 Convention and the 1967 Protocol is both to establish certain fundamental rights, such as *non-refoulement*, and to prescribe certain standards of treatment. The refugee may be stateless and therefore, as a matter of law, unable to secure the benefits accorded to nationals of his or her country of origin. Alternatively, even if nationality is retained, the refugee's unprotected status can make obtaining such benefits a practical impossibility. The Convention consequently proposes, as a minimum standard, that refugees should receive at least that treatment which is accorded to aliens generally.¹⁶ Most-favoured-nation treatment¹⁷ is called for in respect of the right of association (article 15),¹⁸ and the right to engage in wage-earning employment (article 17(1)). The latter has always been of major importance to the refugee in search of an effective solution,¹⁹ but it is also the provision which has attracted most reservations. Many States have thus emphasized that the reference to most-favoured-nation shall not be interpreted as entitling refugees to the benefit of special or regional customs, or economic or political agreements.²⁰ Other States have expressly rejected most-favoured-nation treatment, limiting their obligation to accord only that standard applicable to aliens generally,²¹ while some view article 17 merely as a recommendation,²² or agree to apply it 'so far as the law allows'.²³

National treatment, finally, is to be granted in respect of a wide variety of matters, including the freedom to practise religion and as regards the religious education of children (article 4); the protection of artistic rights and industrial property (article 14); access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings (*cautio judicatum solvi*) (article 16);²⁴ rationing (article 20); elementary education (article 22(1)),²⁵ public relief (article 23);²⁶ labour legislation and social security (article 24(1));²⁷ and fiscal charges (article 29).

1.1.1 Equality of treatment, employment, and social benefits

Fridtjof Nansen, the first League of Nations High Commissioner for refugees, recognized that getting refugees into employment was critically important, both to relieve the costs otherwise falling on the public purse, and for the sake of human dignity. Equality of treatment with nationals was always the goal, but despite the oft repeated hope that restrictions would not be applied 'in all their severity' to resident refugees and stateless persons,²⁸ protecting the local labour market tended to prevail. This approach continued into the first draft of the

Refugee Convention,²⁹ although France's proposal for a somewhat more liberal standard—most-favoured-nation treatment for 'regularly resident' refugees—met with general agreement.³⁰ The *Ad hoc* Committee was of the view that equal treatment with nationals was a step too far,³¹ and although the US representative, Mr Henkin, thought that 'without the right to work all other rights were meaningless', he recognized that the situation and the perception could be different in other countries.³²

Yugoslavia formally proposed national treatment at the 1951 Conference,³³ but most States still opposed the idea, and even the High Commissioner thought it might generate hostility towards refugees. The drafters refused to commit to more than 'sympathetic consideration' to granting the same right to work to refugees as to their own nationals, and the suggested amendment was defeated.³⁴

Restrictive policies persist and are often justified today, not just on protectionist grounds, but on account of the perception that allowing refugees and asylum seekers to work will lead to ties with the local community and make their subsequent removal that much harder.³⁵ Even though refugees and asylum seekers would contribute to the domestic economy, translating this into policy and practice remains elusive. Within the EU, article 29 of the Qualification Directive (recast) settles the issue in the case of recognized refugees, but others, including asylum seekers, can still be denied the right to work.

In 2017, the Irish Supreme Court found, as a matter of constitutional law, that the non-citizen and the citizen alike may indeed be entitled, through the principle of equality before the law, to invoke personal rights, such as the right to work (or more accurately, the right to seek work).³⁶ Under the Refugee Act 1996,³⁷ asylum seekers faced a blanket ban on employment which could hardly be justified in the case of Irish citizens. The question was, in the words of O'Donnell J, 'whether the right is in essence social, and tied to the civil society in which citizens live', such as voting, 'or whether the right protects something that goes to the essence of human personality so that to deny it would be to fail to recognize their essential equality as human persons'.³⁸ States are certainly competent to regulate the access of non-citizens to the labour market, but the right to work is linked to the dignity, freedom and personality of the individual, and that implies certain boundaries.³⁹ The question then is whether the differences between citizens and non-citizens permitted differential treatment, and although policy might justify certain limitations, an absolute ban could not be upheld, particularly where there was no limit to the time during which an

asylum claim might be processed.⁴⁰ Although doctrinally important on several fronts, the judgment left room for limits,⁴¹ and, notwithstanding the principle of equality before the law, asylum seekers still have only a qualified path to employment.⁴²

That principle nevertheless arises directly with respect to public relief, further to article 23 of the Convention.⁴³ Austria's 2005 Asylum Law linked the grant of refugee status to a 'temporary' right of residence valid for three years initially, which could be extended indefinitely if withdrawal proceedings were not initiated in the meantime. As a consequence, refugees with permanent residence were treated equally with nationals, while those with so-called temporary residence, even though they had 'asylum', received only minimum subsistence benefits. This distinction was challenged, a reference was made to the CJEU, and that Court affirmed the general rule of equal treatment without exception.⁴⁴ Entitlement to social security depended on refugee status, not on the issue or validity of a residence permit, or on any supposed distinction between recently arrived refugees and those who had resided longer.⁴⁵ Only objective differences might justify differential treatment, and limiting support for the recently arrived was hardly an appropriate response.⁴⁶

When applied to the interpretation of Convention articles in context, the principle of equal treatment can potentially move protection standards forward and towards the goal of successful settlement and integration. Even where the principle has constitutional status, the path is unlikely to be easy, and although there may indeed be a right to work on a basis of equality, it is not one that can be clearly derived from the Convention alone.⁴⁷

1.2 Standards applicable to refugees as refugees

Although the stipulative provisions of article 1 are excluded from reservation, three States have made declarations which may affect claims to refugee status. The Netherlands, for example, declared on ratification that Ambonese transported to that country after 17 December 1949 (the date of Indonesia's accession to independence) were not considered eligible for refugee status. Turkey, on the other hand, stated on signature that it considered the Convention should apply also to 'Bulgarian refugees of Turkish extraction ... who, being unable to enter Turkey, might seek refuge on the territory of another Contracting State'.⁴⁸ Somalia, somewhat portentously, declared that its accession to the Convention was not to be construed so as to prejudice or adversely affect 'the

national status or political aspiration of displaced people from Somali territories under alien domination'.⁴⁹ Such evidently political statements, not amounting to reservations, appear to have had little if any substantive effect on the application of the Convention generally or on the interpretation of the refugee definition. Of interest, however, is Portugal's 1999 extension of the Protocol to Macau, subsequently confirmed by communications from the Governments of Portugal and China. On resuming sovereignty over Macau, China advised that the Convention would also apply to Macau Special Administrative Region, subject to China's reservation.⁵⁰

Of greater importance is the varying degree to which States have been prepared to accept and to apply benefits and standards of treatment established by the Convention on behalf of refugees as refugees. Article 8, for example, makes a half-hearted attempt to exempt refugees from the application of exceptional measures which might otherwise affect them by reason only of their nationality. Several States have made reservations, of which some exclude entirely any obligation, some regard the article as a recommendation only, while others expressly retain the right to take measures based on nationality in the interests of national security.⁵¹ Article 9, indeed, expressly preserves the right of States to take 'provisional measures' on the grounds of national security against a particular person, 'pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary ... in the interests of national security'. Nevertheless, this has not prevented certain States from seeking further to entrench their powers by way of reservation.⁵² Similar concern is evident in States' responses to article 26, which prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances. Seventeen States have made and maintain reservations, some half of which expressly retain the right to designate places of residence, either generally, or on grounds of national security, public order (*ordre public*), or the public interest.⁵³ Burundi, reflecting concerns shared by many African countries and reiterated in the 1969 OAU Convention,⁵⁴ declares that it accepts article 26 provided refugees (a) do not choose their place of residence in a region bordering on their country of origin; and (b) refrain in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals.⁵⁵

The principal articles still to be considered fall loosely into two groups: first, those under which States parties agree to provide certain facilities to refugees;

and secondly, those by which States have undertaken to recognize and protect certain ‘rights’ on behalf of refugees. The first group includes the provision of administrative assistance (article 25);⁵⁶ the issue of identity papers (article 27);⁵⁷ the issue of travel documents (article 28);⁵⁸ the grant of permission to transfer assets (article 30); and the facilitation of naturalization (article 34).⁵⁹ Within the second group are included the following specific ‘rights’: ⁶⁰ recognition of the law of personal status (article 12);⁶¹ exemption from penalties in respect of illegal entry or presence (article 31);⁶² limitations on the liability to expulsion (article 32);⁶³ and the benefit of *non-refoulement* (article 33).

1.2.1 Administrative assistance: article 25

The drafters of the 1951 Convention knew that refugees often arrive in countries of prospective asylum without identity documents. Their recognition of the refugee’s need for an identity, as inherent in his or her dignity and integrity, was reflected in the Convention, particularly articles 25, 27, and 28. Read together, these three articles form a single system of protection of the refugee’s entitlement to identity and documentation.

The origins of article 25 can be found in the earliest efforts of the League of Nations to address the problems of refugees. The League’s 1926 Arrangement regarding Russian and Armenian Refugees, for example, was specifically organized around the objective of certifying the identity and ‘position’ of refugees.⁶⁴

Article 25 of the 1951 Convention continues this practice and provides that States ‘shall arrange’ that certain administrative assistance shall be afforded to refugees in certain circumstances.⁶⁵ Moreover, Contracting States ‘shall deliver or cause to be delivered’ certain documents, such documents ‘shall stand in the stead’ of international documents, and ‘shall be given credence in the absence of proof to the contrary’. The article concludes by requiring that fees for service ‘shall be moderate’.

When the *Ad hoc* Committee which drafted the 1951 Convention discussed the proposed article on administrative assistance, Paul Weis, representing the International Refugee Organization, pointed out that it should not pose a particular problem in common law countries. Because of the practice of accepting affidavit evidence, he said, ‘no new legislation or administrative procedures were required to protect refugees’.⁶⁶ Some common law countries, including the United Kingdom, have in fact made reservations to this article,⁶⁷

but the *travaux préparatoires* show clearly that the United Kingdom's only concern, both during the *Ad hoc* Committee sessions in 1950 and at the 1951 Conference, was that it should not have to enact implementing legislation in a field amply and sufficiently covered by the common law through the simple instrumentality of the sworn affidavit.⁶⁸

The Report of the *Ad hoc* Committee further clarified the object and purpose of the draft article on administrative assistance:

Refugees do not enjoy the protection and assistance of the authorities of their country of origin. Consequently, even if the government of the country of asylum grants the refugee a status which ensures him treatment equivalent to or better than that enjoyed by aliens, he may not in some countries be in a position to enjoy the rights granted him. Often he will require the assistance of an authority which will perform for him the services performed by national authorities in the case of persons with a nationality.⁶⁹

In its comment on paragraph 2 of the draft article, the *Ad hoc* Committee noted that it required the authorities to deliver to refugees the documents and certifications which are normally delivered to aliens who possess a nationality, either by the judicial or administrative authorities of their country of nationality or by its consular authorities. A footnote provides an indication of the types of documents involved, such as those certifying the identity and the position of the refugees, their family position and civil status, the regularity, validity and conformity with the previous law of their country of origin of documents issued in that country, certifying the signature of refugees and copies and translations of documents drawn up in their own language, the refugee's previous record, professional qualifications, university degrees, diplomas, etc.⁷⁰

At the 1951 Conference, the UK representative said that he had taken no part in the discussion,

[f]or the reason that common law applied in the United Kingdom, and that, as a consequence, the documents referred to ... would not be required to enable refugees to exercise rights in that country. Affidavits would be sufficient. The United Kingdom delegation might have to enter a reservation ... in order to make its position clear, especially since paragraph 2, as at present drafted, would make it mandatory on the United Kingdom authorities to supply the documents which would under Continental systems of law be issued by national authorities. Such an obligation would be unacceptable to the United Kingdom Government. But he wished to emphasize that he was in no way opposed to the general tenor of the article⁷¹

The UK's reservation to article 25 declares that it cannot undertake to give effect to the obligations contained in paragraphs 1 and 2 and can only undertake to apply the provisions of paragraph 3 so far as the law allows. Its own comment on this reservation provides:

No arrangements exist in the United Kingdom for the administrative assistance for which provision is made in article 25 nor have any such arrangements been found necessary in the case of refugees. Any need for the documents or certifications mentioned in paragraph 2 of that article would be met by affidavits.⁷²

The drafters were nevertheless concerned that without specific assistance, refugees might not be able to enjoy the rights accorded them in the Convention. As the representative for Belgium said, this provision could not be left to discretion.⁷³ The *Ad hoc* Committee recognized that documentation issued to refugees must be credible and authoritative, and suggested that Contracting States should 'give documents issued ... *the same validity* as if the documents had been issued by the competent authority of the country of nationality'.⁷⁴ This was amended by the 1951 Conference to 'credence in the absence of proof to the contrary', an understandably lesser standard of validity than that of 'original' documents. Such 'lesser validity' is inherent in the circumstances—'documents' issued under article 25 are clearly not originals—but the standard also reflects the experience with affidavit evidence familiar to common law countries, and the legal principle that evidence given under oath should be presumed to be true.⁷⁵ The standard of 'credence' also serves to protect the interests of Contracting States, which remain free to annul or modify any benefit granted on the strength of such document, on the basis of later contrary evidence.

1.2.2 Identity documents: article 27

Article 27 lays down an unequivocal obligation on Contracting States to 'issue identity papers to any refugee in their territory who does not possess a valid travel document'.⁷⁶ The duty is subject to no exceptions, and the *travaux préparatoires* make it clear that every refugee was intended to benefit.⁷⁷ Moreover, while article 27 is within the category of provisions to which States may make reservations,⁷⁸ no State party has done so.

The question of identity papers for refugees was considered at both sessions of the *Ad hoc* Committee, in February and August 1950. The Secretariat invoked

the precedent of article 2 of the 1933 Convention relating to the International Status of Refugees: ‘Each of the Contracting States undertakes to issue Nansen certificates, valid for not less than one year, to refugees residing regularly in its territory’,⁷⁹ and noted that: ‘It is a general principle to issue identity papers, under various designations, which serve both as identity cards and as residence permits.’⁸⁰

Although the Belgian representative had some reservations about issuing documents to those who were unlawfully on State territory, both the US representative, Mr Henkin, and the IRO representative, Mr Weis, confirmed that ‘every refugee should be provided with some sort of document certifying his identity’,⁸¹ and this was accepted.⁸²

1.2.3 The Convention travel document: article 28

Article 28 of the 1951 Convention maintains the practice of issuing travel documents to refugees, initiated under the League of Nations, and provides in paragraph 2 for documents issued under earlier arrangements to continue to be recognized.⁸³ The operative part of article 28 is succinct: ‘The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.’ The criterion of entitlement, ‘lawfully staying’, is examined more fully below, but the words of this provision, at least in theory, may well place the refugee in a better position with regard to the issue of travel documentation than the citizen of the State in which he or she resides.⁸⁴ A Schedule to the Convention prescribes the form of the travel document and makes provision, among other matters, for renewal, recognition, and return to the State of issue. Article 28(1) also empowers States, in their discretion, to issue travel documents to refugees not linked to them by the fact of lawful stay, who may be present temporarily or even illegally.

Where the applicant for a travel document is indeed a refugee within the Convention and/or the Protocol, and meets the requirement of lawful stay, article 28 permits few exceptions to the obligation to issue. The reference to ‘compelling’ reasons of national security and public order as justifying an exception clearly indicates that restrictive interpretation is called for. It was thus emphasized at the 1951 Conference that the refugee is not required to justify his or her proposed travel;⁸⁵ paragraph 14 of the Schedule to the Convention (which declares that the Schedule’s provisions in no way affect laws and regulations

governing admission, transit, residence, establishment, and departure), might nevertheless be interpreted as permitting a somewhat broader range of restrictions. In this context, ‘public order’ (*ordre public*) still remains a relatively fluid concept, and certain States have not excluded the possibility of applying to the issue of Convention travel documents the same restrictions as they would apply with regard to national passports.⁸⁶

A more serious obstacle in practice to the issue of Convention travel documents can result from the absence within a State’s administration of any procedure for consideration and determination of applications for refugee status. Even where such procedures do exist, they may be limited to consideration of refugee status in the context of asylum, that is, at the point at which questions of admission, residence, and expulsion arise. The refugee admitted under a resettlement programme, or allowed to remain otherwise than by reference to his or her refugee status (for example, as a student or business person, or by reason of marriage to a local citizen) may be unable, quite simply, to invoke such status and thereby to secure treatment in accordance with the Convention. The standard of reasonably efficient and efficacious implementation suggests that some sort of procedure is required, if States are to meet their obligations under provisions such as article 28. The critical importance of documentation for refugees has been regularly reiterated, and a conclusion on travel documents was among the first to be adopted by the UNHCR Executive Committee.⁸⁷

The Schedule prescribes the format of the Convention travel document,⁸⁸ and further regulates its issue and renewal, extension, recognition by other States, and guarantee of the holder’s returnability to the issuing country.⁸⁹ Geographical validity for the largest possible number of countries is called for, and the document is to be valid for one or two years, at the discretion of the issuing State.⁹⁰ Renewal shall be by the State of issue, so long as the holder has not established lawful residence in another country,⁹¹ and diplomatic and consular offices abroad are to be empowered to effect limited extensions of validity.⁹² Contracting States undertake to recognize Convention travel documents issued by other parties (even, it may be supposed, if they do not accept that the holder is a refugee) and to accept them for visa purposes.⁹³ Paragraph 13(1) of the Schedule makes clear the obligation of the issuing State to readmit the holder of one of its travel documents, ‘at any time during the period of its validity’.⁹⁴ The right of the refugee to return to the country which had issued him or her with a travel document was extensively discussed in the *Ad hoc* Committee, where it

was agreed that without a right of return, a travel document was practically worthless.⁹⁵ The IRO representative, Mr Weis, noted that agreement on the ‘return clause’ was important because ‘not only did it provide for rights for refugees of the greatest value but it also created relations between States’.⁹⁶ Although there were some differences among participating States regarding the formalities attaching to departure and return, the basic question of return was not disputed. The representative of Denmark, for example, considered that a travel document was implicitly understood to confer on the holder the right of re-entry; what he was concerned to ensure was that issuing States, ‘should assume an *unconditional* commitment to re-admit holders of their own travel documents’.⁹⁷ The representative of France reiterated that without a return clause a travel document was completely meaningless, while the UK representative, Mr Hoare, was of the view that,

The basic principle underlying the provisions of paragraph 13 was that States issuing travel documents to refugees resident within their territory would bind themselves to allow such refugees re-entry during the period of validity of the document. He was anxious that the principle should not be tampered with.⁹⁸

Paragraph 13(3) nevertheless empowers States ‘in exceptional cases, or in cases where the refugee’s stay is authorized for a specific period ... ’ to limit the return clause to not less than three months. Article 28 already acknowledges States’ discretionary competence to issue travel documents to refugees not otherwise ‘lawfully staying’ in their territory. The Schedule confirms that discretion, by allowing States to avoid any long-term responsibility towards refugees whom they wish simply to assist with resettlement in a third State.⁹⁹ In practice, however, it is clear that excessive limitation of the return clause can result in serious problems for refugees, who may find themselves unable to return to the country of issue of their travel document and yet without any entitlement to residence elsewhere.¹⁰⁰

With the aim of resolving some at least of those issues, a number of States have concluded agreements regulating ‘transfer of responsibility’ for refugees who change their lawful residence from one country to another.¹⁰¹ Paragraph 6 of the Schedule predicates responsibility for renewal and extension of CTDs on the fact that ‘the holder has not established lawful residence in another territory and resides lawfully in the territory’ of the renewing authority. Paragraph 11, in turn, predicates transfer of responsibility for the issue of a CTD on the fact that the

refugee ‘has lawfully taken up residence in the territory of another Contracting State’.¹⁰² Given the divergence in national immigration laws and concepts, these terms are clearly capable of many different interpretations. Inter-State agreements have therefore attempted to provide objective criteria for ascertaining the moment of transfer. Article 2(1) of the 1980 European Agreement, for example, declares:

Responsibility shall be considered to be transferred on the expiry of a period of two years of actual and continuous stay in the second State with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the travel document.

The same article provides a method of calculation of the relevant period, and permits disregard of stay allowed solely for study, training, or medical care, and of periods of imprisonment.¹⁰³

Finally, paragraph 15 of the Schedule to the Convention declares that neither the issue of a CTD nor entries on it shall affect the status of the holder, particularly as to nationality, and paragraph 16 affirms that the CTD holder is not entitled to diplomatic protection by the issuing State, and that that State acquires no right to exercise such protection.¹⁰⁴ In 2006, on the initiative of Special Rapporteur John Dugard,¹⁰⁵ the International Law Commission adopted draft articles on diplomatic protection, which included specific provision for stateless persons and refugees; draft article 8 provides for the exercise of diplomatic protection in respect of both a stateless person and a refugee (in the latter case, one ‘who is recognized as a refugee by that State, in accordance with internationally accepted standards’), where the person concerned is lawfully and habitually resident ‘at the date of injury and at the date of the official presentation of the claim’. An exception is made in regard to any injury caused by an internationally wrongful act of the State of nationality of the refugee.¹⁰⁶ In 2007, the General Assembly commended the articles to the attention of governments,¹⁰⁷ and the articles have since been the subject of further comment and debate in the Sixth Committee, most recently in October 2019.¹⁰⁸ The General Assembly decided to come back to the issue in 2022 and invited governments to comment further, focussing on the question of a convention or other appropriate action.

However, a recognized refugee possesses an ‘international status’, and

recognition entitles him or her to exercise certain rights in other Contracting States. If such rights are violated, it remains open to the State which has recognized the refugee to take up the breach of treaty in the normal way, irrespective of the limits imposed by the rules of diplomatic protection; this point was central to UNHCR's argument in the *Al Rawi* case.¹⁰⁹ In practice, diplomatic assistance falling short of full protection is often accorded by issuing States, and possession of a CTD would also constitute *prima facie* evidence at least of the holder's entitlement to protection by UNHCR.

International travel has expanded and become much more regulated over the years, and the Schedule to the Convention is behind the times with regard to security features and by comparison with national passport practices. As an integral part of the treaty, the Schedule can be amended in principle only by agreement of all the Contracting parties.¹¹⁰ However, there is no Convention reason why States should not provide a 'better' travel document than that described in the Schedule,¹¹¹ and several States issue CTDs for longer than two years, with the right of return co-extensive with the validity of the document; from the perspective of other 'receiving' States, what counts is whether the holder remains returnable.

In effect, it was enough for UNHCR to lead by example and to draw on the object and purpose of article 28, namely, the facilitation of international travel and return to the 'home State'. In 2015, it advised the Executive Committee of its own involvement in the promotion of biometric registration and documentation, and at the same time invited member States to consider machine-readable travel documents.¹¹² The Standing Committee reviewed UNHCR's paper on the subject in 2017,¹¹³ which noted the adoption by the International Civil Aviation Organization (ICAO) in June 2015 of a standard for the issuance of CTDs in machine-readable format, in accordance with internationally agreed specifications; this was now applicable to States parties to the 1944 Convention on International Civil Aviation (Chicago Convention).¹¹⁴ The Executive Committee's October 2017 conclusion expressly acknowledged that, 'the effective realization of the right set out in article 28 of these Conventions can best be achieved if refugees and stateless persons have access to travel documents in line with international standards'; such documents can ease and facilitate travel, and contribute also to the pursuit of durable solutions and complementary pathways. The Executive Committee welcomed the efforts of States that had already made the move to machine-readable CTDs in accordance

with ICAO standards, and encouraged the sharing of good practices in regard to such documentation among both parties and non-parties to the 1951 Convention.¹¹⁵

1.2.4 Treatment of refugees entering illegally: article 31

Article 31 has already been analysed in its relation to the principle of *non-refoulement* and asylum, and separately with respect to detention,¹¹⁶ and for present purposes it is sufficient to recall certain basic points of principle. Although not comprehensive, this provision serves as a point of departure in determining the minimum standard of treatment to be accorded to those whose situation remains unregularized in the country of first refuge. It applies first to refugees who, ‘coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present … without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’. A proposal to exempt illegally entering refugees from penalties was first included in the draft convention prepared by the 1950 *Ad hoc* Committee on Statelessness and Related Problems in February 1950.¹¹⁷ As was commented at the time, ‘A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.’¹¹⁸ When the Committee reconvened in August that year, no changes were made in the text, although the Committee noted ‘that in some countries freedom from penalties on account of illegal entry is also extended to those who give assistance to such refugees for honourable reasons’.¹¹⁹ The Committee’s draft text was then considered by the 1951 Conference of Plenipotentiaries.

The record of negotiations confirms the ‘ordinary meaning’ of article 31(1), which applies to refugees who enter or are present without authorization, whether they have come directly from their country of origin, or from any other territory in which their life or freedom was threatened, provided they show good cause for such entry or presence. So far as the references to refugees who ‘come directly’ and show ‘good cause’ may be ambiguous, the *travaux préparatoires* illustrate that these terms were intended specifically to address one particular concern of the French delegation. Because the draft ‘trespassed’ on the delicate ‘sovereign’ areas of admission and asylum, France was concerned that it should not allow those who had already ‘*found asylum* … to move freely from one

country to another without having to comply with frontier formalities'.¹²⁰ The French delegate gave the example of 'a refugee who, having found asylum in France, tried to make his way unlawfully into Belgium. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time'.¹²¹ The essential question between France and other participating States was whether the requirement that the refugee should show 'good cause' for entering or being present illegally was adequate, (as the UK representative argued), or whether more explicit wording was required, as suggested by the French delegate.¹²²

Other countries, however, recognized that refugees might well have good cause for leaving any first country of refuge. The United Nations High Commissioner for Refugees, Dr van Heuven Goedhart, recalled his own wartime experiences and expressed concern about 'necessary transit' and the difficulties facing a refugee arriving in an ungenerous country.¹²³ The UK representative, Mr Hoare, said that fleeing persecution was itself good cause for illegal entry, but there could be other good causes. The French suggested that their proposed amendment be changed so as to exclude refugees, 'having been unable to find even temporary asylum in a country other than the one in which ... life or freedom would be threatened'. This was opposed by the British representative on practical grounds (it would impose on the refugee the impossible burden of proving a negative); and by the Belgian representative on language and drafting grounds (it would exclude from the benefit of the provision any refugee who had managed to find a few days' asylum in any country through which he had passed).¹²⁴ Although the French continued to have concerns about the wording, the present text was finally settled.

The UNHCR Executive Committee has considered 'illegal' or 'irregular' movements of refugees and asylum seekers on many occasions. While expressing concern in regard to such movements, participating States have acknowledged that refugees may have justifiable reasons for such action, including fear of persecution or danger to safety or freedom, and that they may have to use fraudulent documentation to leave.¹²⁵ Whether other circumstances amount to 'good cause' may depend very much on the facts,¹²⁶ although UK courts tend to see being a refugee as enough to justify the use of false documents.¹²⁷

Refugees who come within article 31 are not to be subjected to 'penalties',

which appears to comprehend prosecution, fine, and imprisonment, but not necessarily administrative detention, provided at least that it is not arbitrary.¹²⁸ The United Kingdom considered that provisional detention was not ruled out if necessary to investigate the circumstances of entry, and the Conference President likewise distinguished between detention to investigate and penalties for illegal entry, the latter being prohibited where entry was justified.¹²⁹

Because of the long-term prejudice to refugees who may be prosecuted despite the protection due under article 31, UNHCR and others regularly urge Contracting States to ensure that decisions on applications for refugee status and asylum be taken *before* any prosecutions; that the decision to prosecute be contingent on a final decision, either that the individual concerned is not a refugee, or that they do not meet the criteria of article 31(1); and that no recognized refugee be prosecuted or otherwise penalized on account of their irregular entry or presence—criteria, incidentally, which are intended also to meet State interests and concerns regarding irregular movements.

Section 31 of the United Kingdom's Immigration and Asylum Act 1999 was enacted following the Divisional Court's judgment in *Adimi*,¹³⁰ and was intended precisely to ensure that refugees were not penalized for offences of unlawful entry and presence. In addition, section 2 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 provides for the defence of reasonable excuse in relation to a number of 'document' offences.¹³¹ Like many States, however, the United Kingdom's record of compliance is far from perfect,¹³² and a refugee can still be prosecuted and convicted in disregard of article 31. This may be due to errors of incorporation,¹³³ or because of deeper, structural problems. In *Mateta*, the court found it 'surprising and disturbing' that none of the defence lawyers appeared to have known of the available defences and as these would likely have succeeded, the convictions were quashed.¹³⁴ The enactment of defences is clearly important in securing protection, but where the authorities tend to prosecute first and decide status later, more may be needed, for example, to deal with the division of responsibilities between immigration authorities, on the one hand, and prosecuting services, on the other. Here, the effective implementation of article 31 calls for pre-emptive, rather than reactive policy and process.¹³⁵

This is important also, because the fact of conviction can lead to serious prejudice at later stages of the refugee's exile, when applying for an extension of permission to remain or for naturalization. The UK Immigration Rules, for

example, provide that indefinite leave to remain is to be refused to a recognized refugee, if the applicant has ‘been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence’.¹³⁶

The question then arises, whether the subsequent denial of indefinite leave to remain by reason of conviction comes within the scope of those penalties which States have undertaken not to impose. The drafting history of article 31 shows that prosecution or penal or criminal sanctions were not the only measures in mind, but that other immediate or incidental sanctions or disadvantages were also to be included, where they were clearly linked to irregular entry or presence. While the risk for the refugee is perhaps greatest in the period of arrival,¹³⁷ there is no reason in principle why ‘penalties’ should not include measures imposed later in time, or the later impact of a sanction imposed earlier. From this perspective, the bar to indefinite leave to remain is inconsistent with article 31, either because (a) it is an indissoluble continuation of the initial impermissible penalty; or (b) in and of itself, it discriminates among refugees, singling out certain of them for a lower standard of treatment because of their mode or method of arrival and denying them the enjoyment of the full range of economic, social and integration rights,¹³⁸ which the Convention aims to protect.

Notwithstanding changes overall in the situation of refugees in the world since 1951, States have consistently recognized that refugees will frequently have good reasons for irregular movement and illegal entry,¹³⁹ and ‘penalties’ should be understood in a wider sense, commensurate with today’s conditions and State policies and practices. Refugees nevertheless continue to face problems and, as the UK Supreme Court found in *SXH v Crown Prosecution Service*, where delay in deciding whether or not to prosecute results in detention, that too can amount to a penalty, and specifically also to a violation of articles 5 and 8 of the European Convention.¹⁴⁰

Besides acknowledging the difficult circumstances that commonly face those seeking to escape persecution, article 31 is a necessary and important step on the path to successful settlement of the refugee and in strengthening his or her capacity to contribute to the community that has provided asylum. This approach is consistent with the object and purpose of the Convention, the Preamble to which takes as the starting point, ‘the social and humanitarian nature of the problem of refugees’, recognizes ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’, notes that the

international community has ‘endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms’, and concludes that it is desirable, ‘to extend the scope of and protection accorded’.

The Convention catalogue of rights emphasizes the importance of a stable relationship between refugees and their country of refuge, not privileging them, but making provision among others for juridical status, the acquisition of property (which would include that necessary for accommodation), the protection of artistic rights, the broad field of gainful employment (whether wage-earning or self-employed), as well as welfare and social security.¹⁴¹ The effective enjoyment of these entitlements will enable the refugee to establish themselves in a new community, and if return home proves unattainable, ease the path through assimilation to naturalization.¹⁴²

Within this context of protection and solutions, ‘penalties’ include any seriously prejudicial measures that have the effect of putting the refugee at a disadvantage in the enjoyment of economic, social and integration rights, when compared to other recognized refugees. Not every difference in treatment is ruled out, and ‘seriousness’ is implicit in the word ‘penalty’—the question is whether its impact and effect seriously impede the refugee’s progress to assimilation and, even if local naturalization is not the ultimate destination,¹⁴³ to the security and stability that attach to permanent or indefinite residence and their equivalents. This means that the refugee entering or present irregularly should not only be protected from the contemporaneous imposition of criminal or administrative sanctions, such as prosecution or prolonged detention; but also against penalization which extends in time, obstructing the refugee’s successful settlement, such as denial of or restricted access to social security, community support services, language tuition, education, employment, and a secure and stable residence status. The interposition of a bar to settlement, and thus also to the possibility of naturalization, because of conduct by the refugee which the Convention itself anticipated, should therefore be considered as a penalty within the meaning of article 31(1); it perpetuates the insecurity of the refugee, making it more difficult to maintain secure and stable relations in exile, and to settle successfully.

Beyond the scope of article 31(1), however, article 31(2) makes it clear that States may impose ‘necessary’ restrictions on movement, which would include those prompted by security considerations or special circumstances like a large influx.¹⁴⁴ Such measures also come within article 9, and are an exception to the

freedom of movement called for by article 26. Article 31(2) nevertheless calls for restrictions to be applied only until status in the country of refuge is regularized,¹⁴⁵ or admission obtained into another country; moreover, Contracting States are to allow refugees a reasonable period and all necessary facilities to obtain such admission. Those facilities clearly include access to the representatives of other States and of UNHCR.

1.2.5 Expulsion of refugees: article 32

Article 32, which limits the circumstances in which refugees ‘lawfully in their territory’ may be expelled by Contracting States, has also been analysed above in the context of *non-refoulement*.¹⁴⁶ The meaning of ‘lawfully’ in article 32 is examined further below, and for the present it suffices to recall that this provision limits expulsion to grounds of national security or public order;¹⁴⁷ that it requires a decision to be reached in accordance with due process of law; that some form of appeal should be generally permitted; and that the refugee should be allowed a reasonable period in which to seek admission into another country. As with most Convention provisions, and subject always to conformity with its other obligations under international law, the State clearly enjoys choice of means with regard to its implementation of article 32. Thus, it may be sufficient to adopt internal, *ad hoc* administrative procedures regulating the exercise of the discretion to set removal machinery in motion, so that formal incorporation of the limitations on expulsion is not necessary. However, both the entry and removal of non-citizens tend now to be highly regulated and, subject to it satisfying the substantive requirements of particular obligations, that practice can provide some indication of today’s internationally applicable standard. On one reading, the precise implications of the reference to decisions in accordance with due process of law may seem uncertain. The French version of the text (*‘une décision rendue conformément à la procédure prévue par la loi’*) suggests that formal compliance with the law is all that is required.¹⁴⁸ However, the concept of due process today includes, as minimum requirements, (a) knowledge of the case against one, (b) an opportunity to submit evidence to rebut that case, (c) reasoned negative decisions, and (d) the right to appeal against an adverse decision before an impartial tribunal independent of the initial decision-making body. Subject to a measure of qualification with regard to cases at the high end of the security spectrum, these higher standards of procedural due process are now arguably required as a matter of general international law.¹⁴⁹

In 2014, the International Law Commission adopted draft articles on expulsion,¹⁵⁰ article 26 of which, without prejudice to other guarantees that may be provided by law, lists the following rights: to receive notice of the expulsion decision; to challenge the expulsion decision, except where compelling reasons of national security otherwise require; to be heard by a competent authority; to access effective remedies to challenge the expulsion decision; to be represented before the competent authority; and to have the free assistance of an interpreter if the individual affected cannot understand or speak the language used by the competent authority. Article 27 also requires suspensive effect in the case of a lawfully present alien, ‘when there is a real risk of serious irreversible harm’.¹⁵¹ Debate in the Sixth Committee in 2017 demonstrated continuing support for international refugee law, including *non-refoulement*, and for the legal regime for stateless persons,¹⁵² but some divergence remains on other matters, including with regard to whether and how the articles should be taken forward.

In *ND and NT v Spain*, the court relied on the draft articles in determining whether two men had been subjected to a collective expulsion without any examination of their individual circumstances, a procedure, or legal assistance.¹⁵³ The case concerned the men’s immediate return to Morocco after they sought to enter Spanish territory without authorization. The court found that there had indeed been an ‘expulsion’ within the meaning of article 4 of Protocol No. 4 to the ECHR,¹⁵⁴ rejecting Spain’s argument that ‘non-admission’ fell outside its scope.¹⁵⁵ The court also affirmed that there was no ‘minimum number’ required for an expulsion to be ‘collective’;¹⁵⁶ rather, the ‘decisive criterion’ was the absence of ‘a reasonable and objective examination of the particular case of each individual alien of the group’.¹⁵⁷ However, the court found there was no violation of article 4.

The decision turned on whether Spain had afforded the applicants genuine and effective opportunities to claim protection. The court stated that article 4 did not require an individual interview in all circumstances; it was sufficient that ‘each alien ha[d] a genuine and effective possibility of submitting arguments against his or her expulsion’ which were ‘examined in an appropriate manner by the authorities of the respondent State’.¹⁵⁸

In a much-criticized decision, the Grand Chamber held that there had been no violation of article 4. It stated that the applicants had access to Spanish territory at the Beni Enzar border crossing point, as well as to Spanish embassies and consulates, where they could have submitted a claim for international

protection.¹⁵⁹ This was notwithstanding UNHCR's submission that 'prior to November 2014 it had not been possible to request asylum at the Beni Enzar border crossing point in Melilla or at any other location, and that there had been no system for identifying persons in need of international protection.'¹⁶⁰ The court found that the applicants did not make use of available procedures, 'but instead crossed the border in an unauthorised manner (in this instance taking advantage of their large numbers and using force)'.¹⁶¹ As such, the fact that the Spanish border guards did not identify them individually was a 'consequence of the applicants' own conduct'.¹⁶²

The judgment has been described as a 'shock' and 'a significant setback in the jurisprudence of the Court',¹⁶³ which 'condones a deplorable State practice of violent policing, fencing and push-backs of migrants at the EU borders'.¹⁶⁴ It has been suggested that by placing 'individual conduct and border management at the centre' of its reasoning, the court took 'too stern—or even punitive' an approach for a human rights body.¹⁶⁵

The decision does seem remarkable in light of evidence before the court which suggested the lack of any real opportunities to apply for protection, and the fact that a mere possibility to apply for asylum cannot exempt a State from its obligations to examine individual claims.¹⁶⁶ However, it is important to recall the court's closing remarks, namely that its findings did 'not call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders—either their own borders or the external borders of the Schengen area, as the case may be—in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*'.¹⁶⁷ Indeed, had the court been called upon to consider article 3 of the ECHR,¹⁶⁸ it may well have found a violation of the principle of *non-refoulement*.¹⁶⁹

1.2.6 *Non-refoulement*: article 33

The scope of the principle of *non-refoulement*, both as a treaty rule and as a rule of general international law, has been fully analysed in [Chapters 5–7](#).

1.3 The criteria of entitlement to treatment in accordance with the Convention

The question of entitlement to Convention rights and benefits is separate from, but related to, the general issue of State responsibility in international law. As the

ILC succinctly put it, there is an internationally wrongful act when conduct, consisting of an act or omission attributable to a State under international law, constitutes a breach of an international obligation of the State.¹⁷⁰ Particular treaty regimes, however, commonly aim to delimit the area of substantive obligation more closely, and human rights treaties, for example, will often confine responsibility to the actions or omissions of State parties which have an impact or effect on individuals in their territory, or subject to their jurisdiction, or under their authority or control. Other treaties, such as the 1951 Convention, may condition particular benefits on degrees of attachment—the more closely connected the individual is with their State of refuge, the greater the catalogue of entitlements.¹⁷¹ Such regimes necessarily operate *within* the overarching framework of State responsibility, and the treaty remains to be implemented by reference to general principles, such as those governing interpretation, or which otherwise govern the conduct of States, such as the prohibition of torture or discrimination on the ground of race. Rules of this kind may operate at the periphery of State activity, but can often be in tension with what States actually do when implementing particular obligations that may be vague or uncertain, and with respect to which States enjoy choice of means.

Some provisions of the Convention are limited to refugees ‘lawfully staying’ in Contracting States, some apply to those ‘lawfully in’ such States, while others apply to refugees *tout court*, whether lawfully or unlawfully present. Regrettably, there is little consistency in the language of the Convention, be it English or French, but three general categories may be distinguished: simple presence, lawful presence, and lawful residence; for some purposes also reference may be required to the concept of habitual residence.

1.3.1 Simple presence

Some benefits extend to refugees, by virtue of their status alone as refugees, without in any way being dependent upon their legal situation. Article 33, for example, refers simply to refugees, as does article 3.¹⁷² Articles 2, 4, and 27 are predicated on the fact of presence (‘the country in which he finds himself’; ‘refugees within their territories’; ‘any refugee in their territory’/‘*du pays où il se trouve*’; ‘*réfugiés sur leur territoire*’; ‘*tout réfugié se trouvant sur leur territoire*’), while article 31 is specifically applicable to cases of illegal entry or presence (‘in their territory without authorization’/‘*se trouve sur leur territoire sans autorisation*’).

1.3.2 Lawful presence

Lawful presence is to be distinguished from lawful residence; it implies admission and/or permission to remain in accordance with the applicable immigration law, and generally for a temporary purpose, for example, as a student, visitor, or recipient of medical attention. Under the Convention, articles 18 (self-employment), 26 (freedom of movement), and 32 (expulsion) apply to refugees whose presence is lawful ('lawfully in'/'*qui se trouvent régulièrement*').¹⁷³ At first glance, this might suggest that the benefit of these provisions is due to any refugee whose presence is lawful, but State practice does not support such an interpretation. On the contrary, national approaches to admission, stay, residence, and residence conditions indicate that more than simple lawful presence is required, and that in general the refugee who benefits will have been granted a residence permit, either following recognition of status, or on resettlement or other form of admission after recognition elsewhere. No alternative agreed meaning emerges from the practice, and it falls to each State party therefore to determine, in accordance with domestic law and policy, what is meant by 'lawfully in' for the purpose of these provisions.¹⁷⁴

The extension of article 32's protection against expulsion to refugees who are merely lawfully present in Contracting States is certainly doubtful, given State practice,¹⁷⁵ and in principle there appears to be no reason why the temporarily present refugee should not be subject to the same regime of deportation as applies to non-citizens generally. It may be assumed that he or she will still enjoy the right of return to the State which issued a travel document and article 33 will apply in any event. It may be argued that the grounds of public order/*ordre public* include breach of any aspect of a country's immigration law,¹⁷⁶ in which case there will be little to distinguish the refugee lawfully present from the refugee lawfully resident. Article 32 is nevertheless a substantial limitation upon the State's power of expulsion, but its benefits are confined to lawfully resident refugees, that is, those in the State on a more or less indefinite basis; there is very little recorded practice, however, which specifically addresses the legal issues raised by measures to expel refugees.

There is no evidence in the *travaux préparatoires*, or indeed in the practice of States, to suggest that the benefit of article 32 can be claimed by asylum seekers, simply by reason of their having been admitted or allowed to remain pending determination of their status. The 1951 Convention is not self-applying, declaratory notions notwithstanding, and neither does it possess any 'normative

requirements' that can carry interpretation and application beyond the ordinary meaning of words in context, and so forth. As the UK Supreme Court held in *ST (Eritrea)*, 'the article 32(1) duty ... is plainly owed to refugees who have been granted asylum'.¹⁷⁷ The Court also stressed that, absent any internationally agreed meaning for the term 'lawfully staying', the place to look was the domestic law of Contracting States.¹⁷⁸ Even here, a different context may require a different approach, and where an asylum application is successful, but not where it is rejected, the initial period of admission or temporary stay may well be taken into account for other purposes, such as calculating the period of residence. The line between lawful and unlawful residence may often be blurred in practice, where policies and rights are in tension; for example, the Court of Appeal held that someone present in the United Kingdom in breach of the immigration law and liable to removal is *not* lawfully resident, but that was not conclusive of the question, whether they were socially and culturally integrated and therefore in fact a 'settled migrant'.¹⁷⁹

1.3.3 Lawful residence

Finally, many articles apply only to refugees lawfully resident in the Contracting State, that is, those who are, as it were, enjoying asylum in the sense of residence and lasting protection.¹⁸⁰ Again the terminology varies. Article 25 refers to States 'in whose territory (the refugee) is residing'/'*sur le territoire duquel il réside*'. Articles 14 and 16(2) invoke the country of the refugee's 'habitual residence'/'*résidence habituelle*', while articles 15, 17(1), 19, 21, 23, 24, and 28 employ, in English, the somewhat imprecise term 'lawfully staying'.¹⁸¹ The corresponding phrase in the French text is '*résident régulièrement*' (or some variation thereof); it is evident from the *travaux préparatoires* concerning article 28, for example, that the English phrase was selected for its approximation to the French term, particularly as the concept of residence in common law systems is often replete with contradiction. The terminology adopted in the Convention, however, is not free from difficulty. It was noted at the second session of the *Ad hoc* Committee in 1950 that a resident in France may be a privileged, ordinary, or temporary resident.¹⁸² The cases of those present only for a short period of time might cause problems, but in the view of the French representative, '[a]n examination of the various articles in which the words "résident régulièrement" appeared would show that they all implied a settling down and consequently a certain length of residence'.¹⁸³ In order to obtain the benefit of the articles cited

above, the refugee must show something more than mere lawful presence.¹⁸⁴ Generalizations are difficult in the face of different systems of immigration control, but evidence of permanent, indefinite, unrestricted, or other residence status, recognition as a refugee, issue of a travel document, or grant of a re-entry visa will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of a Contracting State. It would then fall to that State to rebut the presumption by showing, for example, that the refugee was admitted for a limited time and purpose, or that he or she is in fact the responsibility of another State.¹⁸⁵

1.3.4 Habitual residence

The phrase ‘former habitual residence’ appears in article 1A(2) of the 1951 Convention to identify the country with respect to which a stateless person might establish his or her status as a refugee, on the basis of a well-founded fear of persecution.¹⁸⁶ In this context, the drafters gave little attention to the precise meaning of the phrase, the *Ad hoc* Committee observing simply that the expression did not refer to a locality, but to ‘the country in which (the refugee) had resided and where he had suffered or fears he would suffer persecution if he returned’.¹⁸⁷ Habitual residence for a stateless person would necessarily seem to imply some degree of security, of status, of entitlement to remain and to return, which were in part the objectives of inter-government arrangements of the inter-war period.¹⁸⁸ Where the term ‘habitual residence’ is used in other articles of the 1951 Convention, it signifies more than a stay of short duration, but was apparently not intended necessarily to imply permanent residence or domicile.¹⁸⁹

‘Domicile’, indeed, is a term of art fraught with problems in common law and other jurisdictions, and is distinguished from residence in article 12(1) of the Convention: ‘The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.’ State practice differs on the law that should govern issues of personal status (legal capacity, capacity to marry, family rights, succession, and so forth); some have opted for the law of the individual’s domicile, and others for the law of the individual’s State of nationality. Article 12 is intended to address the problems that may arise for refugees, but it is not always easy to determine when one domicile has been abandoned, and another acquired;¹⁹⁰ hence, the use of the residuary concept of residence.¹⁹¹

‘Habitual residence’ and even ‘residence’ alone involve elements of fact and

intention. For example, whether those admitted for permanent residence to Canada do in fact establish such residence in Canada does not necessarily follow, as citizenship courts have confirmed. On the one hand, residency is now conceded to have an ‘extended meaning’ (that is, it is flexible enough to accommodate periods of absence).¹⁹² On the other hand, the grant of the special status of citizenship requires more than a place of abode and an intent to return;¹⁹³ it requires that the individual ‘centralize his or her mode of living’ in Canada, and this in turn may depend upon additional factors, such as family ties, only temporary links overseas, and continuing connections with Canada (bank accounts, investments, and the like).¹⁹⁴

Both the 1951 Convention and municipal law rely on different conceptions of residence for different purposes, as the above sections show. Similarly, in municipal law, certain benefits, such as social security, access to health services, or relief from deportation, may require a qualifying period of residence, while entitlement to citizenship through naturalization generally requires both a period of residence and evidence of commitment to the community.

1.4 Territorial scope

Although it is considered of little relevance today, article 40 of the 1951 Convention—the territorial application or colonial clause—was relied on by the UK Supreme Court in *Bashir*,¹⁹⁵ to justify the refusal to allow certain recognized refugees from the Sovereign Base Areas (SBAs) in Cyprus to travel to the United Kingdom. The appellants were part of a group which had been shipwrecked off the coast of Akrotiri in 1998, who were brought ashore by the British military authorities, found by them to be refugees, and accommodated thereafter in disused service facilities in Dhekelia.¹⁹⁶ The question was whether they were entitled to enter mainland United Kingdom, as the military authorities and the refugees requested, or whether the Secretary of State was empowered to refuse them entry. The Court confirmed that the Refugee Convention continued to apply to the SBAs by virtue of the declaration of 1956, extending its application to what was then the colony of Cyprus.¹⁹⁷ The Court examined the purpose of the ‘colonial clause’, which was to accommodate the limited autonomy accorded to more advanced dependent territories and ‘the principle of self-determination and the trusteeship obligations of colonial powers’. The Court did not recognize—and it does not appear that this point was raised in argument—that the character of the SBAs was radically different from that of other territories. The SBAs are

military bases, no other British presence than a military one is anticipated, civilians only come within them by way of an armed forces connection, while the ‘accident’ of birth within the SBAs gives no right by itself to claim British citizenship.¹⁹⁸ As set out in the Exchange of Notes accompanying the 1960 Treaty between the United Kingdom, Turkey and Cyprus, the UK agreed, among other matters, not to develop the SBAs for other purposes, not to set up colonies, and not to allow new settlement other than for temporary purposes. The SBAs do not have any international relations of their own, but are inseparable from the UK itself.¹⁹⁹ They are not a colony, nor are they a ‘non-self-governing territory’, as that term is understood in international law, nor can they be said to possess international personality. Apart from territory, they do not possess any of the elements that make up a political entity—there is no *polis*, no local population able to exercise its political will, no provision for the acquisition of local citizenship, indeed, no local citizenship; there are no democratic institutions, no elections, and no votes. The object of the ‘colonial clause’ was essentially to extend the benefit of treaties to the people of non-self-governing territories, who could expect to be consulted on the issue through the local government. This is implied by article 40(3), which refers to the possibility of extension, ‘*subject, where necessary for constitutional reasons, to the consent of the governments of such territories*’. A territorial construct, such as a military base not possessed of a people, let alone a government, does not come within the scope of article 40.

No rule of international law requires that the ‘metropolitan’ State comprise immediately contiguous territories; the SBAs are territory over which the UK exercises exclusive authority, as the word ‘sovereign’ implies, and in respect of which it owes no special obligations to the United Nations, for example, arising from its non-self governing character. ‘Extension of application’ not being possible, the Convention should be considered as applying to the territory, as to the State itself, with the consequence that the refugees are entitled to move to the UK in the exercise of their right under article 26, without being required to obtain leave to enter, and to benefit from the rights and privileges due in virtue of having been recognized as refugees.

The Court, however, found otherwise, concluding that the refugees had no right to be ‘resettled’ in the UK. The SBAs were ‘territory for whose international relations the State is responsible’, where the State’s duties under the Convention were ‘in principle and in normal circumstances limited to providing and securing the refugee’s Convention rights in the context of that territory’.²⁰⁰

2. Protection in national law: the refugee status determination procedure

Whether a State takes steps to protect refugees within its jurisdiction and, if so, which steps, are matters very much in the realm of sovereign discretion, in the sense that States commonly enjoy choice of means when deciding how to implement their international obligations. For States parties to the Convention and Protocol, the outer limits of that discretion are confined by the principle of effectiveness of obligations, and the measures adopted will be judged by the international standard of reasonable efficacy and efficient implementation, and against the goal of achieving the required result. Legislative incorporation may not be expressly called for, but effective implementation requires, at least, some form of procedure whereby refugees can be identified, and some measure of protection against laws which may otherwise be indiscriminate in their response to questions of admission, residence, and removal.²⁰¹ State practice understandably reveals widely divergent methods of implementation, from which it is difficult to extract any easy formula for determining adequacy and sufficiency. The effectiveness of formal measures depends not only upon the overall efficacy of a State's internal administrative and judicial system, but also upon the particular problems with which that system is faced. Procedures designed for the individual asylum seeker may fail to absorb, let alone survive, a large-scale influx; the needs of the latter, moreover, can also differ radically, requiring less sophisticated, often purely material solutions, at least in the short term (although such generalizations are often used to excuse impermissibly low standards of protection).

A potentially useful distinction is that between refugee status, on the one hand, and the legal consequences which flow from that status, on the other hand; the latter may include an entitlement to residence formally recognized by municipal law or simply eligibility for consideration under a discretionary power only distantly confined by international law. In practice, that distinction is often difficult to maintain, particularly where status is itself the criterion for residence and where normal residence requirements—relating, for example, to character or potential for assimilation—may filter back to influence the decision whether someone is a refugee. Similarly, the mere fact that a State treats refugees separately from others will not be conclusive evidence of effective protection. A refugee enjoys fundamental human rights common to citizens and foreign nationals; if these are generally assured, if due process of law is acknowledged, and if measures of appeal and judicial review permit examination of the merits

and the legality of administrative decisions, then it may be said that the refugee is sufficiently protected.

States' differing approaches to the problem of definition have already been mentioned.²⁰² The criteria of the 1951 Convention are commonly adopted, with additional provision now increasingly made also for the protection of others in need of complementary or subsidiary protection. In addition, cognate forms of protection are now recognized as due when States cooperate in criminal law matters, including extradition, measures to combat international crimes, or the suppression of trafficking and people smuggling.²⁰³ International law is now directly concerned with the treatment anticipated for returned offenders, and victims also, and State practice demonstrates a broad consensus that liability to persecution or prejudice should serve as the underlying rationale, the international standard precluding return.

2.1 General standards for the determination of refugee status

The basic refugee definition, both in international law and in the form adopted by municipal systems, is highly individualistic. It supposes a dispassionate case-by-case examination of subjective and objective elements, which may well prove impractical in the face of large numbers, although they too require the benefit of certain minimum standards.²⁰⁴ For asylum seekers generally, provided they can overcome the variety of barriers to access, the very existence of procedures for the determination of status can guarantee both *non-refoulement* and treatment in accordance with the relevant international instruments.²⁰⁵ In 1977, the Executive Committee expressed the hope that all States parties to the Convention and Protocol would establish such procedures and also give favourable consideration to UNHCR participation.²⁰⁶ As described below, the Committee further recommended basic procedural requirements, designed at such a level of generality as to be capable of adoption by most States.²⁰⁷

Formal procedures for the determination of refugee status clearly go far towards securing the effective internal implementation and application of the 1951 Convention and the 1967 Protocol, which the General Assembly urged when it adopted the UNHCR Statute in 1950. This has long been one of UNHCR's principal objectives, together with 'full access' for those in search of asylum, and with appropriate provision also for particular groups, such as women, children, and those with disabilities.²⁰⁸

Although neither the Convention nor the Protocol formally requires

procedures as a necessary condition for full implementation, their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination argue strongly for the adoption of such effective internal measures. At its 1977 session, the Executive Committee elaborated this approach, not only urging governments to establish formal procedures,²⁰⁹ but also recommending the following basic procedural requirements:

1. The competent official (for example, immigration officer or border police officer) to whom applicants address themselves at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. The official should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
2. Applicants should receive the necessary guidance as to the procedure to be followed.
3. There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance.
4. Applicants should be given the necessary facilities, including the services of competent interpreters, for submitting their case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
5. Applicants recognized as refugees should be informed accordingly and issued with documentation certifying refugee status.
6. Applicants not recognized should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or a different authority, whether administrative or judicial, according to the prevailing system.
7. Applicants should be permitted to remain in the country pending decisions on the initial request by the competent authority referred to in paragraph (3) above, unless it has been established by that authority that the request is clearly abusive. They should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.²¹⁰

UNHCR regularly expresses its concern to the Executive Committee regarding restrictive trends, particularly with regard to access, admissibility, accelerated procedures, and suspensive effect. Together with NGO stakeholders, it also actively engages with individual States and with regional organizations, such as the European Union, in seeking to influence harmonization efforts and improve procedures.²¹¹ In 2005, it criticized aspects of the original Directive on Minimum Standards for Procedures, arguing that, the ‘safe third country’ concept should be limited and should include an effective opportunity to rebut a presumption of safety; accelerated procedures should be limited to clearly well-founded or clearly abusive or manifestly unfounded cases; the same minimum procedural guarantees should apply for all asylum examinations; the right to an effective remedy should include suspensive effect; and the ‘safe country of origin’ concept should be applied narrowly.²¹² UNHCR has likewise taken issue with the recast Directive, adopted in 2013.²¹³

2.2 The role of UNHCR in national procedures

Participation by UNHCR in the determination of refugee status derives sensibly from its supervisory role and from the obligations of States parties to cooperate with the Office, and it allows UNHCR to monitor closely matters of status and the entry and removal of asylum seekers. The procedures themselves will differ, necessarily, in the light of States’ own administrative and judicial framework; so, too, will the nature and degree of involvement of UNHCR. The fundamental issue, however, remains the same—identifying those who should benefit from recognition of their refugee status, and advocating for the interpretation and application of treaty terms that is consistent with international law and, where appropriate, that secures protection in novel cases or unforeseen circumstances.

In a few countries, UNHCR participates directly in the decision-making process; in others, the local office may attend hearings in an observer capacity, while in yet others the exact role may be determined *ad hoc*, for example, by intervening at appellate level, or by submitting *amicus curiae* briefs.²¹⁴ Generally, UNHCR’s procedural responsibilities may be summarized as contributing to the effective identification of refugees in need of protection, for example, by offering an assessment of the applicant’s credibility in the light of the claim and of conditions known to exist in his or her country of origin.²¹⁵ UNHCR regularly issues guidelines on the eligibility of particular groups of asylum seekers, which it describes as ‘legal interpretations of the refugee criteria

in respect of specific profiles on the basis of social, economic, security, human rights and humanitarian conditions in the country/territory of origin concerned'.²¹⁶ UNHCR also provides information on the treatment of similar cases or similar legal points in other jurisdictions, both through open access to *Refworld*,²¹⁷ and in its guidelines on international protection and direct interventions in legal proceedings.²¹⁸ Finally, by way of the supervisory function mandated by its Statute and accepted by States party to the 1951 Convention/1967 Protocol,²¹⁹ UNHCR represents the international community's interest in protection under those instruments, and more generally, in light of the policy directives expressly given to the Office by the General Assembly, or implicit in its resolutions.

2.3 Due process and procedural fairness in the determination of refugee status

At first glance, international law may appear to have little to say with respect to the procedural aspects of due process, particularly as the responsibility of the State for the fulfilment of its obligations turns essentially on what results in fact. However, the 1951 Convention has become one of the most highly litigated treaties in domestic jurisdiction, and the practice of States in applying its provisions, often in parallel with international human rights law, has contributed substantially to the emergence of a concept of international due process. The UNHCR Executive Committee's 1977 recommendations offer only a very basic agenda, a formally non-binding but practically necessary minimum if refugees are to be identified and accorded protection in accordance with international obligations. Reaching decisions quickly and removing those who are found not to require international protection are perceived by many States today as essential to reduce what they perceive as abuse and to render the asylum process more manageable. In practice, however, few States have yet succeeded in marrying an efficient and expeditious national process (and national legal traditions) to the fulfilment of protection obligations, and the asylum seeker's procedural rights are often the victim of politics or 'crisis'.²²⁰

Moreover, it remains a fact that procedure falls very much within the area of 'choice of means', so that national procedures vary considerably, drawing particularly on local legal culture, due process traditions, constitutional law, and 'traditional' approaches to border management and control as a sovereign function, with the impact of regional and universal human rights principles somewhat of a late arrival. The end result is that while there may be general

agreement on certain general principles, their translation into particular rules will likely be contested, even as they change over time. For example, the once common practice of decision-making ‘on the papers’ has been widely overtaken by oral hearings;²²¹ the right to interpretation may be accepted, but practice varies when it comes to cost, the level of competence, and the precise form;²²² the right to counsel also varies, sometimes being provided for by statute,²²³ and at other times being constitutionally guaranteed;²²⁴ and the right to confidentiality of proceedings depends very much on the jurisdiction, often putting in issue the interest of the asylum seeker, on the one hand, and the tradition of open, public hearings, on the other.²²⁵

Beyond form lies process, and in general States that have ‘judicialized’ refugee status determination mostly require decision-makers to base their determinations on evidence adduced at the hearing which is found to be credible and trustworthy in the circumstances, and to take account of all the evidence. The claimant, in turn, is generally entitled to present evidence, to challenge that submitted against his or her case,²²⁶ and sometimes also to cross-examine witnesses.²²⁷ Finally, the claimant must be advised of the decision which, if negative, should be accompanied by written reasons.

Reasons for decisions are an inherent part of procedural fairness and an essential pre-requisite for fundamental justice. Whether there has been procedural fairness is an objective question for the court to decide. Fairness is important because, by ensuring that the decision-maker receives all relevant information and that it is properly tested, it contributes to better decisions. It is also conducive to the rule of law and, by helping to avoid the sense of injustice which might otherwise arise, it respects the dignity of those to whom rules are applied.²²⁸

Constitutional and statutory approaches vary, and there may be no general duty in common law to give reasons. However, as the Supreme Court of Ireland underlined in *Mallak* in 2012, given the compelling jurisprudence, ‘it must be unusual for a decision maker to be permitted to refuse to give reasons’.²²⁹ The Court took into account article 296 of the Treaty on the Functioning of the European Union, which provides that, where ‘institutional acts’ are concerned, ‘Legal acts shall state the reasons on which they are based’; and article 41(2)(c) of the Charter of Fundamental Rights, which sets out the entitlement of everyone to ‘good administration’, including ‘the obligation of the administration to give reasons for its decisions. The Supreme Court then quoted the CJEU’s view in the

Nadiany Bamba case,²³⁰ that,

The purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested ... and, second, to enable [the] judicature to review the legality of that act.²³¹

The reasons alone will be practically meaningless, however, unless accompanied by a statement of the relevant facts. The reasons requirement provides justification for the decision, showing that the decision-maker has identified the material facts in the applicant's claim; identified relevant country of origin evidence and assessed its weight; assessed the credibility of the applicant;²³² identified and interpreted the relevant rule or rules of law; applied the law to the facts in a reasoned way (to show, for example, whether what the claimant fears is persecution, or whether the group to which he or she belongs is a 'social group', or whether he or she has what amounts to a well-founded fear); and determined whether the claimant is a refugee.

Ultimately, when it comes to implementation, international law does offer the litmus test of effectiveness, which is to see if the result mandated by the primary obligation is in fact fulfilled: Are refugees identified and protected, whether against *refoulement* or with respect to the enjoyment of Convention rights more generally? In the absence of supra-national authority competent to determine such matters once and for all, an almost constant state of tension is inevitable between the various stakeholders in protection—States, UNHCR, regional and universal human rights bodies, NGOs, advocates, academics, and refugees themselves—and that is part of the necessary dynamic of international refugee law.

3. The 2013 European Union Procedures Directive

In June 2013, a revised Procedures Directive was adopted,²³³ superseding the original, first-phase directive of 2005.²³⁴ While the recast version has generally strengthened procedural guarantees for applicants,²³⁵ it has also been criticized for its complexity and a number of 'missed opportunities' stemming from political compromises.²³⁶ As such, it may prove challenging to apply in

practice.²³⁷

Several aspects of the recast Procedures Directive have been examined above, with particular reference to the provisions on ‘safe countries’,²³⁸ their implications for review and appeal, and the likely impact of implementation on the international obligations of the State. This section presents a brief overview of the principal articles of the recast version and considers their relation to internationally required results, such as a status for refugees, *non-refoulement*, and protection of human rights.²³⁹ Whereas the original Directive was described as providing for ‘minimum standards’,²⁴⁰ the recast version is instead framed as establishing ‘common procedures’, although Members States still have the discretion to create more favourable standards.²⁴¹ As Velluti argues, the ‘compromise text ... illustrates the difficulty of harmonizing administrative procedures rooted in diverging and longstanding national legal traditions’ and, as such, ‘its provisions overall are insufficient for establishing common procedures ... because of the many derogations that it still permits’.²⁴² This means that refugee status determination in Europe remains a patchwork of not necessarily consistent or compatible procedures.

The recast Directive is structured in six Chapters, with 55 substantive provisions and 62 preambular recitals providing interpretative guidance. Annex III is a ‘correlation table’ showing where provisions from the original directive have been reflected in the recast version.

The recast Directive applies to all applications for international protection made in a Member State’s territory,²⁴³ including at the border,²⁴⁴ in territorial waters, and in transit zones.²⁴⁵ The reference to territorial waters is ‘significant’ given the higher numbers of asylum seekers arriving by boat.²⁴⁶ At border crossings or detention facilities, the authorities must provide people with information about the possibility to apply for protection, and provide interpreters to the extent necessary to facilitate access to the asylum procedure.²⁴⁷ Furthermore, organizations and individuals providing advice to applicants must be given effective access to them.²⁴⁸ People may not be detained solely because they are applying for protection, and anyone detained must have the possibility for speedy judicial review.²⁴⁹

Applicants for protection have the right to remain in a Member State while the claim is being considered at first instance.²⁵⁰ The ‘right to remain’ includes being held at the border or in a transit zone,²⁵¹ and accelerated border procedures may be used to determine the admissibility and/or substance of a protection claim.²⁵²

The only exceptions to the right to remain concern subsequent protection applications²⁵³ and extradition requests. An important new guarantee in the Directive is that an applicant may only be extradited where the competent authorities are satisfied that this will not result in direct or indirect *refoulement*.²⁵⁴

The Directive clarifies that refugee claims must be considered first; only if an applicant is found not to be a refugee will eligibility for subsidiary protection be examined.²⁵⁵ A new provision states that applicants who are granted subsidiary protection must be able to appeal against the decision rejecting the refugee claim, except where subsidiary protection status affords the same rights and benefits as refugee status.²⁵⁶

Member States must ensure that decision-makers are properly trained²⁵⁷ and know ‘the relevant standards applicable in the field of asylum and refugee law’.²⁵⁸ These new provisions address a ‘serious gap’ in the original directive.²⁵⁹ Decision-makers must examine applications on an individual, objective and impartial basis, using ‘precise and up-to-date information from various sources’ about the situation in the country of origin and any relevant transit countries.²⁶⁰ This reflects the Directive’s objective of ‘frontloading’ to avoid appeals,²⁶¹ since it is ‘in the interests of both Member States and applicants to ensure a correct recognition of international protection needs already at first instance’.²⁶² Decisions must be made in writing, with reasons given for any rejection.²⁶³

Applicants must be informed of the procedure, their rights, and their obligations in a language they understand, with interpreting services where necessary.²⁶⁴ A new provision states that, on request, applicants must be given free ‘legal and procedural information’ in relation to first-instance decisions,²⁶⁵ and ‘free legal assistance and representation’ for appeals (unless there is no tangible prospect of success).²⁶⁶ Member States are permitted to restrict such information, assistance, and representation to those who lack sufficient resources,²⁶⁷ and monetary/time limits may be imposed.²⁶⁸ As Costello and Hancox note, legal representation is very different from legal information,²⁶⁹ and no matter how detailed legal ‘information’ is, it ‘does not amount to the assistance provided by a qualified legal advisor enabling the asylum-seeker to support her particular case throughout the different stages of the application’.²⁷⁰ Recital 22 explains that it would be ‘disproportionate’ were Member States compelled to provide such information only through qualified lawyers, which is why they may use ‘non-governmental organisations or professionals from

government authorities or specialised services of the State’ instead.²⁷¹ On balance, Garlick concludes that the provisions should ‘enable applicants to gain access to better information and advice in more cases’.²⁷² Applicants have the right to consult a legal adviser at any stage of the procedure at their own cost,²⁷³ as well as the right to communicate with UNHCR or other organizations providing legal advice or counselling.²⁷⁴ UNHCR is permitted to have access to applicants wherever they are, to information about individual claims, and to present its views in relation to any individual claims.²⁷⁵

Applicants must be given the opportunity for a personal interview (including those who are listed as dependent adults on an application).²⁷⁶ Here, the recast Directive provides much stronger guarantees and protections than the original version, including that the applicant have the opportunity to provide reasons why there might be inconsistencies or contradictions in their statements, or elements missing.²⁷⁷ However, it is a matter of concern that a decision-maker may ‘take into account’²⁷⁸ an applicant’s failure to appear for an interview, since failure to comply with a procedural requirement ‘is unrelated to the question of whether she or he has a well-founded fear of persecution or serious harm, and should thus not impact at all upon the material assessment of protection needs’.²⁷⁹ Member States cannot reject or exclude protection applications solely because they have not been lodged as soon as possible.²⁸⁰

A new definition in the recast Directive concerns an ‘applicant in need of special procedural guarantees’, which means someone ‘whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances’.²⁸¹ Such circumstances could include ‘age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or [matters which arise] as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence’.²⁸² Such applicants should be identified prior to a first-instance decision being made and provided with ‘adequate support, including sufficient time’, to enable effective access to procedures.²⁸³ They must not be subject to accelerated procedures if adequate support cannot be provided.²⁸⁴

The recast Directive provides greater possibilities for children to apply for protection and enhanced safeguards for their rights.²⁸⁵ Minors must have the right to apply either on their own behalf or through an adult,²⁸⁶ and the best interests of the child shall be a primary consideration throughout the process.²⁸⁷ Interviews must be conducted in a child-appropriate manner.²⁸⁸ There are special

guarantees for unaccompanied minors, including that Member States ensure as soon as possible that a representative is available to assist (in a manner that accords with the principle of the best interests of the child).²⁸⁹ The provisions on children were very controversial during negotiations and the resultant rules are complex,²⁹⁰ leading some commentators to conclude that they may be difficult to apply in practice²⁹¹ (and consistently with the Convention on the Rights of the Child).²⁹²

Time limits are set in relation to registering protection applications,²⁹³ the examination of claims,²⁹⁴ and enabling applicants to exercise their right to an effective remedy.²⁹⁵ A new provision allows Member States to suspend the examination of claims ‘due to an uncertain situation in the country of origin which is expected to be temporary’,²⁹⁶ but the situation must be reviewed at least every six months, and claims still must be decided within 21 months from the time they were lodged.²⁹⁷ This means, however, that applicants could be without a formal legal status for almost two years. It also seems to run counter to the idea of ‘front-loading and the desirability of recognizing strong claims quickly’.²⁹⁸

Applications may be prioritized when they are likely to be well-founded and/or where the applicant is considered to be in a vulnerable situation.²⁹⁹ More controversially, however, they may be expedited (and/or undertaken at border or transit zones) if the applicant has ‘only raised issues that are not relevant’ to the protection claim; is from a safe country of origin; has misled authorities; has disposed of an identity or travel document that would have helped to establish his or her identity;³⁰⁰ has made ‘clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information’; has made an inadmissible subsequent application; is applying simply to frustrate the enforcement of a decision that would result in removal; entered the territory or prolonged his or her stay unlawfully and without good reason, has not presented him- or herself to the authorities or has not applied for protection; has refused to be fingerprinted; or may be considered a danger to national security or public order.³⁰¹ In contrast to the original directive, these grounds for acceleration are exhaustive.³⁰²

Under article 33(2), applications may only be considered inadmissible if another Member State has granted protection;³⁰³ the applicant has a ‘first country of asylum’ or a ‘safe third country’ to which he or she could be sent;³⁰⁴ the application is a subsequent one where no new information has been presented;³⁰⁵ or a dependant lodges an application after he or she has already agreed to have

their claim considered as part of another application, and there are no facts that justify a separate application.³⁰⁶

The provisions on explicit and implicit withdrawal³⁰⁷ confuse the international refugee law concepts of cessation, cancellation, and revocation.³⁰⁸ There is a risk that they could result in *refoulement* when status is lost,³⁰⁹ although as Garlick points out, in practice, a person would be protected from removal by the ECHR and potentially the Charter of Fundamental Rights as well.³¹⁰

All applicants must have the right to an effective remedy before a court or tribunal against any protection decision,³¹¹ including decisions that an application is unfounded or inadmissible,³¹² should not be examined³¹³ or reopened,³¹⁴ or should be withdrawn.³¹⁵ Whereas the original directive was silent as to what an ‘effective remedy’ entailed, the recast version requires there to be ‘a full and *ex nunc* examination of both facts and points of law’,³¹⁶ incorporating the European Court of Human Rights’ standard.³¹⁷ In ‘one of the most significant and positive innovations of the recast’ Directive,³¹⁸ applicants are generally permitted to remain in the territory pending the outcome of an appeal,³¹⁹ although there are four exceptions relating to claims that are manifestly unfounded, inadmissible, not reopened (on account of the claim being implicitly withdrawn or abandoned), or not examined (because the applicant entered from a ‘European safe third country’).³²⁰ In essence, the Directive creates a two-tier system whereby ‘either Member States grant the remedy automatic suspensive effect, or grant automatic suspensive effect to the request for interim protection that an applicant may make where the exceptions in Article 46(6) apply’.³²¹ Here, as in some other areas, such as applicants with special needs, unaccompanied minors, and legal aid, ‘detail may be equated with some degree of obfuscation ...’³²²

Finally, a number of exceptions to the standard rules in the Directive are permitted where simultaneous applications are made by ‘a large number’ of asylum seekers (for example, in relation to time limits, interviews, and border procedures).³²³ This carve-out has been described as ‘worryingly vague’.³²⁴ Garlick suggests that it might be an attempt to circumvent the more onerous obligations of the Temporary Protection Directive in situations of mass influx,³²⁵ although that instrument is not self-executing so would, in any event, require a decision by the Council to take effect.³²⁶

In conclusion, while the recast Procedures Directive has a number of positive features that enhance protection for applicants, Member States retain ‘a good deal of flexibility to set fairly low standards’ in some areas.³²⁷ In 2016, the

Commission proposed a regulation to replace the recast Directive, which would have given direct effect to EU rules and have avoided numerous divergences resulting from the process of transposition into domestic legislation.³²⁸ There being no agreement at the time, in 2020 the Commission proposed a ‘New Pact on Asylum and Migration’ which recommended a screening mechanism at borders, prior to accessing the asylum procedure. Understandably, this gave cause for concern, notwithstanding assurances that every person would have an individual assessment, that *non-refoulement* and fundamental rights would be respected, and that a general exemption would apply where guarantees could not be maintained. Also, Member States, working closely with the Fundamental Rights Agency, would establish an effective monitoring mechanism at the screening stage. The aim, nonetheless, is to take decisions without the asylum seeker having made a ‘legal entry’ to the EU and to follow up with return proceedings.³²⁹ At the time of writing, April 2021, negotiations were continuing.

4. Process in refugee status determination: getting to ‘Yes’; getting to ‘No’

The 1951 Convention does not require a refugee to have fled by reason of persecution, or that persecution should actually have occurred. The focus is more on the future, but there are inherent weaknesses in a system of protection founded, as international law would seem to require, upon essays in prediction. Although subjective fear or at least apprehension may be relevant, the key issues are nevertheless factual, and the key question is whether there are sufficient facts to permit the finding that, if returned to his or her country of origin, the claimant may face a serious risk of harm. The credibility of the applicant and the weight of the evidence are thus of critical importance.

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, prepared in 1979 at the request of States members of the UNHCR Executive Committee, deals in large measure with some of the practical problems of determining refugee status, from the standard of proof to guidelines for the conduct of hearings. It acknowledges the general legal principle that the burden of proof lies on the person submitting a claim, but recalls that an applicant for refugee status is normally in a particularly vulnerable situation which may occasion serious difficulties in presenting the case.³³⁰ In refugee and related human rights contexts, it has long been accepted that responsibility also falls on the decision-maker to ascertain and evaluate the relevant facts. In M.S.S.

v Belgium and Greece, the European Court of Human Rights found that the general situation concerning the treatment of asylum seekers in Greece was known to the Belgian authorities, and that consequently the applicant should not be expected to bear the entire burden of proof.³³¹ In *Hirsi v Italy*, the Court also indicated that evidence of an individualized threat of treatment contrary to article 3 is not always needed; information from independent sources may make it ‘sufficiently real and probable’ that the general situation in a country entails risks sufficient to require non-return.³³² Moreover, in *Rustamov v Russia*, the Court specifically noted that: ‘requesting an applicant to produce “indisputable” evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him’.³³³ In determining whether an asylum seeker has a well-founded fear of being persecuted, the responsibilities are shared, but the standard of proof can still seem elusive.

Although an applicant must generally prove the *facts* on which he or she relies on a balance of probabilities, the legal test for the *risk* of persecution is not set so high.³³⁴ The history of the 1951 Convention shows that refugee status was intended for a person who has been persecuted or who has ‘good reason’ to fear persecution.³³⁵ The fear here is essentially an ‘appreciation’, based on an objective situation, of what might plausibly and reasonably follow. The meaning of terms can only be pursued so far in the abstract, for decision-making requires looking at a series of variables, each of which may be characterised by uncertainty. In some respects, the process is ultimately ‘predictive’, and will try to focus on what *might* happen, some time in the future, in a variety of necessarily unknown circumstances. Only in very rare cases, if ever, will the persecutor have provided clear evidence that this particular asylum seeker is indeed at risk. The word ‘predict’ is potentially misleading, however, so far as it may suggest a high degree of confidence in a particular outcome; whether international protection is called for involves a decision of a somewhat different order. The bottom line is *risk*, but reaching a conclusion on risk requires that the preliminary steps be taken efficiently and effectively. Words such as ‘serious’ or ‘reasonable’ risk, when removed from any set of individual circumstances, cannot capture precisely what is needed, but an appreciation of risk will commonly emerge within the interstices of the process of understanding the individual in context; here, a well-constructed process properly anchored in the applicable international standards can help to reach the right conclusions.

Whether someone is recognized as a refugee increasingly turns on whether we *believe* his or her story, considered against what we *believe* to be the situation in his or her country of origin. The irony is that these conditions—belief in the individual, belief in the country conditions—while sufficient, are not always necessary. We may *not* believe the asylum seeker, for example, but we may well know objectively and independently of their personal credibility, that they are at risk of persecution because of factors such as race, religion, or ethnic origin.³³⁶

‘Objective knowledge’ can come from a range of authoritative sources, but here, too, judgements must be made: Is the source reliable, can the picture it paints be trusted, are the events it recounts corroborated, has the source proven accurate in the past, has it ever been challenged or qualified? The existence in a State of a consistent pattern of gross, flagrant or mass violations of human rights may be sufficient to establish the existence of risk in general, but the individualized approach to international protection nevertheless keeps the claimant at its centre: Who is this person in their own land and, given the available information about the country of prospective return, would he or she likely face an unacceptable risk of persecution or other serious harm? This requires attention, for example, to reports on the human rights situation and their appreciation, not summary disregard;³³⁷ no less, it requires an appreciation of the individual’s personal circumstances against the known background. In *Rustamov v Russia*, the European Court of Human Rights found that the authorities, ‘did not pay requisite attention to the evidence concerning the human rights situation’ in the country requesting the applicant’s extradition, and consequently there was a ‘lack of thorough and balanced examination of the general human rights situation ... [and] failure to give meaningful consideration to the applicant’s personal circumstances’.³³⁸

In practice, many of the facts relating to conditions in the country of origin will be common knowledge, or will be capable of proof on the basis of authoritative documentary information. In such circumstances, what counts is the personal situation of the applicant, who will often be unable to support his or her statements with ‘hard evidence’. Consequently, a combination of procedural and evidentiary rules may be called for, leading to a hearing in which the claimant is best able to present his or her story, and to decision-making premised on appropriate standards of proof.³³⁹

The minimum outline for refugee status procedures is relatively straightforward, as are the guidelines for examiners and decision-makers. The

basic issues involve establishing the narrative of flight, including the reasons, clarifying country of origin conditions, and reaching an assessment of the whole in light of the essentially future orientation of the refugee definition. Asylum applicants have a responsibility to tell the truth and present their case fully, but, as indicated above, counsel and examiners too have a duty and a role to play in the process of presentation. This is not a rule of law, but a general notion flowing from the nature of the proceedings, where the ultimate objective, recognizing and protecting refugees, may otherwise get lost in the process.³⁴⁰

Experience shows that the refugee status determination process is often unstructured. As the Irish High Court has acknowledged, decision-makers commonly rely on instinct and a feel for credibility, but with inadequate attention to the facts, the weight of the evidence, and standards of proof.³⁴¹ Even where decisions are felt to be correct, lack of confidence can result from systematically basing oneself on subjective assessments and failing to articulate clearly the various steps which lead to particular conclusions and the reasons which justify each stage. Such lack of confidence can increasingly undermine the capacity to deal effectively with the caseload, whatever the strengths or weaknesses of individual applications, and no matter how many unstructured decisions are in fact right.

Considered in its simplest form, the process of determining refugee status involves no more than the application of a legal formula to a particular set of facts. In practice, there are many inherent problems. Decision-makers, for example, must be able to elicit relevant information from the narrative which is the applicant's story; to assess the credibility of applicants, witnesses and experts, and to justify decisions on credibility; to weigh the evidence rationally; to determine and state the material facts,³⁴² to apply the law to the facts; to take decisions and to justify those decisions by reference to reasons and principle. This in turn requires a degree of competence, even skill, in the arts of questioning, interviewing, and examination, and a capacity to bring out the relevant elements from an individual narrative. It requires skill also in the use of interpreters, as well as confidence in the use of country of origin and jurisprudential information, discrimination in the selection of such sources, and in their evaluation and assessment.

In addition, a sound knowledge of the legal and procedural framework is called for, including its national and international aspects, and a sensitivity to other influential factors in the process, for example, the subjective element of

fear, both as a dimension of the refugee definition and of the proceedings themselves; cultural factors which influence the narration of events, including practices of truth and concealment, and the attribution of family and other relationships of greater and lesser dependence; and the relationship of group fear to individual cases.

4.1 The interview, examination, or hearing

The object of the interview, examination, or hearing is to encourage and obtain a narrative, and an understanding, of the applicant's reasons for leaving, or refusing to return to, his or her country of origin. The process itself, whether conducted directly or through counsel, is one of communication, and communication operates on many levels, including the content or the information transmitted, and the context, which explains what the message is about. Context includes not only the words used and the manner of their presentation, but also the reactive aspects which flow from environment, questioning and expectations. For the message sent is not necessarily the message received, either because examiner and applicant move in different contexts and are misreading each other's responses; or because of an absence of shared symbols, such as language and culture; or because of the emotion attendant on the process (the intimidating aspect of proceedings, the trauma of recalling torture, sexual abuse, ill-treatment, or other suffering).

In a process of case-by-case determination, the hearing must nevertheless be used to elucidate the applicant's reasons for flight and unwillingness to return, in the light of what is known about conditions in the country of origin, as gathered from what the applicant says, from other information provided, and from the decision-maker's own knowledge. The facts given must in turn be interpreted in light of the applicable legal criteria—the *well-foundedness* of the fear, whether what is feared is *persecution*, and whether the persecution feared is *attributable* to any of the *reasons* specified in the 1951 Convention.³⁴³

Often what is important in a person's narrative are *events*, and in particular, their *impact* on the claimant as an individual. Events may be *proximate and personal*, in the sense that the applicant has actually experienced, for example, torture, brutality, discrimination, or imprisonment; or they may be more *distant*, though no less relevant, such as the related experience of others which the applicant (and the observer) perceives to bear upon his or her own case.³⁴⁴ If there are patterns of persecution of those who share similar characteristics, that

may suffice to raise a strong presumption of a reasonable possibility or serious risk of persecution. A credible information base, in turn, will help to show whether such patterns do in fact exist.

Having identified the events which are central to the applicant's story, the decision-maker must evaluate the *apprehensions*, that is, the *fears* founded upon them: Are they *reasonable* in the circumstances; are they *well-founded*, in the sense of revealing a serious risk of persecution?

In articulating decisions on individual cases, a framework of rights, reasons, restrictions, and likelihood can be helpful. First, what are the *rights* of the applicant that are claimed to be at risk? Where do they stand in the hierarchy of importance? Secondly, upon what *grounds*, for what *reasons*, are those rights the object of attention, and/or at risk of being harmed? Next, what is the nature of the *restriction or measure* which it is feared may affect, repress, deny, or injure the rights and interests in issue? Are questions of proportionality involved? Are there any competing State or community interests?

Finally, although this fact is integral to the whole process, how *likely* is it that the applicant may be the victim of measures which otherwise must be considered as persecution within the meaning of the Convention? Is there a reasonable, or serious, possibility of such measures eventuating? Is the risk one which, on balance, can be discounted? Or is the nature of the interest such that even an otherwise remote possibility cannot be disregarded, particularly in light of the overall objective of the process, which is to provide protection, to ensure that dignity and integrity and fundamental human rights are assured.

The question of the likelihood of persecution is in practice inseparable from the personal circumstances of the individual considered in light of the general situation prevailing in the country of origin. Likelihood may vary over time and space, depending, for example, on fluctuations in conflicts, or on the physical proximity of individuals to particular localities, and it may be tempting to dismiss a recognized existing risk as nonetheless 'too remote'. The Convention question is whether the fear is well-founded, and *that* is the context in which remoteness should be considered. The temporal dimension is not a separate issue, but central to the assessment; a judgement is called for, which alternative terminology, such as 'imminence', rarely clarifies and frequently distorts.³⁴⁵

4.2 Uses and abuses of country and other information

The hearing rarely provides enough information, and although nowadays there

are few limits to the sources that might be consulted, extensive searches of available databases, information repositories, and online sources often raise rather than answer questions. Credible and trustworthy information is nevertheless increasingly recognized as the essential foundation for good decisions. The inherent difficulties of coherently assessing the authority of disparate sources and the necessity to inform decision-makers spread across five regions led the Canadian Immigration and Refugee Board to establish a Documentation Centre in 1988, with the objective of becoming ‘the principal resource in Canada for the provision of credible and trustworthy evidence relevant to the process of refugee determination, including country of origin information and information on jurisprudential questions’.³⁴⁶ Since then, other countries, independently, regionally, and in cooperation with each other, have followed this model, although generally with some differences in approach and methodology.³⁴⁷ UNHCR used also to produce, collect, and disseminate country of origin information, but since 1 January 2019, it has entrusted that function to the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), part of the Austrian Red Cross. UNHCR has endorsed www.ecoi.net as ‘the main global platform’ for COI, and will concentrate on its law and policy collections in Refworld (www.refworld.org).

There can be no doubting the value of accurate, in-depth, up-to-date, and trustworthy information in the refugee determination context. For example, refugees may have fled a country as a result of counter-insurgency operations, but the fuller picture will show the origins of the conflict, such as resistance to dispossession of historical land rights; the protagonists (such as the military, representing a dominant non-indigenous elite); the policies (such as institutionalized or systemic discrimination against particular ethnic, linguistic, religious, or economic groups or classes); and the tactics (such as the abduction, torture, and arbitrary killing of group representatives). A complete picture will never be available, but a comprehensive approach will contribute significantly to identifying refugee-related reasons for flight. Knowing past patterns and present conditions enables one to make reasonably accurate predictions about the future; about the way certain elements are likely to react and interact; and therefore about the degree of security awaiting those returned or returning to their country of origin.

‘Documentary evidence’, particularly when it is available electronically in real or near-real time, can have a seductive air, often seeming sufficient to decide the

case. But like any other material, such evidence must still be assessed and put in context, whether it relates personally to the claimant, or to conditions in the country of origin. Information of the latter kind gives only a general impression, more or less detailed, of what is going on. Like the refugee determination process itself, it can have the artificial quality of freezing time, in a way that can lead to single events, such as an election or the signing of a peace agreement, acquiring greater significance than is their due.³⁴⁸ Situations remain fluid, and recognizing that and drawing the right sorts of inference from evidence acknowledged as credible and trustworthy, are the hallmarks of sound decisions. According to Houle, however, the common law transmits what might be called a latent presumption of bad faith, that is, disbelief, in the personal testimony of the claimant; and a latent presumption of objectivity, authority, or weight, with regard to documents in the public domain. The result, she says, is that too often a simple contrast of the contradictions between personal testimony and documentary information is used, without more, to justify a negative finding on credibility.³⁴⁹ Indeed, the IRB Guidelines expressly state that,

The Board is entitled to rely on documentary evidence in preference to the testimony provided by a claimant, even if it finds the claimant trustworthy and credible. However, RPD members must provide clear and sufficient reasons for accepting documentary evidence over the evidence of the claimant, especially when it is uncontradicted.³⁵⁰

In one case, the judge warned that,

The danger in preferring documentary evidence over [a claimant's] direct evidence, is that documentary evidence is usually general in nature. [A claimant's] recitation of what occurred to him, or her, is particular and personal. Thus, without some clear explanation as to why the general is preferred over the particular one may doubt a conclusion that is based on a preference for the former over the latter.³⁵¹

As Houle makes clear, decision-makers need to attend more carefully to determining what *weight* to attribute to documentary information, in addition to assessing its credibility and trustworthiness.

4.3 Consistency of decision-making

A recurring problem in refugee status determination, both nationally and within a

regional context such as the European Union, is that of consistency of decision-making. This can result from differences of legal interpretation—for example, the meaning of ‘persecution’ or ‘particular social group’—or from different appreciations of essentially similar factual situations. Although the 1951 Convention is probably the most highly litigated international agreement, domestic tribunals across multiple jurisdictions do not have the benefit of a higher international court or authority to steer them through the challenges of interpreting and applying criteria shared in common.³⁵² The EU has sought to promote regional consistency by way of harmonization through the Common European Asylum System, but while instruments such as the Qualification Directive may contribute to shared understandings of key legal criteria, convergent determinations of similar factual applications across the Member States are more elusive.³⁵³

Some national systems encourage consistency through various forms of guidance. In the UK, the Upper Tribunal (Immigration and Asylum) is able to ‘star’ certain decisions as binding on points of law, although not on matters of fact.³⁵⁴ With regard to the latter, it can determine certain decisions to be ‘Country Guidance’ (CG), in which case they then constitute, ‘an authoritative finding’ in any appeal which depends on the same or similar evidence, unless either expressly superseded or replaced by a later CG determination, or inconsistent with otherwise binding authority. A failure to follow clearly applicable guidance or to explain why it does not apply will likely ground an appeal for error of law.³⁵⁵

In Canada, the Chairperson of the Immigration and Refugee Board is expressly authorised to issue policy guidelines, and also to identify particular decisions as ‘jurisprudential guides’.³⁵⁶ ‘Guidelines’ issued so far have covered issues such as protection claims made by civilian non-combatants, children, women fearing gender-related persecution, and claims involving sexual orientation and gender identity and expression (SOGIE). They are described as ‘not mandatory’, but ‘decision-makers are expected to apply them or provide a reasoned justification for not doing so’.³⁵⁷ ‘Jurisprudential guides’ are decisions that are ‘well-written, detailed, and contain persuasive reasoning’. Members ‘are encouraged to follow the reasoning ... in cases with similar facts or explain their reasons for not doing so’.³⁵⁸

This somewhat cautious language reflects the almost constant tension between, on the one hand, the institutional goal of a consistent, cohesive and

coherent jurisprudence; and, on the other hand, the independence of decision-makers who must assess a variety of *individual* claims against apparently similar factual scenarios that do not necessarily lead to the same conclusion. The risk with any form of ‘guidance’ is that it may steer decision-makers away from individual circumstances and lead to a failure on their part to consider the evidence as a whole and ‘in the round’. ³⁵⁹ In *CARL v Canada* (2019), the Federal Court considered challenges to four instances of jurisprudential guidance, precisely because they dealt with questions of *fact*, either in whole or in part. ³⁶⁰ It was argued that they were *ultra vires* the authority of the IRB Chairperson, and improper also, because country conditions were constantly changing; moreover, the guidance trespassed on decision-makers’ independence and jurisdiction to make their own findings of fact. ³⁶¹ The Court accepted that guidance might unlawfully fetter discretion, but found that it did so only ‘because of the statement of expectations’ with which they were prefaced. ³⁶² It emphasized that each case is to be decided on its particular facts as determined by the Board member, account being taken of any relevant jurisprudence and country documentation, but without improper pressure to conform that accompanies the language of expectation. ³⁶³ The Court rejected the further argument that the jurisprudential guides unfairly enhanced the evidential standard to the prejudice of claimants, by undermining the settled presumption that a claimant’s sworn testimony is presumed to be credible and truthful. ³⁶⁴ It noted that presumptions can be displaced by objective evidence, in the presence of which the burden shifts to the claimant to rebut that evidence, or to contextualize it consistently with his or her own claim. ³⁶⁵

The Federal Court of Appeal disagreed with the court at first instance, de Montigny JA finding that the central question was whether the jurisprudential guides actually interfered with the adjudicative independence of board members. ³⁶⁶ The use of ‘guidelines and other soft law techniques to achieve an acceptable level of consistency’ was especially important for the IRB, and the ‘factual findings’ went beyond the evidence specific to any particular claimant. The guidelines were issued in a transparent manner, were readily available, and did not dictate conclusions but rather allowed for departure where there are good reasons for so doing; there was no evidence to suggest that decision-makers were under pressure from above. ³⁶⁷ Nevertheless, findings on factual issues are ‘fraught with risks and difficulties’, requiring the ‘utmost vigilance’ on the part of counsel; moreover, the decision to designate guidelines should always be

approached with the ‘utmost caution’.³⁶⁸

4.4 Assessing credibility and drawing inferences from the evidence

Refugee claims made by people from different backgrounds raise a variety of issues.³⁶⁹ The cross-cultural dimension is obvious on some levels, but the decision-maker’s understanding of credibility is almost always affected by the fact that he or she is dealing with knowledge at greater or lesser remove. Simply considered, there are just two issues: First, could the applicant’s story have happened, or could his or her apprehensions come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable? If the story is consistent with what is known about the country of origin, then the basis for the right inferences has been laid.³⁷⁰

Several States have issued guidelines on assessing credibility, which identify the central issues as: considering all the evidence; making clear findings on credibility and providing adequate reasons; basing decisions on significant and relevant evidence and aspects of the claim, and dealing with contradictions, inconsistencies, omissions, and materiality; relying on trustworthy evidence to make adverse findings of credibility; and allowing the claimant to clarify contradictions or inconsistencies in the testimony.

Australia’s 2015 guidelines emphasize the assessment of credibility as a finding of *fact*, the need again to consider all the evidence, and for credibility findings to be clear and rational and based on the evidence. They also recognize that a ‘not credible’ finding in some respects is not necessarily inconsistent with the existence of a well-founded fear of persecution in other respects; and stress the responsibility of the decision-maker to *inquire*, to raise issues with the claimant, to test for internal consistency and consistency with external sources or information, and to allow an opportunity to respond. ‘Delay’ may be a relevant consideration in the assessment of credibility, and go to the genuineness or depth of the claimant’s fear, while the guidelines also counsel caution in the assessment of personal demeanour.³⁷¹

Occasionally, the legislature may attempt to determine what shall and what shall not be considered credible, or at least to influence the weight which decision-makers are required to give to certain events. For example, section 8 of the UK Asylum and Immigration (Treatment of Claimants) Act 2004 emphasizes elements which damage credibility, namely, conduct which conceals, misleads,

or obstructs. It presumes to establish presumptions as to the negative quality of individual behaviour—the failure to produce a valid passport, or the destruction, alteration or disposal, without reasonable explanation, of a passport, ticket or other documentation connected with travel, or the failure to answer questions, again without reasonable explanation.

Canada has legislated specifically with regard to documents and, in addition to providing acceptable documentation establishing identity,³⁷² section 100(4) of the Immigration and Refugee Protection Act provides in part that, ‘the claimant must produce all documents and information as required by the rules’; Rule 11 of the Refugee Protection Division Rules (2012) States further that:

The claimant must provide acceptable documents establishing their identity *and other elements of the claim*. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.³⁷³

As is now the case under the UK Asylum and Immigration (Treatment of Claimants) Act 2004, the lack of acceptable documents without reasonable explanation is thus a relevant and significant factor in determining the credibility of the applicant. The Canadian Guidelines nonetheless stress that what is ‘reasonable’ will depend on the circumstances of the case, and in some circumstances it may well be *unreasonable* to expect a claimant to obtain documents from his or her country of origin.³⁷⁴

4.4.1 Reasoning around credibility: consistency and inconsistency

Personal credibility is now critically important in the status determination process and a personal interview or hearing is therefore essential.³⁷⁵ More than a pro forma approach is required, however, given what experience has revealed about memory, trauma, recall, delay, successive interviews, deference, and, above all, about preconceptions, expectations, assumptions, and ‘common sense’.³⁷⁶ Decision-makers can all too commonly rely on instinct and a feel for credibility, while paying too little attention to identifying material facts, weighing the evidence, assessing risk. As the Irish High Court has noted:

One's experience of life hones the instincts, and there comes a point where we can feel that the truth can, if it exists, be smelt. But reliance on what one firmly believes is a correct instinct or gut feeling that the truth is not being told is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact.³⁷⁷

Moving from one's own instinctive views on what is plausible, reasonable, necessary, or likely, to a more 'objective' position, can be assisted by in-depth training and rigorous oversight, but also by attention to matters of form.³⁷⁸ This can include early legal assistance, competent interpretation, an environment conducive to narrative, and recognition of the limitations of documentary evidence, particularly where it is but the backdrop to the personal testimony of the claimant; as courts have recognized, such testimony ought not to be discounted in the absence of *cogent* contrary or qualifying evidence.³⁷⁹

In one United Kingdom case, the Court of Appeal described an applicant who, in earlier proceedings, had been 'adjudged to be lacking (indeed totally lacking) in credibility', but whose claim ultimately succeeded on the basis of a medical assessment which addressed her rape, torture and violent abuse, and identified her also as a very private person who did not like to express her emotions in company and who lived with feelings of deep and intense shame and self-disgust.³⁸⁰ The Court dismissed the decision below that the medical report was not 'independent evidence of torture' because based in large measure on the testimony of the claimant.³⁸¹ To the contrary, the Court emphasised that, if an independent expert's findings, expert opinion and honest belief were to be refused the status of independent evidence because, as must inevitably happen, the expert *starts* with an account from her client and patient, then the very notion of independent evidence in this context would be deprived of all meaning.³⁸²

Too often, the decision-maker fails to treat the personal account of the claimant as evidence in its own right. 'Implausibility' is culturally configured and will frequently reflect idealized and factually incorrect assumptions about the world at large, for example, about the efficacy of border controls, or about bribery, or about how smuggling networks actually operate, or about the assistance which people do commonly render unto others. Over-reliance on such subjective assessments can be countered by requiring careful articulation of the steps leading to particular conclusions and the reasons that justify each stage.³⁸³

Inconsistencies must nevertheless be assessed as material or immaterial. *Material* inconsistencies go to the heart of the claim, and concern, for example,

the key experiences that are the cause of flight and fear. Being crucial to acceptance of the story, applicants ought in principle to be invited to explain contradictions and clarify confusions.³⁸⁴

Inconsistency may be *immaterial* if it relates to incidentals, such as travel details, or distant dates of lesser significance. A statement from which different inferences can be drawn, however, is not an inconsistency, and generally a negative inference as to credibility ought only to be based on inconsistencies that are material or substantial; still, a series of minor inconsistencies and contradictions may combine to cast doubt on the truthfulness of the claimant. In practice also, negative inferences will often be drawn from the claimant's destruction of documents, withholding of information, failure to provide evidence of identity, and persistent vagueness in response, particularly where the claimant is unable or unwilling to provide a reasonable explanation.

Holes or inconsistencies that appear in the fabric of the narrative can be dealt with through question and answer, provided some care is used in the choice of questions. Research shows that errors in testimony increase dramatically in response to specific questions (25–33 per cent more errors), by comparison with spontaneous testimony given in the form of a free report, which nevertheless can be more time-consuming. Such free reports also tend to be sketchy and incomplete, however, and can be most effectively filled out by using 'open', rather than 'closed' questions. The open question solicits views, opinions, thoughts and feelings, founded on personal experience; the closed question invites the monosyllabic answer, yes or no; a simple statement of fact; a closed answer.³⁸⁵

The process of narration is also a process of communication, and all behaviour, even silence or inactivity, may convey its own message. But, as already noted, the message sent is not necessarily the message received. Although witness behaviour, such as the manner of expression, politeness, firmness of speech, nervousness or openness, is sometimes considered a good guide to credibility, cultural differences can often invalidate this approach. Similarly, to work successfully, cross-examination requires a fairly sophisticated understanding of a language common to all the parties, but is quite unsuited to the questioning of one not fluent, or where question and answer must pass through the medium of an interpreter.³⁸⁶

Indeed, the use of interpreters in a manner which will best elicit the narrative of the claimant is something of an art.³⁸⁷ Translation is *not* a mechanical process,

but a two-way, sometimes three-way street, that places particular responsibilities on every participant in the refugee determination process. The interpreter is both link and obstacle; *link*, because he or she facilitates an oral dialogue; and *obstacle*, because the questioner's intentions may be misunderstood, either because of a failure to communicate clearly and coherently, or because both parties do not possess a common basis of understanding and values. What the applicant says comes across *filtered* and then has to pass by the decision-maker's own baggage of preconceptions. Accepted universals, like time, family, common sense, are upset by other people's world views.³⁸⁸

Refugee claims are not like other cases; they rarely present hard facts, let alone positive proof or corroboration. More often than not, the decision-maker must settle for inferences instead, that is, conclusions drawn from the generally inadequate material available. In the absence of hard evidence, the possibility of persecution must be inferred from the personal circumstances of the applicant, and from what is known about the country of origin. The credibility of testimony is thus both an essential pre-condition to the drawing of inferences relating to refugee status; and a matter of inference in itself. Inference in this context does not mean the strict logical consequences of known premises, or the process of reaching results by deduction or induction from something known or assumed. Rather, it is the practical business of arriving at a conclusion which, although not logically derivable from the assumed or known, *nonetheless possesses some degree of probability relative to those premises.*³⁸⁹

Inference must be distinguished from conjecture, though the line is often difficult to draw:

A conjecture may be plausible but it is of no legal value, for its essence is that of a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.

The attribution of an occurrence to a cause is ... always a matter of inference.³⁹⁰

Thus, an inference as to the facts (what happened), or as to the credibility of the claimant (is he or she to be believed) must be based on the evidence and be reasonably open to the decision-maker.

4.5 Appeal or review

The UNHCR Executive Committee employed somewhat ambiguous language with respect to appeal or review from initial decisions on asylum or refugee

status, merely recommending that claimants have ‘a reasonable time to *appeal for a formal reconsideration* of the decision’, and leaving open both the identity and composition of the re-examining body,³⁹¹ and the administrative or judicial nature of the process.

The principle of effectiveness of obligations favours a second look at asylum decision-making, but the nature of the review process requires careful consideration. Certain jurisdictions maintain a tradition of ‘deference’ with regard to specialist tribunals and first-level finders of fact,³⁹² while in others the review process can be limited to narrow questions of law.³⁹³ In practice, neither is necessarily appropriate to determining the relevant international law and whether international obligations are in danger of being violated, but much will depend on the constitutional position of domestic courts when reviewing administrative decision-making; some sort of appeal, however, going both to facts and to legality, offers the best chance of correcting error, ensuring consistency, and promoting better decision-making.

‘Deference’ can be an obstacle to effective review, but the Irish High Court has stressed, for example, that credibility assessment must not only concord with established legal principles, but also with ‘the principles of constitutional justice’.³⁹⁴ This suggests a possibly wider view of the traditional error of law doctrine, and a greater readiness to review the materiality of error.³⁹⁵ In practice, deference can be misleading, insofar as it may distract from the underlying principles that require decision-making, in each instance, to identify the most relevant evidence and give reasons for accepting or rejecting it.³⁹⁶ Given the right to an effective remedy, this may compensate for the lack of an appeal on the merits. However, if review is confined to errors of law, then the initial decision-making level needs to be solidly constructed around the articulation and provision of reasons for decisions and for each step towards the final conclusion. Reasons are required to identify the material facts, to separate out the relevant from the irrelevant, to determine what is credible or not, to indicate why one source is preferred to another, and to identify the applicable law and its meaning and scope.³⁹⁷ They are also inherent in the duty to act fairly and essential if the claimant is to have a truly effective remedy.

Unfortunately, national procedures are commonly characterized by a ‘culture of disbelief’.³⁹⁸ It is a fair criticism of the process across jurisdictions (driven perhaps by the otherwise non-controversial proposition that it is for the claimant to establish his or her case), that greater emphasis is placed on when and how

negative inferences should be drawn, than on when and how to draw positive inferences. Not surprisingly, the extent to which higher courts review findings of credibility varies between jurisdictions, but a critical, inquiring approach is needed, if compliance with international and regional standards is to be ensured. For example, the recast EU Procedures Directive helpfully identifies some of the key elements which need to be ‘controlled’ by a superior court, including whether applications have been ‘examined and decisions taken individually, objectively and impartially’; whether ‘precise and up-to-date’ country of origin information has been obtained; whether decisions are in writing; and whether reasons in fact and law are given for negative decisions, and so forth. If domestic courts do not review effectively, decision-making does not improve, and the potential for breach of international obligations simply increases.³⁹⁹

Credibility determinations in applications for international protection raise important questions about traditional conceptions of judicial review and appeal. The error of law approach to review, that is, a concentration on *form* rather than *substance*, may only accentuate dissatisfaction and contribute little to improving the quality of decision-making. Moreover, the case for ‘deference’ needs to be re-examined. It is, or may be, premised on certain assumptions, for example, that a court should be slow to interfere with the findings of a specialist or skilled tribunal; or that the basic principles of due process are understood and factored into the decision-making process. The record suggests that those assumptions are not justified, if ever they were, and that a more rigorous approach is required in relation to the standards of administrative decision-making, especially where fundamental rights are engaged.⁴⁰⁰ In this context, the local reviewing court may find itself as the organ of State primarily charged with ensuring that the country’s system of protection is compatible with its international legal obligations. International jurisdictions provide important guidance, but they can only be subsidiary to the central role of the national courts as guarantors of the rule of law.⁴⁰¹ In the refugee context and specifically in applying the refugee definition, many things will never be known for certain, but those tribunals have a principal part to play in an international regime in which the primary goal remains protection and the avoidance of impermissible harm, not exclusion.

5. The status of refugees and the termination of refugee status in national law

The following sketches out a few areas requiring attention if an effective national and international system of protection is to be maintained. Clearly, a perennial challenge is the incorporation of international obligations into domestic law, and then ensuring their effective implementation at the ‘front end’, when the refugee or asylum seeker first makes contact with State officials. International legal standards also bear on the next stage, as the claim to protection is determined and reviewed, and thereafter, following recognition of status and the grant of permission to remain.

For certain States parties, the very act of ratification may cause the treaty to have internal effect, so that it can be relied upon at law by the refugee who seeks to establish status or to secure a particular advantage or standard of treatment.⁴⁰² Even in such countries, however, specific measures of incorporation may be appropriate, particularly in procedural matters. In other States, including many with a common law tradition, specific legislation is essential if the concept of refugee status is to have any legal content, and if standards of treatment are to be legally enforceable, rather than dependent upon executive discretion.

The divorce between refugee status, on the one hand, and asylum in the sense of a lasting solution, on the other hand, has been analysed above; States are bound by one fundamental consequence of refugee status, *non-refoulement*, but retain discretion in the grant of asylum. Between the obligation and the liberty, refugees may yet find themselves in a limbo of varying degrees of legal and administrative security. Many States in practice allow or tolerate the presence of asylum seekers pending the conclusion of procedures for the determination of status. Other countries permit residence pending decision, although departure to a third country can be required.⁴⁰³

Where asylum in the sense of residence does follow,⁴⁰⁴ then the precise standards of treatment to be accorded will again depend upon the standing of the relevant international treaties in the local law and upon the provisions of any incorporating legislation. Protection against extradition, expulsion, and *refoulement* may be secured by law indirectly (for example, where deportation appeals tribunals are empowered to take all relevant factors into account); or directly, by express restrictions upon the permissible grounds of expulsion and choice of destination.

5.1 Refugee status and the ‘opposability’ of decisions

The existence of an international legal definition of refugees raises the question

of the opposability of determinations of refugee status by UNHCR and individual States parties to the 1951 Convention/1967 Protocol. UNHCR is charged with protection of refugees and is alone competent to decide who comes within its jurisdiction under the Statute or any relevant General Assembly resolution. Given States' acquiescence in UNHCR's protection function, its determinations of status are in principle binding on States, at least so far as meeting its mandate responsibilities is concerned. The very definition of refugees, however, incorporates areas of appreciation, so that in practice UNHCR's position on individuals and groups may be challenged. Nevertheless, as noted in another context,⁴⁰⁵ UNHCR's opinions must be considered by objecting States in good faith and a refusal to accept its determinations requires substantial justification.⁴⁰⁶

In its 1978 Conclusion on the extraterritorial effect of determinations of refugee status,⁴⁰⁷ the Executive Committee 'considered that one of the essential aspects of refugee status, as defined by the 1951 Convention and the 1967 Protocol, is its international character,' and noted that States parties to the Convention and Protocol undertake to recognize and accept for visa purposes CTDs issued by other States.⁴⁰⁸ It noted further, 'that several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights—as a refugee—in another Contracting State and that the exercise of such rights is not subject to a new determination of ... refugee status'.⁴⁰⁹ Moreover, it recognized that,

[r]efugee status as determined in one Contracting State should only be called into question by another Contracting State when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention.⁴¹⁰

Apart from providing for the exercise of certain rights, neither the Convention nor the Protocol makes any express provision for extraterritorial effect as such. The undertaking to 'recognize the validity' of travel documents issued under article 28 is arguably limited to their validity for visa, identity, and returnability purposes. However, just as a passport is generally accepted as *prima facie* proof of nationality,⁴¹¹ so ought the CTD to be accepted as evidence that the holder possesses the international legal status of refugee. State practice either for or

against the Executive Committee's recommendations is sparse, and the occasions on which one State will challenge another's determinations are likely to be rare. A refugee who has offended the law can generally be deported to the State which issued the travel document. A more acute problem arises, however, where the extradition is sought of a refugee recognized in one State but physically present in another. Where the requesting State is the country of origin, the protecting or asylum State may justifiably object to the potential *refoulement* of 'its' refugee. In such a case the refusal to accept the latter's determination of status, followed by extradition of the refugee, constitutes a putative wrong to the protecting State.⁴¹²

The risk of extradition is a real one for many refugees and can be most acute when they move between States, whether or not in possession of a CTD. On such occasions, immigration and border checks may result in arrest, detention, and possible extradition as a result of an INTERPOL 'Red Notice' or 'diffusion', which may well have been initiated by the refugee's country of origin.⁴¹³ INTERPOL promotes cooperation among police forces on a number of fronts, including through the dissemination of various levels of 'notice' indicating, for example, that an individual is being sought and should be arrested with a view to extradition. A 'Red Notice' is effectively an 'international wanted persons notice', but many States require their border and police officers to arrest those who are listed.

Notices are published by INTERPOL's General Secretariat at the request of National Central Bureaus or of competent international organizations, such as the International Criminal Court. The Red Notice comes closest to being an international arrest warrant, and a 'diffusion' is similar, but sent directly by a member State to another country; in each case, the notice must comply with INTERPOL's constitution and rules on data processing.⁴¹⁴ In principle, the constitution requires the organization to act 'in the spirit of the Universal Declaration of Human Rights', and forbids it from undertaking 'any intervention or activities of a political, military, religious or racial character';⁴¹⁵ in addition, its Rules on the Processing of Data govern how it should handle and protect information.⁴¹⁶

In practice, Red Notices are often used for political purposes, to target journalists, human rights activists, and refugees.⁴¹⁷ INTERPOL's administrative system was for long unable to 'intercept' alerts that did not meet constitutional requirements, and in addition no effective remedies were available to those

targeted. To some extent, these deficiencies have been made good, particularly as a result of published instances of abuse and resulting political pressure.⁴¹⁸

In June 2014, INTERPOL's Executive Committee announced that under its refugee policy, each Red Notice and diffusion request would be assessed by the General Secretariat or its internal oversight mechanism, the Commission for the Control of INTERPOL Files. In general, such notices would be disallowed if the refugee status of the person concerned had been confirmed, and if the notice had been requested by the State in which the refugee feared persecution.⁴¹⁹

A gap remains, however, in that INTERPOL will not necessarily be apprised of each and every determination of refugee status or grant of asylum.⁴²⁰ In its 2017 resolution on data processing, the INTERPOL General Assembly 'encouraged' members to provide confirmation of refugee status, 'with due observance of confidentiality requirements', but, taking its lead from a host of UN Security Council resolutions, it placed most emphasis on making sure that 'refugee status is not abused by terrorists and other criminals'.⁴²¹ Meeting in October 2018, the Working Group on International Cooperation of the Conference of the Parties to the UN Convention against Transnational Organized Crime recommended more research on the interplay between refugee and asylum proceedings and extradition proceedings, but did not deal directly with the protection dimension.⁴²²

The goals of international criminal justice and international protection will likely continue to be in tension from time to time, and it is no less likely that some States will continue to pursue refugees for political reasons. Whenever they are faced with an extradition request involving a refugee, States parties to the 1951 Convention/1967 Protocol need first to recall the fundamental character of their *non-refoulement* obligations; secondly, they should in principle accept the refugee status of an individual travelling on a CTD issued by another State party, and that he or she is properly entitled to protection by that State. Arguably also, a non-State party which accepts a CTD for visa, immigration, or return purposes is estopped from denying that the issuing State has a legal interest in the holder, and therefore also in his or her protection. That argument may be less well-founded in cases of first contact, including spontaneous arrivals at the border, but in all cases UNHCR's protection responsibilities will be engaged, and cooperation in good faith will be required to enable it to fulfil its mandate and find a solution consistent with international law.

5.2 The principle of acquired rights

The justification for refugee status may come to an end in a variety of circumstances. The question then arises whether the State, in the exercise of its discretion generally over the conditions of residence of foreign nationals, is entitled to require the former refugee to leave its territory. As a matter of law, and at first glance, this aspect of sovereign competence cannot be doubted. In practice, however, it has been common to find that, once asylum is granted, the issue of refugee status is reviewed only if, by their own actions, refugees render themselves liable to deportation (for example, by engaging in criminal activity). Where refugee status ceases in other cases, then the individual becomes subject to the ordinary law governing the residence of foreign nationals. The corollary is that he or she is entitled to the same standards of treatment, including the right not to be arbitrarily expelled. This right, it has been argued elsewhere, entails not only that decisions on expulsion be in accordance with law, but that the foreign national's 'legitimate expectations' be taken into account, including such 'acquired rights' as may derive from long residence and establishment, business, marriage, and local integration.⁴²³

¹ As of 30 April 2021, 149 States had ratified the 1951 Convention and/or the 1967 Protocol. For States parties, see 'List of States' in preliminary matters, above xix. For text of the relevant treaties, see the online version opil.ouplaw.com/ view/ 10.1093/ law/ 9780198808565.001.0001/ law- 9780198808565

² This assessment, made in the first edition of this work (1983), may be even more justified today, although perhaps for different reasons. Some States perceive the Convention as an obstacle to efficient 'migration management', or as diverting resources from countries of first refuge to fund refugee determination for the few who make their way to the developed world, or as a potential security threat. Cf. Jackson, I. C., 'The 1951 Convention relating to Status of Refugees: A Universal Basis for Protection' (1991) 3 *IJRL* 403.

³ Criticism of the Western/European focus of the 1951 Convention generally fails to note that the invitation to participate in the Conference of Plenipotentiaries was extended to *all* United Nations Member States. As one participant noted at the time, the non-appearance of so many non-European States contributed in no small degree to the initial orientation of art. 1; see UN doc. A/CONF.2/ SR.3, p. 12 (Mr Rochefort). See further text to ⁿ 7.

⁴ The proposed Protocol formed the basis of the 1954 Convention relating to the Status of Stateless Persons: 360 UNTS 117, finalized after a further conference and discussed further in Ch. 13. See Goodwin-Gill, G. S., 'United Nations Treaty-Making: Refugees and Stateless

Persons', in Chesterman, S., Malone, D., & Villalpando, S., eds., *Oxford Handbook of United Nations Treaties* (2019) Ch. 22, 427.

⁵ UN doc. E/1850. See also UN docs. E/1618, E/AC.32/2; Einarsen, T., 'Drafting History of the 1951 Convention and the 1967 Protocol', in Zimmermann, A., ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 37; Robinson, N., *Convention relating to the Status of Refugees: A Commentary* (1953) 181–9, 190–214.

⁶ ECOSOC res. 319 B II (XI) (11 Aug. 1950).

⁷ Of the 51 States that ratified the Convention between 28 July 1951 and 31 December 1967, fewer than half (22) opted for the geographical limitation to 'events in Europe'. Of the 21 African States that ratified in the same period, 11 opted for the limitation, but five of those States elected to opt into alternative (b)—Europe or elsewhere—before 31 December 1962, some within just months of ratification (Cameroon, Central African Republic, and Togo); that effectively brings the 22 down to 17, that is, one-third.

⁸ At 30 April 2021, four States maintained the geographical limitation: Congo, Madagascar, Monaco, and Turkey. See *Multilateral Treaties deposited with the Secretary-General*, Ch. V, 'Refugees and Stateless Persons': https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&clang=_en. The information below relating to reservations and declarations, many of which have been withdrawn since the last edition, is based on information recorded on this site.

⁹ See generally Goodwin-Gill, 'United Nations Treaty-Making' (n 4); Weis, P., 'The 1967 Protocol relating to the Status of Refugees and some Questions of the Law of Treaties' (1967) 42 *BYIL* 39.

¹⁰ Cape Verde, the United States of America, and Venezuela have acceded only to the Protocol, while Madagascar and St. Kitts and Nevis are party only to the Convention. There are some advantages in ratifying only the Protocol, for example, with respect to dispute settlement; see n 13. Eswatini (formerly Swaziland) ratified the Protocol first, in 1969, and ratified the Convention later, in 2000.

¹¹ Art. I of the Protocol. Note also art. I(3), on the geographical limitation.

¹² See generally Blay, S. K. N. & Tsamenyi, B. M., 'Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1990) 2 *IJRL* 527.

¹³ Under the Convention, reservations are further prohibited with respect to arts. 36–46, which include a provision entitling any party to a dispute to refer the matter to the International Court of Justice (art. 38). The corresponding provision of the Protocol (art. IV) may be the subject of reservation, and such has been made by Botswana, China, Congo, El Salvador, Ghana, Jamaica, Rwanda, Tanzania, St. Vincent and the Grenadines, and Venezuela. It is also not clear from art. VII of the Protocol whether reservations may be made to art. II (cooperation with the United Nations); they are clearly permissible under the corresponding Convention provision (art. 35), although none has been made; cf. Peru's

declaration on ratification of the Protocol.

¹⁴ Malta's reservations on accession excluded entirely application of arts. 7(2), 14, 23, 27, and 28, and qualified arts. 7(3), 7(4), 7(5), 8, 9, 11, 17, 18, 31, 32, and 34 as applicable 'to Malta compatibly with its own special problems, its peculiar position and characteristics'. Most of these reservations were withdrawn in 2002, and those remaining (regarding arts. 23, 11, and 34) were withdrawn in 2004. Cf. Objections by Finland, among others, to various reservations with respect to the 1989 Convention on the Rights of the Child: *Multilateral Treaties deposited with the Secretary-General* ([n 8](#)) Ch. 4 'Human Rights'.

¹⁵ Art. 37 lists the agreements replaced, as between the parties, by the Convention.

¹⁶ Art. 7(1). Honduras understands art. 7 to mean 'that it shall accord to refugees such facilities and treatment as it shall deem appropriate at its discretion, taking into account the economic, social, democratic and security needs of the country'. Note also arts. 5, 6, 13, 18, 19, 21, 22(2); see further below on art. 26.

¹⁷ Goodwin-Gill, G. S., *International Law and the Movement of Persons between States* (1978) 186 and note, and sources cited.

¹⁸ Cf. reservation by Ecuador, limiting acceptance of art. 15, 'so far as those provisions are in conflict with the constitutional and statutory provisions ... prohibiting aliens, and consequently refugees, from being members of political bodies'.

¹⁹ See [Ch. 2](#), ss. 3.1, 7: on the right to work, see also further s. 1.1.1.

²⁰ See reservations by Angola, Belgium, Brazil, Cape Verde, Denmark, Finland, Iran, Latvia, Luxembourg, Madagascar, the Netherlands, Norway, Papua New Guinea (see [n 53](#)), Portugal, Spain, Sweden, Uganda, and Venezuela.

²¹ Bahamas, Honduras, Ireland, Malawi, Moldova, Monaco, Mozambique, Switzerland, Zambia, and Zimbabwe.

²² Austria, Burundi, Ethiopia, Latvia, Moldova (art. 17(2)), and Sierra Leone; Papua New Guinea does not accept any obligation with respect to art. 17(1).

²³ Jamaica; see also reservations by Malta, Mexico, Sweden, the United Kingdom, and Zambia.

²⁴ China (art. 16(3)); Timor-Leste has made a reservation to art. 16(2).

²⁵ Ethiopia, Malawi, Monaco, Mozambique, and Zambia consider this provision a recommendation only; Eswatini, Papua New Guinea (see further [n 53](#)), and Timor-Leste accept no obligation.

²⁶ Estonia, Iran, Timor-Leste, Monaco, and Zimbabwe consider this a recommendation only, and it was not accepted by Malta until 2002; for Canada's interpretation of the phrase 'lawfully staying' in both arts. 23 and 24, see further [n 184](#).

²⁷ Reservations have been made to this article by Canada, Estonia, Finland (art. 24(3)), Iran, Jamaica, Latvia, Malawi, Moldova, Monaco, New Zealand, Sweden, Timor-Leste, the United Kingdom, and the United States. Turkey has declared that refugees shall not enjoy greater rights than Turkish citizens in Turkey. Poland does not accept art. 24(2).

²⁸ See, for example, para. (6), 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees: ‘It is recommended that restrictive regulations concerning foreign labour shall not be rigorously applied to Russian and Armenian refugees in their country of residence.’ Art. 7 of the 1933 Convention relating to the International Status of Refugees and art. 9 of the 1938 Convention concerning the Status of Refugees coming from Germany each use the ‘in all their severity’ language.

²⁹ *Ad hoc Committee on Statelessness and Related Problems. Status of refugees and stateless persons. Memorandum by the Secretary-General, Annex (Preliminary draft convention): UN doc. E/AC.322 (3 Jan. 1950) 34 (art. 13—wage-earning employment).*

³⁰ France—Revision of draft art. 12 of document E/AC.32/L.3 (art. 13 of doc. E/AC.32/2): UN doc. E/AC.32/L.3/Corr.2 (25 Jan. 1950); Summary Record of the Twelfth Meeting: UN doc. E/AC.32/SR.12 (1 Feb. 1950) para. 49. Following the 1933 and 1938 Conventions, a few closely defined categories might receive more generous treatment; see now art. 17(2) and (3) of the 1951 Convention.

³¹ *Ad hoc Committee on Refugees and Stateless Persons, Summary Record of the Thirteenth Meeting: UN doc. E/AC.32/SR.13 (6 Feb. 1950) paras. 3 (Mr Rain, France), 4 (Mr Henkin, USA), 8 (Mr Rain, France), 12–17 (Sir Leslie Brass, UK).*

³² *Ad hoc Committee on Refugees and Stateless Persons, Second Session, Summary record of the Thirty-Seventh Meeting: UN doc. E/AC.32/SR.37 (26 Sep. 1950) 12.*

³³ UN doc. A/CONF.2/31 (4 Jul. 1951); the Yugoslav amendment was supported by Germany.

³⁴ UN doc. A/CONF.2/SR.9 (21 Nov. 1951) 4–5, 16 (16-1-4).

³⁵ Access to the labour market alone is not necessarily the end of the refugee’s problems, and securing recognition of qualifications remains a serious obstacle to employment. See NOKUT (Norwegian Agency for Quality Assurance in Education), ‘Toolkit for Recognition of Refugees’ Qualifications’: <https://www.nokut.no/en/>; Council of Europe, ‘European Qualifications Passport for Refugees’: <https://www.coe.int/en/web/education/recognition-of-refugees-qualifications>; UNESCO, ‘What you need to know about the UNESCO Qualifications Passport for Refugees and Vulnerable Migrants’ (15 Nov. 2019): <https://en.unesco.org/news/what-you-need-know-about-unesco-qualifications-passport-refugees-and-vulnerable-migrants>; Malgina, M., Schwitters, H., & Skjerven S. A., ‘Preparing for recognition of refugees’ qualifications’, *University World News* (11 Jan. 2020): <https://www.universityworldnews.com>.

³⁶ *N.V.H. v Minister for Justice and Equality* [2017] IESC 35. Note that this case is also cited as *NHV v Minister for Justice and Equality*.

³⁷ Refugee Act 1996, s. 9(4). This Act has been replaced by the International Protection Act 2005, s. 16(3)(b) of which contains an almost identical provision.

³⁸ *N.V.H. v Minister for Justice and Equality* (³⁶) para. 14. In the words of the Supreme Court of Canada, ‘Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in

society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect': *Re Public Service Employee Relations Act* [1987] 1 SCR 313, paras. 90–1 (Dickson CJ and Wilson J), quoted in Murphy, C. & Ryan, D., 'Work, dignity and non-citizens: reflections from the Irish constitutional order' [2020] *Public Law* 30, 38.

³⁹ *N.V.H. v Minister for Justice and Equality* (n 36) paras. 15–16; the Court referred to *Botta v Italy* (1998) 26 EHRR 241, 256; Committee on Economic, Social and Cultural Rights, 'General Comment No. 18 on the right to work': UN doc. E/C.12/GC/18 (6 Feb. 2006) para. 1. See also 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights. Statement by the Committee on Economic, Social and Cultural Rights': UN doc. E/C.12/2017/1 (13 Mar. 2017); Edwards, A., 'Article 17 1951 Convention', in Zimmermann (n 5) 951.

⁴⁰ *N.V.H. v Minister for Justice and Equality* (n 36) paras. 17–19. The claimant had been waiting for more than eight years. A somewhat different approach has been taken in the UK to a work-related, non-refugee case, where the court considered the government's two-year delay in sending a biometric residence permit to an individual with limited leave to remain. Even though there was no direct authority to show that a right to work was itself protected by art. 8 ECHR 50, 'where an individual is wholly or substantially deprived of the ability to work altogether, article 8(1) is at least arguably engaged'. In the circumstances, the government's own policy documents confirmed that no UK employer could have lawfully employed the application, with the inevitable inference that he had been deprived of all available employment opportunities: *Hans Husson v Secretary of State for the Home Department* [2020] EWCA Civ 329, paras. 35–7. See also the court's discussion of a duty of care at paras. 42–64.

⁴¹ See Murphy & Ryan (n 38) 38–40.

⁴² In 2018, Ireland transposed the EU Reception Directive (recast) into local law, art. 9 of which requires Member States to ensure that asylum seekers have effective access to the labour market no later than nine months after lodging their claim for protection, provided that a first instance decision has not been yet taken and the delay is not due to the applicant. See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast): [2013] OJ L180/96; Ireland: European Communities (Reception Conditions) Regulations 2018: SI 2018/230; Ireland: International Protection Office, Addendum 1 to Information Booklet for Applicants for International Protection (IPO 1), 'Access to the Labour Market': <http://www.ipo.gov.ie/>.

⁴³ Art. 23: 'The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.' In turn, art. 29(1) of the EU Qualification Directive (recast) scrupulously provides that: 'Member States shall ensure that beneficiaries of international protection receive, in the

Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State.’ The beneficiaries of subsidiary protection, however, are less well-favoured: art. 29(2). See also Lester, E., ‘Article 23 1951 Convention’, in Zimmermann ([n 5](#)) 1043.

[44](#) Case C-713/17 *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Landi* (Third Chamber, 21 Nov. 2018) paras. 15–16, 19–24.

[45](#) *Ibid.*, paras. 19–24.

[46](#) *Ibid.*, paras. 31–2. In 2018, the Austrian Constitutional Court came to a similar conclusion with regard to the Social Welfare Act of Lower Austria, which reduced benefits to those who had not legally resided in Austria for a total of five out of the previous six years. Among others, the Court invoked art. 23 of the 1951 Convention and art. 29 of Directive 2011/95, noting that there was no factual justification for treating refugees differently: Case No. G 136/2017-19 ua, Verfassungsgerichtshof (7 Mar. 2018) para. 3.2; the Court concluded that the law in question violated the principle of equality in art. 7 of the Austrian Constitution and art. I(1) of the federal law on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination): paras. 4, 6; *Ergebnis*, para. 1. English summary on *Refworld*.

[47](#) See further Zetter, R. & Ruaudel, H., ‘Refugees’ Right to Work and Access to Labor Markets—An Assessment’, [Parts 1 & 2](#) (2016): www.knomad.org; Garner, A., ‘Arrested Development? UNHCR, ILO, and the Refugees’ Right to Work’ (2014) 30(2) *Refugee* 15; Council of Europe, Parliamentary Assembly, ‘Refugees and the right to work’, res. 1994 (11 Apr. 2014); Committee on Migration, Refugees and Displaced Persons, Report, doc. 13462 (24 Mar. 2014).

[48](#) In 1989, 320,000 Bulgarians of Turkish ethnic origin did indeed cross into Turkey; see [Ch. 4](#), s. 2.5.1. On ratification, Turkey also expressed its understanding that the terms ‘re-availment’ and ‘re-acquisition’ in art. 1C implied not only a request by the individual concerned, but also the consent of the State in question.

[49](#) Ethiopia in 1979 objected to this declaration, stating ‘that it does not recognize it as valid on the ground that there are no Somali territories under alien domination’. Georgia, which ratified in 1999, stated that, ‘before the full restoration of the territorial integrity of Georgia, this Convention is applicable only to the territory where the jurisdiction of Georgia is exercised’.

[50](#) The United Kingdom did not extend either the Convention or the Protocol to Hong Kong, and China has not extended either instrument to the Hong Kong Special Administrative Region.

[51](#) Reservations by Ethiopia, Fiji, Israel, Jamaica, Latvia, Madagascar, Spain, Sweden, Uganda, and the United Kingdom.

[52](#) Reservations by Angola, Ethiopia, Fiji, Jamaica, Madagascar, Uganda, and the United Kingdom.

[53](#) Reservations by Angola, Burundi, Latvia, Malawi, Mexico, Moldova, Mozambique, the

Netherlands, Rwanda, Spain, Sudan, Zambia, and Zimbabwe. Botswana has made an ‘open’ reservation, Iran considers art. 26 to be a recommendation only, while Papua New Guinea partially withdrew its ‘no obligation’ reservation to arts. 17(1), 21, 22(1), 26, 31, 32, and 34 in 2013, specifically and exclusively with regard to, ‘refugees transferred by the Government of Australia to Papua New Guinea and accepts the obligations stipulated in those articles in relation to such persons’. At the 1951 Conference, it was said that art. 26 was not infringed where, under a labour contract or group-settlement scheme, refugees who were admitted were required to remain in a particular job for a particular time: UN doc. A/CONF.2/SR.11 (22 Nov. 1951), 16. Robinson further considered that art. 26 would not be breached in the case of ‘special situations where refugees have to be accommodated in special camps or in special areas even if this does not apply to aliens generally’: Zimmermann ([n 5](#)) 133, n 207.

[54](#) Arts. II(6) and III.

[55](#) Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018) 80–3; Cantor, D. & Chikwanha, F., ‘Reconsidering African Refugee Law’ (2019) 31 *IJRL* 182, 198–201, 207–11, 227–30; Corliss, S., ‘Asylum State Responsibility for the Hostile Acts of Foreign Exiles’ (1990) 2 *IJRL* 181.

[56](#) Some common law countries, where affidavits and statutory declarations may take the place of official documents, have made reservations; see, for example, those of Fiji, Ireland, Jamaica, Uganda, and the United Kingdom. Estonia, and Sweden have also limited their obligations; Finland withdrew its reservation in 2004; see s. 1.2.1.

[57](#) See Executive Committee Conclusion No. 35 (1984), recommending that States provide such documents and also issue provisional documentation to asylum seekers; see also UNHCR, ‘Identity Documents for Refugees’: EC/SCP/33 (Jul. 1984); *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/649 & Add.1, paras. 22–30—incidentally observing that registration and documentation in situations of large-scale influx should be without prejudice to subsequent case-by-case determination: paras. 29–30. See further s. 1.2.2.

[58](#) In 2004, Finland withdrew the reservation under which it did not accept an obligation to issue travel documents, but agreed to recognize those issued by other Contracting States. Israel agrees to issue CTDs subject to the limitations provided for in its passport law, while Zambia does not consider itself bound to issue a travel document with a return clause, where another State has accepted a refugee from Zambia. Estonia limited its obligation for five years from ratification in 1997. See further s. 1.2.3.

[59](#) Honduras, Malawi, Mozambique, and Eswatini accept no obligation to accord more favourable facilities than those ordinarily available to aliens; Papua New Guinea and Latvia accept no obligation.

[60](#) Art. 10, which protects certain types of residence otherwise affected by the events of the Second World War, is not considered further; see Schmahl, S., ‘Article 10 1951 Convention’, in Zimmermann ([n 5](#)) 805. For provisions in respect of refugee seamen, see Bank, R., ‘Introduction to Article 11’ and ‘Article 11 1951 Convention’, in Zimmermann ([n](#)

⁵⁾ 815, 853.

⁶¹ The general rule is that personal status shall be governed by the law of a refugee's country of domicile or residence. Sweden maintains that status is governed by the law of nationality; Botswana and Israel do not accept art. 12, while Spain reserves its position with regard to para. 1.

⁶² Honduras withdrew its reservations regarding arts. 26 and 31 in 2013. Papua New Guinea accepts no obligation under art. 31 save with regard to refugees transferred from Australia, Botswana has made a reservation, and Mexico also, but with respect to arts. 26 and 31(2). See further s. 1.2.4.

⁶³ Not accepted by Botswana and Papua New Guinea (save with regard to refugees transferred from Australia). In 2014, Mexico withdrew its reservation to art. 32, in which it had referred to art. 33 of its Constitution, but without prejudice to observance of the principle of *non-refoulement*. See further s. 1.2.5.

⁶⁴ Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (12 May 1926): 89 LNTS 47 No. 2004. See also Arrangement relating to the Legal Status of Russian and Armenian Refugees (30 Jun. 1928): 89 LNTS 55 No. 2005.

⁶⁵ See further Lester, E., 'Article 25 1951 Convention', in Zimmermann (ⁿ 5) 1129.

⁶⁶ *Ad hoc* Committee on Statelessness and Related Problems, UN doc. E/AC.32/SR.19 (8 Feb. 1950) 4, 6; Weis went on to become UNHCR's first legal adviser. See also Mr Hoare (United Kingdom), Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc. A/CONF.2/SR.11 (22 Nov. 1951) 15.

⁶⁷ See, for example, the reservations of Estonia, Fiji, Ireland, Jamaica, Uganda, Sweden, and the United Kingdom.

⁶⁸ *Ad hoc* Committee on Statelessness and Related Problems, Summary Record of the 19th Meeting, UN doc. E/AC.32/SR.19 (8 Feb. 1950) 2–6.

⁶⁹ UN doc. E/1618, 53, Annex II, 'Comments of the Committee on the Draft Convention relating to the Status of Refugees', 53.

⁷⁰ Report of the *Ad hoc* Committee on Statelessness and Related Problems, UN doc. E/1618 and Corr.1 (17 Feb. 1950) Comment on draft art. 20. The list draws almost verbatim on the activities recommended to be taken by the High Commissioner in the 1928 Arrangement (ⁿ 28).

⁷¹ 1951 Conference, Summary Record of the 11th Meeting, UN doc. A/CONF.2/SR.11 (22 Nov. 1951) 8; see also the comments of the representative for Belgium and the High Commissioner, *ibid.*, 6–8.

⁷² See *Multilateral Treaties deposited with the Secretary-General* (ⁿ 8) Ch. V, 'Refugees and Stateless Persons'.

⁷³ Mr Herment (Belgium), 1951 Conference, UN doc. A/CONF.2/SR.11 (22 Nov. 1951) 11–16, at 12, 14.

⁷⁴ Report of the *Ad hoc* Committee on Statelessness and Related Problems: UN doc.

E/1618 and Corr.1 (17 Feb. 1950) Comments to (then) draft art. 20.

⁷⁵ Thus, when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there is reason to doubt their truthfulness: Cameron, H. E., *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (2018) 79–90; *Durrani v Canada (Citizenship and Immigration)* 2014 FC 167; *Maldonado v Minister for Employment and Immigration* [1980] 2 FC 302, 305, cited with approval in *Sathanandan v Canada (Minister of Employment and Immigration)* (1991) 15 Imm LR (2d) 310 (Federal Court of Appeal), *Fajardo v Canada* (1993) 21 Imm LR (2d) 113, and *Siad v Canada* [1997] 1 FC 698.

⁷⁶ See further Vedsted-Hansen, J., ‘Article 27 1951 Convention’, in Zimmermann ([n 5](#)) 1165.

⁷⁷ *Ad hoc Committee on Refugees and Stateless Persons*, UN doc. E/AC.32/SR.38 (26 Sep. 1950) 23–5.

⁷⁸ Art. 42(1) of the 1951 Convention permits reservations to articles of the Convention other than arts. 1, 3, 4, 16(1), 33, 36–46 inclusive.

⁷⁹ Art. 2, 1933 Convention relating to the International Status of Refugees, 159 LNTS 199 No. 3663.

⁸⁰ *Ad hoc Committee*, Draft Report, UN doc. E/AC.32/L.38 (15 Feb. 1950).

⁸¹ *Ad hoc Committee*, Summary Records, UN docs. E/AC.32/SR.15, paras. 57–129 (the first session debate dealt almost exclusively with issues of residence and security); E/AC.32/SR.38, 23–5 (a Canadian comment in the debate suggests some confusion between identity documents and travel or re-entry documents: 23); E/AC.32/SR.41, 20 (the draft article was adopted with the substitution in the French text of the heading of the phrase ‘*Pièce d’identité*’ for ‘*Carte de légitimation*’); E/AC.32/SR.42, 11–35 (primarily discussing the meaning of the French phrase, ‘*résidant régulièrement*’). Mr Weis noted that, ‘A man without papers was a pariah subject to arrest for that reason alone’: UN doc. E/AC.32/SR.38 (26 Sep. 1950) 24, but it was nevertheless recognized that the issue of identity papers was without prejudice to the right of the government to expel a person illegally present.

⁸² See also UNHCR, ‘Identity Documents for Refugees’, EC/SCP/33 (20 Jul. 1984) paras. 3, 4–8, 10, 12; also Executive Committee Conclusions No. 35 (XXXV), ‘Identity Documents for Refugees’ (1984); No. 91, ‘Registration of Refugees and Asylum Seekers’ (2001); No. 106 (LVII), ‘Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons’ (2006); No. 107 (LVIII), ‘Children at Risk’ (2007); Goodwin-Gill, G. S. & Kumin, J., *Refugees in Limbo and Canada’s International Obligations* (2000).

⁸³ See also Recommendation A of the Final Act. See further Vedsted-Hansen, J., ‘Article 28/Schedule’, in Zimmermann ([n 5](#)) 1177.

⁸⁴ Generally on passports and the right to travel, see Goodwin-Gill ([n 17](#)) Ch. II. On the importance of documentation for refugees, see Executive Committee Conclusion No. 102 (LVI), ‘General’, para. (v) (2005). Robinson notes that at the 1951 Conference, the representative of Venezuela, despite the wording of art. 28(1), held to the view that the issue

of travel documents to refugees would not be considered mandatory in the absence of a similar obligation benefiting nationals: (n 5) 135, n 212. Cf. Turkey's 'general' declaration that 'no provisions of [the] Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey'. See also art. 25, EU Qualification Directive (recast), extending the benefit of travel documents also to those receiving subsidiary protection.

⁸⁵ UN docs. E/AC.32/SR.16, 13–15; SR.42, 5–7; A/CONF.2/SR.12, 4–13; SR.17, 4–11.

⁸⁶ See the reservation by Israel, *Multilateral Treaties deposited with the Secretary-General* (n 8).

⁸⁷ See UNHCR, 'Note on Travel Documents for Refugees', EC/SCP/10 (30 Aug. 1978); Executive Committee Conclusion No. 13 (XXIX), 'Travel Documents for Refugees' (1978); Executive Committee Conclusions No. 35 (XXXV), 'Identity Documents for Refugees' (1984); No. 49 (XXXVIII), 'Travel Documents for Refugees' (1987); No. 91 (LII), 'Registration of Refugees and Asylum-seekers' (2001); No. 102 (LVI), 'General' (2005) para. (v).

⁸⁸ See generally UNHCR, 'Note on Travel Documents for Refugees', (n 87).

⁸⁹ On 'returnability' as an essential incident to travel documentation, see Goodwin-Gill (n 17) 44–6.

⁹⁰ Schedule, paras. 4, 5.

⁹¹ Ibid., paras. 6(1), 11, 12. For an overview of (highly divergent) practice in 20 European countries, see Asylum Information Database, 'Unravelling Travelling. Travel documents for beneficiaries of international protection', ECRE (Oct. 2016). The UK and Ireland issue travel documents with the longest validity, up to a maximum of 10 years; for UK practice, see Home Office, 'Home Office travel documents': <https://www.gov.uk/government/publications/travel-documents-home-office-travel-documents>.

⁹² Schedule, para. 6(2); see also para. 6(3).

⁹³ Schedule, paras. 7, 8, 9. The obligation to recognize CTDs, of course, does not oblige States to admit their holders.

⁹⁴ The return clause only gradually became an integral part of the refugee travel document; see Goodwin-Gill (n 17) 42–4. Some States have agreed on a bilateral basis to readmission even after expiration of validity; see, for example, arts. 2 and 4, 1974 Austria–France Agreement on the Residence of Refugees (collected with other related instruments in Council of Europe doc. EXP/AT.Re(77) 3, 21–3). A similar provision is included in art. 4, 1980 European Agreement on Transfer of Responsibility for Refugees: ETS No. 107.

⁹⁵ On earlier 'front line' State views regarding the inappropriateness of return clauses, see 'Russian, Armenian, Assyrian, Assyro-Chaldean and Turkish Refugees', Report by the Inter-Governmental Advisory Commission (9 Sep. 1930): (1930) 11 *LNOJ* 1462; (1931) 12 *LNOJ* 1004, 1008 (Finland); (1932) 13 *LNOJ* 222–4 (Poland); Report of Max Huber: (1931) 99 *LNOJ Spec. Supp.* 20.

⁹⁶ Ad hoc Committee on Statelessness and Related Problems, Summary Records, 39th Meeting, UN doc. E/AC.32/SR.39 (27 Sep. 1950) 6–10; 41st Meeting, UN doc. E/AC.32/SR.41 (28 Sep. 1950) 12–13; 42nd Meeting, UN doc. E/AC.32/SR.42 (28 Sep. 1950) 3–6.

⁹⁷ 1951 Conference, Summary Record of the 18th Meeting, UN doc. A/CONF.2/SR.18 (23 Nov. 1951) 15 (emphasis supplied; the President, Mr Larsen, speaking for Denmark).

⁹⁸ Ibid., 7. In *Al Rawi*, which concerned a claim for protection by, among others, two British-recognized refugees detained in Guantanamo, the Court of Appeal failed to consider both the international and the domestic legal implications of the fact that each held a valid CTD with a 10-year return clause: *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (UNHCR Intervening)* [2006] EWCA Civ 1279. See the ‘Written Submissions on Behalf of the Office of the United Nations High Commissioner for Refugees, Intervener’ (2008) 20 *IJRL* 675 (Guy Goodwin-Gill acted *pro bono* as Counsel for UNHCR).

⁹⁹ Robinson, *A Commentary* (n 5) 145; see also the general discussion in *Report of the Executive Committee*, 29th Session (1978): UN doc. A/AC.96/558, paras. 35–7.

¹⁰⁰ See UNHCR, ‘Note on Asylum’, doc. EC/SCP/12, paras. 19–23 (1979); *Report of the Executive Committee*, 30th Session (1979): UN doc. A/AC.96/572, paras. 60, 72(2)(m), (n). In 1978, the Observer for Botswana, in urging other countries to offer resettlement opportunities, noted that it was unfair that Botswana should be asked to readmit those who had gone abroad for education, solely because it had been the country of first refuge: UN doc. A/AC.96/SR.302, para. 14. Zambia has reserved the right not to issue a travel document with a return clause, ‘where a country of second asylum has accepted or indicated its willingness to accept a refugee from Zambia’. Cf. the similar views of Poland in 1922: ‘Russian Refugees in Poland’, Memorandum by Mr Tytus Filipowicz (7 Jul. 1922): LoN doc. C.483.M.305.1922 (circulated under cover of the Secretary-General’s note of 14 Jul. 1922).

¹⁰¹ For a review of European bilateral and multilateral practice, see Asylum Information Database (n 91) 10–11.

¹⁰² See Executive Committee Conclusion No. 15 (XXX), ‘Refugees without an Asylum Country’, para. (n) (1979).

¹⁰³ Art. 2(2). Temporary absences not exceeding three months on any one occasion or six months in all are not deemed to interrupt stay.

¹⁰⁴ Cf. Grahl-Madsen, A., ‘Protection of Refugees by their Country of Origin’ (1986) 11 *Yale JIL* 362, arguing for a rule under which the State of origin of refugees, ‘by breaking its ties with a refugee’, loses any right to exercise protection until such time as the refugee willingly returns. Para. 16 appears to have been included in the Schedule simply because it had appeared in the 1946 London Agreement on the Adoption of a Travel Document for Refugees: 11 UNTS 73 No. 150. The Ad hoc Committee debated its deletion, but participants also mentioned both the possibility of exceptions to the general rule (for example, where the country of ‘transit’ accepted the exercise of protection by the country of issue), and the need for such protection. The US representative, Mr Henkin, suggested that the Committee, ‘might

quite well examine the question of the right of protection from the viewpoint, not of stateless persons, but of refugees, stateless or not, who did not enjoy any diplomatic protection'. *Ad hoc Committee on Statelessness and Related Problems*, Summary Records, 18th Meeting, UN doc. E/AC.32/SR.18 (8 Feb. 1950) 8–9.

¹⁰⁵ See 'First Report on Diplomatic Protection', UN doc. A/CN.4/506 (7 Mar. 2000) paras. 175–84; see also Dugard, J., 'Diplomatic Protection', *Max Planck Encyclopedia of International Law* (2009); Denza, E., 'Nationality and Diplomatic Protection' (2018) 65 *Netherlands International Law Review* 463.

¹⁰⁶ *Report of the ILC*, 58th Sess. (2016) 47–51: UN doc. A/61/10; art. 8 is described as 'an exercise in progressive development'. Cf. arts. 47, 48, 1967 European Convention on Consular Functions: ETS No. 61 (in force 2011, but with only five parties), and arts. 1 and 2 of the 1967 Protocol thereto concerning the Protection of Refugees: ETS No. 61A (not in force).

¹⁰⁷ UNGA res. 62/67, 'Diplomatic protection' (6 Dec. 2007) Annex.

¹⁰⁸ See 'Diplomatic protection. Comments and information received from Governments. Report of the Secretary-General': UN doc. A/74/143 (11 Jul. 2019).

¹⁰⁹ See UNHCR's views in the *Al Rawi* case (ⁿ 98); also, *LaGrand (Germany v United States of America)* [2001] ICJ Rep. 466, in which Germany was able to invoke two separate causes of action; the first was based on breach by the US of its treaty obligations to Germany, and the second on the injury done to two German nationals. The Court accepted that these were separate and independent claims. Cf. Reiterer, M., *The Protection of Refugees by Their State of Asylum* (1984) 63–4: 'As paragraph 16 clearly refers to the "issue" of the document, it can in no way negate the right of protection originating from *another* legal relationship, such as a State's interest in seeing the grant of asylum respected or its interest in seeing another Contracting Party comply in good faith with the provisions of the 1951 Convention.'

¹¹⁰ Arts. 40, 41, 31(3)(b), 1969 Vienna Convention on the Law of Treaties.

¹¹¹ Art. 5, 1951 Convention.

¹¹² UNHCR, 'Note on International Protection': UN doc. A/AC.96/1145 (2 Jul. 2015) paras. 26, 53–4.

¹¹³ Report of the 70th meeting of the Standing Committee: UN doc. A/AC.96/1174 (3 Oct. 2017) paras. 229–30.

¹¹⁴ UNHCR, 'Machine-readable travel documents', doc. EC/SC/CRP.15 (7 Jun. 2017) para. 6.

¹¹⁵ Report of the 68th session: UN doc. A/AC.96/1176 (9 Oct. 2017) para. 13, Conclusion No. 114 (LXVIII) on machine-readable travel documents for refugees and stateless persons. The Executive Committee emphasized the need to support host States in this field, both financially and by providing capacity-building and technical support, as appropriate, in collaboration with ICAO and UNHCR. See also, ICAO and UNHCR, 'Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons' (Feb. 2017); UNHCR, 'Compliance Update: Machine-Readable Convention Travel Documents for

Refugees and Stateless Persons' (2019): the majority of States party to the 1951 Convention/1967 Protocol and the 1969 OAU Convention now issue such CTDs to refugees, but the record is not so good for stateless persons.

¹¹⁶ See Ch. 5, s. 3.3.5; Ch. 7, s. 5.2. See further Costello, C. & Ioffe, Y., 'Non-penalization and Non-criminalization' in Costello, C., Foster, M., & McAdam, J., *The Oxford Handbook of International Refugee Law* (2021); Noll, G., 'Article 31 1951 Convention', in Zimmermann (n 5) 1243; Hathaway, J. & Foster, M., *The Law of Refugee Status* (2nd edn., 2014) 28.

¹¹⁷ Belgium and the United States: Proposed Text for Article 24 of the Draft Convention relating to the Status of Refugees: UN doc E/AC.32/L.25 (2 Feb. 1950); Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 2 Feb. 1950: UN doc. E/AC.32/L.26 (2 Feb. 1950).

¹¹⁸ Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32/L.38 (15 Feb. 1950) Annex I (draft art. 26); Annex II (comments, 57).

¹¹⁹ Draft Report of the *Ad hoc* Committee on Refugees and Stateless Persons: UN doc. E/AC.32/L.43 (24 Aug. 1950) 9. Cf. s. 25A, Immigration Act 1971, which establishes the offence of helping an asylum seeker to enter the UK, but ties it to action that is done 'knowingly and for gain', and excludes 'anything done by a person on behalf of an organization which aims to assist asylum seekers and does not charge for its services'. See also *R v Arya Bina* [2014] EWCA Crim 1444, involving 'offences on a grand scale'; the court noted that, 'to facilitate the entry of asylum seekers is to obtain gain from the acutely vulnerable': paras. 28, 40.

¹²⁰ 1951 Conference, Summary Records: UN doc. A/CONF.2/SR.13 (Mr Colemar, France).

¹²¹ Ibid.

¹²² '[I]t was often difficult to define the reasons which could be regarded as constituting good cause for the illegal entry into, or presence in, the territory of a State of refuge. But it was precisely on account of that difficulty that it was necessary to make the wording of paragraph 1 more explicit ... To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience': 1951 Conference, Summary Records: UN doc. A/CONF.2/SR.14, 8, 10 (Mr Colemar, France).

¹²³ 1951 Conference, Summary Records: UN doc. A/CONF.2/SR.14, 4–5; see Ch. 4, s. 3.1.

¹²⁴ 1951 Conference, Summary Records: UN doc. A/CONF.2/SR.14, 7, 10–11.

¹²⁵ See Executive Committee Conclusion Nos. 15 (XXX) 'Refugees without an Asylum Country' (1979); No. 36 (XXXVI), 'General', para. (j) (1985); No. 46, 'General (XXXVII)', para. (i); No. 50 (XXIX), 'General', para. (n) (1988); No. 58 (XL), 'The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection' (1989); No. 65 (XLII), 'General', para. (o) (1991); No. 74 (XLV), 'General', para. (j) (1994); No. 87 (L), 'General', paras. (j)–(m) (1999) No. 91

(LII), ‘Registration of Refugees and Asylum Seekers’, para. (f) (2001); No. 114 (LXVIII), ‘Machine-Readable Travel Documents for Refugees and Stateless Persons’ (2017).

¹²⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reissued 2019) paras. 190, 198—the circumstances which lead asylum seekers to flee their country may also make them apprehensive about approaching persons in authority.

¹²⁷ *R v Mateta* [2013] EWCA Crim 1372, paras. 20, 21.

¹²⁸ See discussion at the 1951 Conference: UN docs. A/CONF.2/SR.13, 13–15; SR.14, 4, 10–11; SR.35, 10–20; also art. 5, 1954 Caracas Convention on Territorial Asylum.

¹²⁹ UN doc A/CONF.2/SR.35, 10–20.

¹³⁰ *R v Uxbridge Magistrates’ Court, ex p. Adimi* [2001] QB 657; see also *R v Asfaw* [2008] UKHL 31 and Ch. 5, s. 3.3.5.

¹³¹ On how the defence operates and the importance of focusing on the facts and circumstances of each case, see *R v Mateta* (n 127) para. 21; also, *R v Makuwa* [2006] 1 WLR 2755, [2006] EWCA Crim 175, where the court, quashing a conviction, held that where the defendant adduced sufficient evidence in support of a claim to refugee status, the prosecution had the burden of proving to the usual standard that he or she was not a refugee.

¹³² See, for example, the Chair of the Criminal Cases Review Commission, writing to the *Guardian* on 24 February 2014: <https://www.theguardian.com/law/2014/feb/24/wrongful-prosecutions-refugee-woe>. See also Holiday, Y., Guild, E., & Mitsilegas, V., ‘The Court of Appeal and the Criminalisation of Refugees’, published in collaboration with the Criminal Cases Review Commission with the support of Queen Mary University of London (Oct. 2018); Response by the Criminal Cases Review Commission (7 Nov. 2018). Between 2005 and 2016, the CCRC referred close to 60 such cases for appeal; around one-third were referrals to the Court of Appeal.

¹³³ In *A & Norwegian Organisation for Asylum Seekers*, for example, the Supreme Court of Norway found that in the domestic law implementing art. 31, the Norwegian word ‘straks’ was not a good translation of the phrase, ‘without delay’; a more realistic approach was called for, taking account of all the circumstances of irregular entry: Case No. 2014/220, HR-2014-01323-A (24 Jun. 2014).

¹³⁴ *R v Mateta* (n 127) para. 56; see also *R v Mohamed Abdalla* [2010] EWCA Crim 2400, para. 10.

¹³⁵ See now Home Office, ‘Section 31 Immigration and Asylum Act 1999: defence against prosecution’ (21 May 2015); Crown Prosecution Service, Policy on the prosecution of immigration offences: <https://www.cps.gov.uk/legal-guidance/immigration>.

¹³⁶ Immigration Rules, Part 11, Asylum, paras. 339R, 339T: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>.

¹³⁷ As Costello points out in her 2017 study, States nevertheless increasingly take the necessary legislative and other steps to ensure the protection of refugees against penalties for illegal entry or presence, particularly criminal prosecution. See, for example, Canadian law: s. 133, Immigration and Refugee Protection Act 2001; *B010 v Canada (Citizenship and*

Immigration) 2015 SCC 58, [2015] 3 SCR 704: Costello, C., Ioffe, Y., & Büchsel, T., ‘Article 31 of the 1951 Convention relating to the Status of Refugees’, UNHCR PPLA/2017/01, 34–7 (Jul. 2017).

¹³⁸ Costello, Ioffe, & Büchsel ([n 137](#)).

¹³⁹ See [Ch. 5](#), s. 5.1. Also, see UNHCR Executive Committee Conclusions 15, 22, 44, and 58: UNHCR, ‘Conclusions on International Protection adopted by the Executive Committee of the UNHCR Programme 1975–2017 (Conclusion No. 1–114)’ HCR/IP/3/Eng/REV. 2017.

¹⁴⁰ *SXH v Crown Prosecution Service* [2017] UKSC 30; ‘if prosecuting authorities are aware—or ought to have become aware—that the basis for a proposed prosecution no longer obtains, or that there is a defence available … which will provide a complete answer to the crime charged, and if they fail to act on that information to secure the defendant’s release, that is an obvious instance of failure to have respect for the defendant’s right to a private life’: para. 45 (Lord Kerr).

¹⁴¹ On equal treatment, see s. 1.1.1.

¹⁴² See art. 34: ‘The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.’

¹⁴³ Many refugees, and many long-resident first-generation migrants, are often reluctant to take what appears to be a final step of separation from their homeland.

¹⁴⁴ Robinson, *A Commentary* ([n 5](#)) 154. But see, in particular, Costello, Ioffe, & Büchsel ([n 137](#)) 43–51.

¹⁴⁵ Cf. art. 9: ‘pending a determination … that [the] person is in fact a refugee’. Vietnamese detained after arriving in Hong Kong after 2 July 1982 were to be given ‘all reasonable facilities’ to obtain authorization to enter another State, or to leave Hong Kong, with or without such authorization: Immigration Amendment Ordinance 1982 (No. 42/82) s. 7 (adding a new s. 13D).

¹⁴⁶ See [Ch. 5](#), s. 3.3.4.

¹⁴⁷ In 1991, France expelled a recognized Moroccan refugee, Abdelmoumen Diouri, resident since 1974, to Gabon, under the ‘urgence absolue’ procedure, on the grounds of his ‘contacts’ with groups and foreign powers prejudicial to public security and national interests. He returned to France after the *tribunal administratif de Paris*, following the advice of the *commissaire du gouvernement* found that ‘les conditions de l’urgence absolue n’étaient pas réunies, pas plus que la nécessité impérieuse pour la sûreté de l’Etat et la sécurité publique’. The *Conseil d’Etat* rejected the Minister’s appeal in October 1991, the *commissaire du gouvernement* accepting that while M. Diouri could present a public security threat, those conditions did not exist at the time of his expulsion: *Conseil d’Etat*, Assemblée (11 Oct. 1991) n° 128128, *Diouri*.

¹⁴⁸ This appeared to be Ireland’s interpretation, as stated on ratification. Cf. Uganda’s reservation to art. 32: ‘Without recourse to legal process the Government … shall, in the

public interest, have the unfettered right to expel any refugee ... and may at any time apply such internal measures as the Government may deem necessary in the circumstances; so however that any action taken by the Government ... in this regard shall not operate to the prejudice of the provisions of art. 33': *Multilateral Treaties deposited with the Secretary-General*, Ch. V, 'Refugees and Stateless Persons' (n 8).

¹⁴⁹ For an earlier assessment, see Goodwin-Gill (n 17) 227–8, 238–40, 308–9.

¹⁵⁰ For background, see 'Expulsion of aliens. Memorandum by the Secretariat': UN doc. A/CN.4/565 (10 Jul. 2006).

¹⁵¹ Report of the ILC: UN doc. A/69/10 (2014) Ch. IV, paras. 35–45.

¹⁵² UN doc. A/CN.4/678 (21 Jan. 2015) 24–6.

¹⁵³ *ND and NT v Spain*, App. Nos. 8675/15 and 8697/15 (Grand Chamber, 13 Feb. 2020), para. 123; see art. 4 of Protocol No. 4 to the ECHR.

¹⁵⁴ As the court explained in *Hirsi Jamaa v Italy*, App. No. 27765/09 (23 Feb. 2012) para. 177, the core purpose of art. 4 is to stop States from removing individuals without examining their personal situation and enabling them 'to put forward their arguments against the measure taken by the relevant authority'. Art. 4 applies wherever a State exercises jurisdiction, including on the high seas: para. 180. For other commentary and cases on collective expulsion, see European Court of Human Rights, 'Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights Prohibition of collective expulsions of aliens' (updated 30 Apr. 2017).

¹⁵⁵ *ND and NT v Spain* (n 153) para. 173 ff. The court sought to harmonize its interpretation with the principle of *non-refoulement* in international refugee law.

¹⁵⁶ *ND and NT v Spain* (n 153) paras. 194, 203.

¹⁵⁷ *Khlaifia and Others v Italy*, App. No. 16483/12 (15 Dec. 2016), para. 237 ff., cited in ibid., para. 195.

¹⁵⁸ *ND and NT v Spain* (n 153) para. 199, referring to *Khlaifia* (n 157) para. 248.

¹⁵⁹ *ND and NT v Spain* (n 153) para. 221.

¹⁶⁰ Ibid., para. 152.

¹⁶¹ Ibid., para. 211.

¹⁶² Ibid., para. 211; see further paras. 200–1. Commentators have argued that 'the Court is inventing completely new aspects related to the "own conduct" of the applicants': Pichl, M. & Schmalz, D., ' "Unlawful" may not mean rightless: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.' Verfassungsblog on Matters Constitutional (14 Feb. 2020) <https://verfassungsblog.de/unlawful-may-not-mean-rightless/>.

¹⁶³ Pichl & Schmalz (n 162).

¹⁶⁴ Wissing, R., 'Push backs of "badly behaving" migrants at Spanish border are not collective expulsions (but might still be illegal refoulements)' *Strasbourg Observers* (25 Feb. 2020) <https://strasbourgobservers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/>.

¹⁶⁵ Papageorgopoulos, S., ‘N.D. and N.T. v. Spain: do hot returns require cold decision-making?’ European Database of Asylum Law (28 Feb. 2020) <https://www.asylumlawdatabase.eu/en/journal/nd-and-nt-v-spain-do-hot-returns-require-cold-decision-making>.

¹⁶⁶ Pichl & Schmalz (n 162).

¹⁶⁷ *ND and NT v Spain* (n 153) para. 232.

¹⁶⁸ This claim had been declared inadmissible at an earlier stage of the proceedings: *ibid.*, para. 128.

¹⁶⁹ See also Wissing (n 18).

¹⁷⁰ Art. 2, Articles on the responsibility of States for internationally wrongful acts: UNGA res. 56/83 (12 Dec. 2001) Annex.

¹⁷¹ Cf. Hathaway, J., *The Rights of Refugees under International Law* (2nd edn., 2021) 173–311.

¹⁷² See also art. 16(1). Hathaway & Foster (n 116) 26.

¹⁷³ Cf. art. 11, which refers to refugees ‘regularly serving as crew members/régulièrement employés comme membres de l’équipage’.

¹⁷⁴ *ST (Eritrea) v Secretary of State for the Home Department* [2012] UKSC 12, paras. 36, 49 (Lord Hope); paras. 57–8 (Lord Dyson). The ideal of one, true meaning common to all parties nevertheless remains, but it will be elusive, given the discretion and choice of means retained by States; see Goodwin-Gill, G. S., ‘The Search for the One, True Meaning ...’, in Goodwin-Gill, G. S. & Lambert, H., eds., *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010) 204. Cf. Hathaway (n 171) 196–212, who would argue that ‘scholarly opinion’ rather than State practice, in all its variety, should govern the interpretation of ‘lawful presence’.

¹⁷⁵ See, for example, *Kan Kim Lin v Rinaldi* 361 F. Supp. 177, 186 (1973); aff’d., 493 F.2d (1974), the Court, referring to the *travaux préparatoires* on art. 32, observed that the term ‘lawfully in their territory’ would ‘exclude a refugee who, while lawfully admitted, has overstayed the period for which he was admitted or was authorized to stay or who had violated any other condition attached to his admission or stay’. In *Chim Ming v Marks* 505 F.2d 1170 (1974), the Court of Appeals considered that the ‘only rational interpretation’ of the phrase was ‘one consistent with the definition of unlawfulness in article 31 as involving the status of being in a nation “without authorization”. Since a nation’s immigration laws provide authorization, one unlawfully in the country is in violation of those laws’.

¹⁷⁶ See cases cited in Goodwin-Gill (n 17) 298, n 1, and generally, 295–9.

¹⁷⁷ *ST (Eritrea) v Secretary of State for the Home Department* (n 174) paras. 60, 63–4 (Lord Dyson).

¹⁷⁸ *Ibid.*, paras. 36, 49 (Lord Hope); paras. 57, 58 (Lord Dyson).

¹⁷⁹ *Secretary of State for the Home Department v SC (Jamaica)* [2017] EWCA Civ 2112, paras. 54, 56–7, 73.

¹⁸⁰ In this regard, note art. 24 of the Qualification Directive (recast); unless compelling reasons of national security or public order require otherwise, Member States are *obliged*, as soon as possible after international protection has been granted, to issue a residence permit valid for at least three years.

¹⁸¹ See also the terminology of residence used in paras. 6 and 11 of the Schedule.

¹⁸² UN doc. E/AC.32/SR.42, 11–20.

¹⁸³ *Ibid.*, 12.

¹⁸⁴ In its reservation to arts. 23 and 24, Canada states that it interprets ‘lawfully staying’ as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence are to be accorded the same treatment with respect to those articles as is accorded to visitors generally. With the later development of due process and constitutional protection, this may now be a distinction without a difference.

¹⁸⁵ The Protocol to the 1962 Switzerland–Federal Republic of Germany agreement on transfer of responsibility, for example, while discounting periods of stay for educational, medical, or convalescence purposes, deems authorization of establishment to arise, ‘lorsque le réfugié a obtenu une autorisation de séjour illimitée ou lorsqu'il peut justifier d'une résidence régulière de trois ans’. Agreements such as this one deal with transfer of responsibility *between States*, and no such period of elapsed residence is required for the refugee seeking to invoke the benefit of Convention articles vis-à-vis his or her country of asylum.

¹⁸⁶ See Ch. 3, s. 5.1.2, and Ch. 13, s. 4.2. Hathaway & Foster (n 116) 67–70.

¹⁸⁷ UN doc. E/1618, 39. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (n 126) paras. 101, 104–5. *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168, [2000] FCA 478; *Al-Anezi v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 283, [1999] FCR 355.

¹⁸⁸ See United Nations, *A Study of Statelessness* (1949), Introduction and Part I.

¹⁸⁹ Art. 14 provides that the same protection of artistic rights and industrial property is to be accorded to refugees in their country of habitual residence, as is accorded to nationals. See debate in the Conference of Plenipotentiaries: UN doc. A/CONF.2/SR.7, 20; SR.8, 6; SR.23, 26.

¹⁹⁰ Domicile involves both subjective and objective factors. In *Trottier v Dame Lionel Rajotte* [1940] SCR 203, the Supreme Court of Canada stated that the principles governing change of domicile of origin or birth are that a domicile of origin cannot be lost until a new domicile has been acquired. This involves two factors: the acquisition of residence in fact in a new place, and the intention of permanently settling there. Leaving a country with the intention of never returning is not enough, in the absence of a permanent residence established in another country, ‘general and indefinite in its future contemplation’.

¹⁹¹ See Ad hoc Committee on Statelessness and Related Problems: UN doc. E/AC.7/SR.8, paras. 14, 19; SR.9, para. 2.

¹⁹² *Re Citizenship Act and in re Antonios E. Papadogiorgakis* [1978] 2 FC 208. This case,

it has been said, ‘imposed on the courts an enquiry covering both intention and fact, neither of these elements being considered determinative by itself’: *Canada (Secretary of State) v Nakhjavani* [1987] FCJ No. 721 (Joyal J).

¹⁹³ In *Canada (Secretary of State) v Nakhjavani* (n 192) the court found that the respondents, stateless persons holding Canadian certificates of identity, maintained a pied-à-terre in Canada, but resided principally in Haifa, Israel, by reason of the husband’s religious and administrative duties on behalf of the Baha’i Faith. Their brief visits to Canada did not qualify them for citizenship.

¹⁹⁴ See *Re Chan* [1988] FCJ No. 323, a successful appeal against refusal of citizenship. The applicant had completed undergraduate and graduate training in Canada, and had left for Hong Kong only after experiencing difficulties in finding a job in Canada commensurate with his qualifications. He kept rooms in his parents’ house, made frequent return trips, maintained strong family ties and other social relations, took only temporary, furnished accommodation overseas, kept bank accounts and filed income tax returns. He was held to meet the residency requirements of the Citizenship Act.

¹⁹⁵ *R (on the application of Tag Eldin Ramadan Bashir and Others) v Secretary of State for the Home Department* [2018] UKSC 45.

¹⁹⁶ Akrotiri, in the west, and Dhekelia, in the east, comprise the SBAs. Refugees and asylum seekers arriving later fell within a variety of ‘agreements’ between the UK and Cyprus.

¹⁹⁷ *Bashir* (n 195) para. 69: ‘The mere fact the United Kingdom lost 97% of the island of Cyprus did not alter the status of the 3% that it retained. The status of the SBAs vis-à-vis the rest of the world did not change, except in relation to the rest of Cyprus, and that was because of a change in the status of the rest of Cyprus and not because of a change in the status of the SBAs.’

¹⁹⁸ British Overseas Territories Act 2002, ss. 3(1), 3(2), 4.

¹⁹⁹ In many respects, the SBAs are analogous to a (land-based) British warship.

²⁰⁰ *Bashir* (n 195), para. 89. At paras. 82–3, the Court considered art. 26 and found that it contemplated restrictions on movement internally, and ‘cannot have been directed to conferring on a refugee a right to move between all or any of a State’s metropolitan and overseas territories, subject only to such constraints as might affect an alien’. Incidentally and erroneously, the Court found that the word ‘and’ needed to be added to the English text of art. 26; a check on a certified true copy would have shown otherwise: https://treaties.un.org/Pages/CTCTreaties.aspx?id=5&subid=A&clang=_en.

²⁰¹ As Legomsky rightly notes, ‘an unfair procedure necessarily produces an unjustifiably high risk of violating the individual’s substantive rights. Thus, a fair refugee status determination is one essential component of the ... prohibition on *refoulement*’: Legomsky, S. H., ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *IJRL* 567, 654.

²⁰² See Ch. 2, s. 6.

²⁰³ Cf. UNHCR, ‘Comments to the Council of Europe’s Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC). On the Replies to the Questionnaire on the relationship between asylum procedures and extradition procedures’ (Apr. 2009).

²⁰⁴ See UNHCR, Guidelines on International Protection No. 11, ‘*Prima facie* recognition of refugee status’, HCR/GIP/15/11 (24 Jun. 2015); Albert, M., ‘Governance and *prima facie* refugee status determination: Clarifying the boundaries of temporary protection, group determination, and mass influx’ (2010) 29(1) *RSQ* 61; Report of the 1979 Arusha Conference, recommendations on the term ‘refugee’ and determination of refugee status: UN doc. A/AC.96/INF/158, at 9 (1979).

²⁰⁵ This is particularly so where access to the courts is guaranteed, constitutionally or otherwise; see, for example, *R (UNISON) v Lord Chancellor and Equality and Human Rights Commission (Intervener)* [2017] UKSC 51—right of access to the courts is inherent in the rule of law and valuable to society as a whole.

²⁰⁶ For many years, the annual General Assembly resolution on UNHCR called for asylum seekers to have access to ‘fair and efficient procedures’; see, for example, UNGA resolutions 50/152 (21 Dec. 1995) para. 5; 51/175 (12 Dec. 1996). In 2020, the General Assembly recognized the importance of ‘full and effective’ application of the Convention and Protocol and ‘full respect for the principle of non-refoulement’, and called upon States ‘to process asylum applications by duly identifying those in need of international protection, in accordance with their applicable international and regional obligations’: UNGA res. 75/163 (16 Dec. 2020) paras. 4, 57. The Executive Committee has continued to reiterate the importance of ‘fair and efficient’ procedures; see, for example, Conclusions No. 93 (LIII), ‘Reception of Asylum-Seekers in the Context of Individual Asylum Systems’ (2002), para. (a); No. 99 (LV), ‘General’ (2004), para. (l); No. 103 (LVI), ‘Provision on International Protection Including Through Complementary Forms of Protection’ (2005), para. (q).

²⁰⁷ See Burson, B., ‘Refugee Status Determination’ in Costello, Foster, & McAdam ([n 116](#)). For an early account of State procedures, see Avery, C., ‘Refugee Status Decision-making: The Systems of Ten Countries’ (1983) 19 *Stanford Journal of International Law* 235. National procedures constantly change; see the second edition of this work, 325–6, n 5.

²⁰⁸ See, for example, Executive Committee Conclusion No. 73 (XLIV), ‘Refugee Protection and Sexual Violence’ (1993), paras. (c), (g); No. 82 (XLVIII), ‘Safeguarding Asylum’ (1997), para. (d)(iii); No. 99 (LV), ‘General’ (2004), para. (q); No. 105 (LVII), ‘Women and Girls at Risk’ (2006), para. (n) (iv); No. 107 (LVIII), ‘Children at Risk’ (2007), para. (g)(I); No. 110 (LXI), ‘Refugees with Disabilities and Other Persons with Disabilities Protected and Assisted by [UNHCR](#)’ ([2010](#)), paras. (f), (j).

²⁰⁹ *Report of the 28th Session* (1977): UN doc. A/AC.96/549, para. 36.

²¹⁰ Executive Committee Conclusion No. 8 (1977). These conclusions were followed up in 1982 (Conclusions No. 28 (XXXIII), ‘Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status,

inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures'), but States were not generally prepared to accept stricter procedural requirements. At the time, and more recently, they have expressed concern about so-called manifestly unfounded and abusive applications; see Executive Committee Conclusions No. 30 (XXXIV), 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (1983); No. 65 (XLII), General' (1991) para. (n); No. 79 (XLVII), 'General' (1996) para. (l); No. 87 (L), 'General' (1991) para. (m). See further s. 2.2.

²¹¹ UNHCR, '[Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions](#)', Mar. 2010); IPU & UNHCR. '[A guide to international refugee protection and building State asylum systems' Handbook for Parliamentarians](#)' No. 27 (2017).

²¹² See Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Mar. 2005). See also Ch. 7, s. 6.4.

²¹³ UNHCR Bureau for Europe, 'UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM(2011) 319 final' (Jan. 2012); see also ECRE. '[Comments on the Amended Commission Proposal to recast the Asylum Procedures Directive \(COM\(2011\) 319 final\)](#)' (Sep. 2011); [ECRE, 'Comments on the Commission Proposal for an Asylum Procedures Regulation'](#) COM(2016) 467' (Nov. 2016).

²¹⁴ For court interventions and *amicus curiae* briefs, see <https://www.refworld.org/type/AMICUS.html>; for historical background on UNHCR's role, see UNHCR, 'Note on Procedures for the Determination of Refugee Status under International Instruments': UN doc. A/AC.96/INF.152/Rev.8 (12 Sep. 1989).

²¹⁵ UNHCR's duty to provide international protection to refugees also requires that it provide information known to it regarding conditions in an asylum seeker's country of origin, at least if such information is critical for the determination of refugee status. For various reasons, UNHCR is not always equipped to collect, assess, and analyse relevant information, and with the ready availability of online sources, States and regional organisations increasingly rely on their own or shared resources. On 'country of origin information', see further s. 4.4.

²¹⁶ See, for example, UNHCR, '[Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan](#)', HCR/EG/AFG/18/02 (30 Aug. 2018).

²¹⁷ Refworld, 'The Leader in Refugee Decision Support': <https://refworld.org>.

²¹⁸ In these ways, UNHCR can influence the development of international refugee law, for example, by gathering and disseminating relevant national case law (the decisions of State organs), as evidence of actual or emerging customary international law; see further Goodwin-

Gill, G. S., ‘The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law’ (2020) 69 *ICLQ* 1.

²¹⁹ UNHCR Statute, para. 8(a); 1951 Convention, art. 35(1); 1967 Protocol, art. II(1).

²²⁰ Procedural unfairness can manifest itself in many different ways, for example, in a ‘fast-track’ procedure where the claimant has insufficient time to obtain evidence: *PN v Secretary of State for the Home Department* [2019] EWHC 1616; or in a requirement that an appeal be pursued from abroad which, with its multitude of attendant obstacles, would not be effective: *R (Kiane) v Secretary of State for the Home Department* [2017] UKSC 42. See also Beirens, H., *Chasing Efficiency: Can operational changes fix European asylum systems?*, Migration Policy Institute Europe, Bertelsmann Stiftung, Mar. 2020; UNHCR, ‘Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union’ (Jul. 2018).

²²¹ The judgment of the Supreme Court of Canada in *Singh v Minister of Employment and Immigration* [1985] SCR 177 was especially influential in this regard.

²²² Cf. IRB Canada, ‘Interpreter Handbook’ (Oct. 2017): <https://irb-cisr.gc.ca/en/interpreters>; Refugee Protection Division Rules (SOR/2012-256) 19: <https://laws-lois.justice.gc.ca/PDF/SOR-2012-256.pdf>; see also *Mohamed (role of interpreter) Somalia v Secretary of State for the Home Department* [2011] UKUT 00337 (IAC); *SZNMT v Minister for Immigration & Citizenship* [2010] FCA 338.

²²³ In immigration removal proceedings in the USA, for example, statute provides that the person concerned shall have ‘the privilege (sic) of being represented (at no expense to the Government)’: Immigration and Nationality Act, s. 292, 8 USC §1362.

²²⁴ In Canada, the right to counsel is protected by both the Charter of Rights and Freedoms (s. 10, ‘Arrest or detention’) and the Immigration and Refugee Protection Act (s. 167), but at their own expense, although legal aid may be available. Cf. Liew, J. and others, ‘Not Just the Luck of the Draw? Exploring Competency of Counsel in Federal Court Refugee Leave Determinations (2005–2010)’ (2020) 37(1) *Refugee: Canada’s Journal on Refugees* 1. See also the EU Charter of Fundamental Freedoms, art. 47 (‘Right to an effective remedy and to a fair trial’); EU Procedures Directive (recast), recitals (22), (23), (25), arts. 12, 17, 19, 20–5 (legal advice and representation). On ‘early legal advice’, see Anderson, B. & Conlan, S., ‘Providing Protection Access to early legal advice for asylum seekers’ (2014): <https://www.compas.ox.ac.uk/project/early-legal-advice-for-protection-applicants/>; Lane, M. and others, ‘Evaluation of the Early Legal Advice Project—Final Report’, Home Office Research Report 70 (May 2013); Aspden, J., ‘Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission’ (Oct. 2008).

²²⁵ See VT (*Article 22 Procedures Directive—confidentiality*) Sri Lanka [2017] UKUT 00368 (IAC); McAllister, D. M., ‘Refugees and Public Access to Immigration Hearings in Canada: A Clash of Constitutional Values’ (1990) 2 *IJRL* 562 and further discussion in the third edition of this work at 534–5.

²²⁶ Conseil d’Etat, 2/6 SSR (18 nov. 1987) 78.981, *Bokwa Kimbolo*; the CRR rapporteur

having failed to share relevant documents with the claimant, ‘*le caractère contradictoire de la procédure n’a pas été respecté*’.

²²⁷ The availability of ‘cross-examination’ depends very much on the nature of the procedure, whether adversarial (as generally in the United States and the United Kingdom), or investigatory (as in Canada and civil law systems). Martin has doubted whether rebuttal evidence, cross-examination and confrontation provide ‘the best way to resolve controversies involving disputes over adjudicative facts’ (citing Davis, K. C., *Administrative Law Treatise* (2nd. edn., 1980) s. 15.3 at 144); Martin, D. A., ‘Reforming Asylum Adjudication: On Navigating the Coast of Bohemia’ (1990) 138 *University of Pennsylvania Law Review* 1247, 1346.

²²⁸ See *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, paras. 81–3 (Singh LJ); *R (Osborn) v Parole Board* [2013] UKSC 61, 67–9 (Lord Reed); Waldron, J., ‘How Law Protects Dignity’ (2012) 71 *Cambridge Law Journal* 200, 210.

²²⁹ *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59, para. 74.

²³⁰ Case C-417/11 P *Council of the European Union v Nadiany Bamba* (Third Chamber, 15 Nov. 2012).

²³¹ Ibid., para. 49, quoted in *Mallak v Minister for Justice Equality & Law Reform* (ⁿ 223) para. 69. In *Nadiany Bamba* (ⁿ 224), the Court also said that the statement of reasons ‘must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measures and to enable the court having jurisdiction to exercise its power of review’; it added that the statement of reasons must ‘be appropriate to the act at issue and the context in which it was adopted’: paras. 50, 53.

²³² On which, see further s. 4.

²³³ Council Directive 2013/32/EU of 26 Jun. 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L180/60. Denmark, the UK, and Ireland opted out of the recast Directive, although the UK (until its withdrawal from the EU) and Ireland remain bound by the original version.

²³⁴ Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status. For analysis, see the third edition of this work, 537–42; Costello, C., ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7 *EJML* 35.

²³⁵ Schittenhelm, K., ‘Implementing and Rethinking the European Union’s Asylum Legislation: The Asylum Procedures Directive’ (2019) 57 *International Migration* 229, 230; Costello, C. & Hancox, E., ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in Chetail, V., De Bruycker, P., & Maiani, F., eds., *Reforming the Common European Asylum System: The New European Refugee Law* (2016); Garlick, M., ‘Asylum Procedures’, in

Peers, S. and others, *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn., 2015); Peers, S., ‘The Second Phase of the Common European Asylum System: A Brave New World—or Lipstick on a Pig?’ *Statewatch* (8 Apr. 2013) 15 <https://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>.

²³⁶ Garlick (n 235) 217.

²³⁷ *Ibid.*, 292.

²³⁸ See Ch. 8.

²³⁹ Other commentators have engaged in a more detailed analysis of the instrument, including comparisons between the original and recast versions. See, for example, Costello & Hancox (n 229); Guild, E. and others, *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection: Study for the LIBE Committee* (2014); Garlick (n 229); Velluti, S., *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (2014) 55–62.

²⁴⁰ See original Directive art. 5, which appeared in principle to prohibit the introduction of higher standards if they were ‘incompatible’ with the Directive, but necessary to ensure compliance with international obligations.

²⁴¹ Art. 5; recital 14.

²⁴² Velluti (n 239) 56 (fns. omitted). Schittenhelm agrees that the directive’s implementation is shaped by existing, diverging domestic asylum policies, each of which has different starting points: Schittenhelm (n 235) 236.

²⁴³ It now expressly covers subsidiary protection claims as well.

²⁴⁴ See further art. 43; Cornelisse, G., ‘Territory, Procedures and Rights: Border Procedures in European Asylum Law’ (2016) 35(1) *RSQ* 74.

²⁴⁵ Art. 3.

²⁴⁶ Costello & Hancox (n 235) 391. Garlick (n 235) 220 makes the same point, observing (at 221) that ‘it is important to recall also that Member States’ responsibilities are engaged in any event under the ECHR, including under the prohibition of *refoulement*, wherever they exercise *de facto* or *de jure* jurisdiction over a person’.

²⁴⁷ See also recital 28: ‘Basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements.’

²⁴⁸ Art. 8(2).

²⁴⁹ Art. 26. The provision now states that detention is governed by Directive 2013/33/EU, whereas the original directive did not.

²⁵⁰ Art. 9. For exceptions, see art. 41. For appeals, and exceptions with respect to claims that are manifestly unfounded, inadmissible, not reopened, or not examined, see art. 46(5)–(6).

²⁵¹ Art. 2.

²⁵² Art. 43. As Garlick notes, one of the aims of the recast Directive was to harmonize widely divergent national rules on border procedures, which have, in turn, ‘served to ensure that the rules were brought into conformity with ECtHR jurisprudence regarding procedural safeguards and fundamental rights’: Garlick ([n 235](#)) 282.

²⁵³ Art. 9(2); see discussion of art. 41 below.

²⁵⁴ Art. 9(3).

²⁵⁵ Art. 10(2). This reflects the CJEU’s decision in Case C-604/12 *HN v Ireland*(8 May 2017) para. 35 (concerning the original directive).

²⁵⁶ Art. 46(2). ‘The change reinforces the importance of refugee protection as a concept derived from international law, which has a central role in the *acquis* framework, and the rights of refugees to hold that status as a matter of principle’: Garlick ([n 235](#)) 233.

²⁵⁷ Art. 4, recital 16. This is a new provision.

²⁵⁸ Art. 10(3)(c).

²⁵⁹ Garlick ([n 235](#)) 225 and references there.

²⁶⁰ Art. 10(3)(a).

²⁶¹ Garlick ([n 2229235](#)) 217; Costello & Hancox ([n 229](#)) 394.

²⁶² Recital 22.

²⁶³ Art. 11.

²⁶⁴ Art. 12. Previously, this only had to be in a language they ‘may reasonably be supposed to understand’: original art. 10(1)(a).

²⁶⁵ Art. 19; see conditions in art. 21.

²⁶⁶ Art. 20. This must be provided by ‘such persons as admitted or permitted under national law’. Such assistance may also be granted for first-instance decisions: art. 20(2). For the scope of assistance and representation, see art. 23.

²⁶⁷ Art. 21(2)(a).

²⁶⁸ Art. 21(4)(a). Furthermore, art. 21(5) provides that: ‘Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant’s financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.’

²⁶⁹ Costello & Hancox ([n 235](#)) 410.

²⁷⁰ *Ibid.*

²⁷¹ Recital 22; art. 21. In Germany, for instance, free legal assistance is provided by welfare organizations and NGOs, which means that applicants may not have received advice by lawyers prior to their asylum interview: Schittenhelm ([n 235](#)) 235, referring to AIDA, ‘Country Report: Germany’ (as at 31 Dec. 2017) 26
www.asylumineurope.org/reports/country/germany.

²⁷² Garlick ([n 235](#)) 241.

²⁷³ Art. 22.

²⁷⁴ Art. 11(1)(c).

²⁷⁵ Art. 29. It now also has express powers to access applicants at the border.

²⁷⁶ Arts. 14–16. For exceptions, see art. 14(2). For requirements of the interview, see arts. 15–17.

²⁷⁷ Art. 16. On the absence of such protection in the original directive, see Joined Cases C-148/13, C-149/13, and C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, Opinion of Advocate General Sharpston (17 Jul. 2014) paras. 76–7, cited in Costello & Hancox ([n 235](#)) 405–6.

²⁷⁸ Art. 14(5).

²⁷⁹ Garlick ([n 235](#)) 236.

²⁸⁰ Art. 10. But see art. 31(8)(h), which permits Member States to use accelerated procedures to assess claims by those who have entered or prolonged their stay ‘unlawfully’.

²⁸¹ Art. 2(d). The provisions on special procedural guarantees were among the most controversial of the Directive: Garlick ([n 235](#)) 242.

²⁸² Recital 29.

²⁸³ Ibid.; art. 24.

²⁸⁴ Art. 24(3).

²⁸⁵ See generally Peers ([n 235](#)) 11–13.

²⁸⁶ Art. 7(3).

²⁸⁷ Art. 25(6).

²⁸⁸ Art. 15(3)(e).

²⁸⁹ Art. 25(1)(a). This is not required where the minor ‘will in all likelihood reach the age of 18 before a decision at first instance is taken’: art. 25(2).

²⁹⁰ It was argued, for instance, that the entitlements could create excessive costs, a risk of protracted litigation, and ‘abuse’: Moreno-Lax, V. & Garlick, M., ‘Qualification: Refugee Status and Subsidiary Protection’, in Peers and others ([n 235](#)) 176.

²⁹¹ Garlick ([n 235](#)) 244.

²⁹² Moreno-Lax & Garlick ([n 235](#)) 176.

²⁹³ Art. 6, recital 26.

²⁹⁴ Art. 31.

²⁹⁵ Art. 46(4).

²⁹⁶ Art. 31(4). For a critique, see Garlick ([n 235](#)) 255.

²⁹⁷ Art. 31(5).

²⁹⁸ Costello & Hancox ([n 235](#)) 411 (fn. omitted).

²⁹⁹ Art. 31(7). Vulnerability is to be assessed according to art. 22 of Directive 2013/33/EU.

³⁰⁰ Commentators have argued that this and the preceding ground seem to be based on an overly restrictive interpretation of art. 31(1) of the Refugee Convention: Costello & Hancox ([n 235](#)) 414; Moreno-Lax & Garlick ([n 235](#)) 92.

³⁰¹ Art. 31(8). The number of grounds has been reduced from the original directive.

³⁰² See interpretation of art. 23(4) of the original directive in Case C-175/11 *HID, BA v Refugee Applications Commissioner et al (Ireland)* (31 Jan. 2013) para. 70. In favour of art. 31(8) being exhaustive, see Costello & Hancox ([n 235](#)) 417 and Garlick ([n 235](#)) 254; cf. Peers ([n 235](#)) 13.

³⁰³ The fact that the content of such protection is lower in the other Member State does not preclude removal unless it results in ‘extreme material poverty’ because of the applicant’s particular vulnerabilities: Joined Cases C-297/17, C-318/17, C-319/17, and C-438/17 *Ibrahim v Bundesrepublik Deutschland*(Grand Chamber, 19 Mar. 2019) para. 103.

³⁰⁴ In accordance with arts. 35 and 38, respectively. See further [Ch. 8](#), s. 6.

³⁰⁵ On subsequent applications, see arts. 40, 41(1).

³⁰⁶ Art. 33(2).

³⁰⁷ See arts. 2(o), 27–8, 44–5.

³⁰⁸ Garlick ([n 235](#)) 222–3.

³⁰⁹ *Ibid.*, 285.

³¹⁰ *Ibid.*, 223, 285.

³¹¹ Including one taken at the border or in a transit zone: art. 46(1)(a)(iii). This provision is based on art. 13 ECHR 50. For analysis of the interaction with the rules set out by the European Court of Human Rights, see Garlick ([n 235](#)) 286–91.

³¹² Art. 46(1)(a)(i)–(ii).

³¹³ Art. 46(1).

³¹⁴ Art. 46(1)(b).

³¹⁵ Art. 46(1)(c).

³¹⁶ Art. 46(3). See further Case C-585/16 *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* (Grand Chamber, 25 Jul. 2018).

³¹⁷ Costello & Hancox ([n 235](#)) note that it draws on *Salah Sheekh v The Netherlands*, App. No. 1948/04 (11 Jan. 2007) 431.

³¹⁸ Garlick ([n 235](#)) 287.

³¹⁹ Art. 46(5).

³²⁰ Art. 46(6). Costello & Hancox ([n 235](#)) 433 argue that, in practice, it is hard to see how this will not result in breaches of art. 13 ECHR 50.

³²¹ Costello & Hancox ([n 235](#)) 435 (fns. omitted). The CJEU has clarified that the Directive does not preclude national legislation which provides for appeals against first-instance decisions to reject and remove an applicant, but which does not also require automatic suspensive effect, ‘even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement’. Case C-180/17 *X, Y v Staatssecretaris van Veiligheid en Justitie* (26 Sep. 2018) para. 46. See also Case C-269/18 PPU *Staatssecretaris van Veiligheid en Justitie v C and J, S v Staatssecretaris van Veiligheid en Justitie* (5 Jul. 2018), which states that an applicant cannot be detained if he or she is authorized to remain

in accordance with art. 46(6) or (8).

³²² Costello & Hancox ([n 235](#)) 445.

³²³ Arts. 6(5), 14(1), 31(3)(b), 43(3).

³²⁴ Costello & Hancox ([n 2](#)) 395.

³²⁵ Garlick ([n 235](#)) 254–5.

³²⁶ Temporary Protection Directive, art. 5.

³²⁷ Peers ([n 235](#)) 15.

³²⁸ Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final—2016/0224 (COD). Chetail, V., ‘Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System’ (2016) 28 *European Journal of Human Rights* 583, 598.

³²⁹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23.9.2020. See also Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 of 23 September 2020; Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 of 23 September 2020.

³³⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ([n 126](#)) paras. 190, 196.

³³¹ *M.S.S. v Belgium and Greece*, App. No. 30696/09 (21 Jan. 2011), para. 352. The Court expressly acknowledged the right of States to manage migration, including irregular migration, provided it takes place within the framework of international law and obligation, but it also recognized the ‘particular vulnerability’ of asylum seekers, an underprivileged group in need of special protection: *ibid.*, paras. 216, 232–3, 251.

³³² *Hirsi Jamaa v Italy* ([n 154](#)) paras. 118, 123, 136.

³³³ *Rustamov v Russia*, App. No. 11299/10, First Section (3 Jul. 2012).

³³⁴ On evidence and the standard of proof, see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ([n 126](#)) paras. 37–43; and for more detailed analysis, see [Ch. 3](#), s. 3.

³³⁵ See [Ch. 2](#), ss. 4, 8.

³³⁶ See *R (on the application of AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521.

³³⁷ *Baysakov v Ukraine*, App. No. 54131/08, Fifth Section (18 Feb. 2010) paras. 49–50. The Court referred to credible and reliable reports on the human rights situation in Kazakhstan obtained from the UN Committee against Torture, Human Rights Watch and Amnesty International, which referred to torture, ill-treatment of detainees, routine beatings, and the use of force against criminal suspects to obtain confessions, but the respondent

government had ‘failed to adduce any evidence or arguments capable of rebutting the assertions made in the reports’.

³³⁸ *Rustamov v Russia* ([n 333](#)) paras. 119, 121, 127; and see at § 128: ‘[w]here an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 enters into play when the applicant establishes, where necessary on the basis of the information contained in recent reports from independent international human rights protection associations or governmental sources, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned ... [T]his reasoning applies in the present case, where the applicant is accused of membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities ... Although in such circumstances the Court will normally not insist that the applicant show the existence of further special distinguishing features ... it considers it nonetheless important to point out that the applicant repeatedly submitted to the competent Russian authorities that he had already been subjected to persecution and ill-treatment at the hands of the Uzbek law-enforcement authorities in connection with his presumed membership.’

³³⁹ On evidence and the benefit of the doubt, see *UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status* ([n 126](#)) paras. 197–9, 203–5.

³⁴⁰ The ‘duty of candour’ may nevertheless require the disclosure of evidence, for the question of risk of persecution or serious harm, ‘should not depend on the diligence of legal representatives’: *RS (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1796, para. 11.

³⁴¹ *R.K.S. v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2004] IEHC 436.

³⁴² See *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469, [2000] FCA 845—a fact is ‘material’ if the decision in the practical circumstances of the particular case turns upon whether that fact did or did not exist, and specifically matters that are objectively material to whether a person is in truth a refugee.

³⁴³ Similar considerations apply also to claims for complementary protection.

³⁴⁴ The United States Asylum Regulations, 8 CFR § 208.13(b)(2)(C)(iii), provide: ‘In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility that he or she would be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.’

³⁴⁵ Anderson, A. and others, ‘Imminence in refugee and human rights law: a misplaced notion for international protection’ (2019) 68 *ICLQ* 111.

³⁴⁶ The terminology of ‘credible and trustworthy information’ was taken from the Immigration Act, as amended; the Documentation Centre (now the Research Directorate) based itself exclusively on material in the public domain, and 1989 guidelines stressed that every factual statement or report, in principle, should be corroborated by three different sources. See Rusu, S., ‘The Development of Canada’s Immigration and Refugee Board Documentation Centre’ (1989) 1 *IJRL* 319; Houle, F., ‘The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience’ (1994) 6 *IJRL* 6. On standards for human rights reporting and assessment, see Barsh, R. L., ‘Measuring Human Rights: Problems of Methodology and Purpose’ (1993) 15 *HRQ* 87; Donnelly, J. & Howard, R. E., ‘Assessing Nations Human Rights Performance: A Theoretical Framework’ (1988) 10 *HRQ* 214. See also, Vogelaar, F., ‘The Eligibility Guidelines Examined: The Use of Country of Origin Information by UNHCR’ (2017) 29 *IJRL* 617; Vogelaar, F., ‘Principles Corroborated by Practice? The Use of Country of Origin Information by the European Court of Human Rights in the Assessment of a Real Risk of a Violation of the Prohibition of Torture, Inhuman and Degrading Treatment’ (2016) 18 *EJML* 302.

³⁴⁷ See, among others, the European Asylum Support Office Country of Origin Information (EASO COI) Portal, which is managed in cooperation with the EU national asylum authorities, Norway, and Switzerland: <https://coi.easo.europa.eu/>. See also, in particular, the European Country of Origin Information Network: www.ecoi.net; the Canadian Immigration and Refugee Board, ‘Policy on National Documentation Packages in Refugee Determination Proceedings (Jun. 2019); the Australian Department of Foreign Affairs and Trade reports: <https://www.dfat.gov.au/about-us/publications/Pages/country-information-reports>; and the United Kingdom Home Office ‘Country policy and information notes’: <https://www.gov.uk/government/collections/country-policy-and-information-notes>. For analysis and critique, see Henderson, M., Moffatt, R., & Pickup, A., *Best Practice Guide to Asylum and Human Rights Appeals* (updated edn., 2020) Ch. 17, Home Office evidence on the country of origin’; Ch. 18, ‘Country information’: <https://www.ein.org.uk/bpg/contents>; Bolt, D., Independent Chief Inspector of Borders and Immigration, ‘An inspection of the Home Office’s production and use of Country of Origin Information. April–August 2017’ (Jan. 2018); Thomas, R., *Administrative Justice and Asylum Appeals. A Study of Tribunal Adjudication* (2011) Ch. 6; International Association of Refugee Law Judges, ‘Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist’ (2009) 21 *IJRL* 149; Pettitt, J., Townhead, L., & Huber, S., ‘The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward’ (2008) 25(2) *Refugee* 182.

³⁴⁸ See Houle, F., ‘Le fonctionnement du régime de preuve libre dans un système non-expert: le traitement symptomatique des preuves par la Section de la protection des réfugiés’ (2004) 38 *Revue juridique thémis* 263.

³⁴⁹ *Ibid.*, 339-41.

³⁵⁰ Immigration and Refugee Board (IRB), ‘Assessment of Credibility in Claims for Refugee Protection’ (Jan. 2004) s. 2.4.7: <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/Credib.aspx>.

³⁵¹ *Kandasamy v Minister of Citizenship and Immigration* (1997) 138 FTR 126 (Reed J).

³⁵² UNHCR’s supervisory role can have influence, but courts frequently go out of their way to stress that its views are not binding; see Goodwin-Gill ([n 218](#)) 11–13, 40–1.

³⁵³ The report by the European Asylum Support Office, ‘Latest asylum trends—2019 overview’, is fairly typical: ‘For some citizenships the recognition rate depended on where the application was lodged ... For Afghans, the share of positive decisions varied between 21% and 73% for the three countries issuing the most decisions, but the range difference was much broader when all EU+ countries were taken into account. Wide variations in recognition rates across the top three countries issuing decisions were recorded also for Iraqis (24% to 67%), Iranians (25% to 65%), Somalis (32% to 99%) and Sudanese (15% to 83%). Conversely, less variation was noted for Syrians (85% to 96%) and Eritreans (71% to 86%). However, the variation in recognition rates increased for Syrians compared to a year ago. As previously, the variation was more limited for citizenships having a recognition rate lower than the EU+ average’: <https://easo.europa.eu/asylum-trends-annual-overview>.

³⁵⁴ The Upper Tribunal’s competence and practice are described in Henderson, Moffatt, & Pickup ([n 347](#)) §§ 29.3–29.4: <https://www.ein.org.uk/bpg/contents>. No decisions have been ‘starred’ since 2007.

³⁵⁵ Henderson, Moffatt, & Pickup ([n 347](#)) §§ 29.5–29.12. The authors note that the European Court of Human Rights considers ‘country guidance’ to be a useful system: *ibid.*, § 29.7, but that such approval is not ‘unconditional’: *ibid.*, § 29.16A. ‘Country guidance’ needs to be applied with some subtlety, and not without qualification: *SB (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 160, para. 70.

³⁵⁶ Section 159(1)(h) of the Immigration and Refugee Protection Act provides that the Chairperson ‘may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides ... to assist members in carrying out their duties’. See also Immigration and Refugee Board, ‘Policy on the Use of Jurisprudential Guides’: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolJurisGuide.aspx>.

³⁵⁷ Immigration and Refugee Board, ‘Policy on the Use of Jurisprudential Guides’ ([n 350](#)). See *Canadian Association of Refugee Lawyers (CARL) v Canada (Citizenship and Immigration)* 2019 FC 1126 (4 Sep. 2019) para. 150 (on the SOGIE Guidelines).

³⁵⁸ Jurisprudential Guides: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/PolJurisGuide.aspx>.

³⁵⁹ See *N.A. v Finland*, App. No. 25244/18, First Section (ECtHR, 14 Nov. 2019)—violation of arts. 2 and 3 ECHR 50 based on the authorities’ failure to assess the evidence in the round, that is, to integrate the particular personal circumstances of the applicant into the country of origin evidence. Also, *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 873, paras. 68, 71: a holistic assessment is required, rather

than treating the authorities and guidelines (here on the internal flight alternative) as giving rise to distinct tests and having quasi-statutory effect.

³⁶⁰ *CARL v Canada* ([n 357](#)).

³⁶¹ Ibid., para. 87; on ‘adjudicative independence’; see also paras. 89–95.

³⁶² Ibid., para. 9: members ‘are expected to apply jurisprudential guides in cases with similar facts or provide reasoned justification for not doing so’.

³⁶³ Ibid., paras. 119, 141, 143, 151. As Lord Hope emphasized in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, ‘in the end of the day each case ... must depend on an objective and fair assessment of its own facts’: para. 50.

³⁶⁴ See *Maldonado v Canada (Minister of Employment and Immigration)* ([n 75](#)).

³⁶⁵ *CARL v Canada* ([n 357](#)) paras. 182–4.

³⁶⁶ *Canadian Association of Refugee Lawyers v Canada* 2020 FCA 196, para. 50.

³⁶⁷ Ibid., paras. 67, 74, 79–85.

³⁶⁸ Ibid., paras. 89–91; de Montigny JA noted that it was unfortunate that many claimants were unrepresented.

³⁶⁹ See Cameron ([n 75](#)); Barsky, R. F., *Arguing and Justifying: Assessing the Convention Refugees’ Choice of Moment, Motive and Host Country* (2000); see also Noll, G., ‘Credibility, Reliability, and Evidential Assessment’ in Costello, Foster, & McAdam ([n 116](#)); Noll, G., ed., *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (2005); Cohen, J., ‘Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers’ (2001) 13 *IJRL* 293.

³⁷⁰ This approach was approved by the Irish High Court in *Ashu v Refugee Appeals Tribunal* [2005] IEHC 469; see also *T. (A. M.) v Refugee Appeals Tribunal and Minister for Justice, Equality & Law Reform* [2004] IEHC 606.

³⁷¹ Australia, Administrative Appeals Tribunal, Migration and Refugee Division, ‘Guidelines on the Assessment of Credibility’ (Jul. 2015); these largely repeat guidance issued in Oct. 2006 for use by the Migration Review Tribunal and the Refugee Review Tribunal. On ‘demeanour’, see also the IRB Guidelines ([n 350](#)) s. 2.3.7; Campbell, J. R., ‘Examining Procedural Unfairness and Credibility Findings in the UK Asylum System’ (2020) 39 *RSQ* 56; Narbutas, N., ‘The Ring of Truth: Demeanor and Due Process in U.S. Asylum Law’ (2018) 50 *Columbia Human Rights Law Review* 348; Dowd, R. and others, ‘Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal’ (2018) 30 *IJRL* 71.

³⁷² Section 106 of the Immigration and Refugee Protection Act provides: ‘The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.’

³⁷³ IRB—Refugee Protection Division Rules (SOR/2012-256), Rule 11 (emphasis

supplied): <https://www.laws-lois.justice.gc.ca/eng/regulations/SOR-2012-256/index.html>; cf. Australian Guidelines (n 371) paras. 45–6.

³⁷⁴ Cf. IRB Guidelines on Credibility (n 350) paras. 2.4.5.1, 2.4.5.3; also, Rogers, H., Fox, S., & Herlihy, J., ‘The importance of looking credible: the impact of the behavioural sequelae of post-traumatic stress disorder on the credibility of asylum seeker’ (2015) 21(2) *Psychology, Crime & Law* 139; Byrne, R., ‘Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals’ (2007) 19 *IJRL* 609.

³⁷⁵ The assessment of credibility in asylum proceedings has attracted considerable scholarly and forensic attention; in addition to works already cited, see Schoenholtz, A. I., Schrag, P. G., & Ramji-Nogales, J., *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security* (2014); Tsangarides, N., ‘The Refugee Roulette: The Role of Country Information in Refugee Status Determination’, Immigration Advisory Service (IAS) (2010); Ramji-Nogales, J., Schoenholtz, I., & Schrag, P., *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (2009); Sweeney, J. A., ‘Credibility, Proof and Refugee Law’ (2009) 21 *IJRL* 700; Thomas (n 341).

³⁷⁶ See Cameron (n 75); Herlihy, J. & Turner, S., ‘What Do We Know So Far about Emotion and Refugee Law?’ (2013) 64 *Northern Ireland Legal Quarterly* 47; Herlihy, J., Gleeson, K., & Turner, S., ‘What Assumptions about Human Behaviour Underlie Asylum Judgments?’ (2009) 22 *IJRL* 351; Herlihy, J. & Turner, S., ‘Memory and seeking asylum’ (2007) 9 *European Journal of Psychotherapy & Counselling* 267; Herlihy, J., Jobson, L., & Turner, S., ‘Just tell us what happened to you: autobiographical memory and seeking asylum’ (2012) 26 *Applied Cognitive Psychology* 661; Rehaag, S., ‘I Simply Do Not Believe: A Case Study of Credibility Determinations in Canadian Refugee Adjudication’ (2017) 38 *Windsor Review of Legal and Social Studies* 38; Luker, T., ‘Decision-making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Tribunal’ (2012) 25 *IJRL* 502.

³⁷⁷ *R.K.S. v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* (n 341). See also Granhag, P. A., ‘Granting asylum or not? Migration Board personnel’s beliefs about deception’ (2005) 31 *Journal of Ethnic and Migration Studies* 29.

³⁷⁸ See, among others, Gyulai, G. and others, *Credibility Assessment in Asylum Procedures—A Multidisciplinary Training Manual*, Vol. 1 (2013); Gyulai, G. and others, *Credibility Assessment in Asylum Procedures—A Multidisciplinary Training Manual*, Vol. 2 (2015); UNHCR, ‘Beyond Proof. Credibility Assessment in EU Asylum Systems’ (May 2013); UNHCR, ‘CREDO—Credibility Assessment Checklists’ (May 2013); UNHCR, ‘The Heart of the Matter—Assessing Credibility when Children Apply for Asylum in the European Union’, Dec. 2014; Sweeney (n 369); Kagan, M., ‘Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations’ (2003) 17 *Georgetown Law Journal* 367.

³⁷⁹ See *Maldonado v Canada (Minister of Employment and Immigration)* (n 75). See also Conlan, S., Waters, S., & Berg, K., ‘Difficult to Believe. The Assessment of Asylum Claims

in Ireland' (Irish Refugee Council, 2012).

³⁸⁰ *R (on the application of AM) v Secretary of State for the Home Department* ([n 336](#)).

³⁸¹ Expert testimony, including medical reports, is not always given appropriate weight; see Barnes, J., 'Expert Evidence: The Judicial Perception in Asylum and Human Rights Appeals' (2004) 16 *IJRL* 349; Good, A., 'Expert Evidence in Asylum and Human Rights Appeals: An Expert's View' (2004) 16 *IJRL* 358; Rhys Jones, D. & Verity Smith, S., 'Medical Evidence in Asylum and Human Rights Appeals' (2004) 16 *IJRL* 381.

³⁸² Cf. *MS (Sri Lanka) v Secretary of State for the Home Department* [2012] EWCA Civ 1548, in which the Court of Appeal held that the Upper Tribunal had erred in finding that the fact that the asylum seeker has left through normal channels at an airport using his own passport was strongly indicative that he was of no further interest to the authorities; that finding had misstated the case as set out in the asylum seeker's *unchallenged* evidence that he had managed to leave with the collusion of airport employees who had been corrupted by his agent. The Court added that it was questionable why a man who was or believed himself to be of no further interest to the authorities would resort to such a mode of departure, with its obvious attendant risks.

³⁸³ The UK Home Office policy instruction on credibility factors in many of the findings of the research cited above, noting that neither a difficulty in providing relevant information nor late disclosure of fundamental elements should automatically count against credibility, that demeanour alone is unreliable, that trauma may manifest itself in persistent fear, loss of self-confidence and self-esteem, difficulty in concentration, self-blame, shame, or a pervasive loss of control and memory loss. These are important foundational steps in constructing an effective and compliant system of protection. Home Office, 'Asylum Policy Instruction. Assessing credibility and refugee status', version 9.0 (6 Jan. 2015).

³⁸⁴ IRB Guidelines on Credibility ([n 350](#)) paras. 2.3.4, 2.5.

³⁸⁵ van Veldhuizen, T. and others 'Establishing Origin: Analysing the Questions Asked in Asylum Interviews' (2018) 25 *Psychiatry, Psychology and Law* 283. For example, ask not, 'When did you leave your country?' but, 'Why did you leave, ... and when was this?' Not, 'Were you ever mistreated?' but, 'Please describe any difficulties you had?' Not, 'Do you like your government?' but, 'How you feel about your government?' Not, 'Are you willing to return?' but, 'How do you feel about returning, and what do you think might happen?'

³⁸⁶ On the limits of cross-examination, see Eggleston, Sir Richard, 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428; see also 'Is Your Cross-Examination Really Necessary?' (1969) IX *Proceedings of the Medico-Legal Society of Victoria* 84. On problems in establishing facts in civil trials, see Cannon, A. J., 'Effective fact finding' (2006) 25 *Civil Justice Quarterly* 327.

³⁸⁷ See Nolan, R., 'Language Barrier' *The New Yorker* (6 Jan. 2020) 26, 30: 'Translation isn't just words to words; it is about expressing whole ways of experiencing the world.' Among the challenges interpreting the Guatemalan language, Mam, for asylum seekers reaching the United States is the absence of immediately corresponding concepts; there being

no direct translation for the word ‘asylum’, for example, Mam has produced this: *Qlet tun ley* —to be held and looked after by the law. See also Smith-Khan, L., ‘Different in the same way? Language, diversity, and refugee credibility’ (2017) 29 *IJRL* 389; Kälin, W., ‘Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing’ (1986) 20 *IMR* 230; and, in another not unrelated context, see Mirdal, G. M., ‘The Interpreter in Cross-Cultural Therapy’ (1988) 26 *International Migration* 327.

³⁸⁸ Alvarez, L. & Loucky, J., ‘Inquiry and Advocacy: Attorney-Expert Collaboration in the Political Asylum Process’ (1992) 11 *NAPA Bulletin* 43 (American Anthropological Association); with reference to claims involving Maya from Huehuetenango, Guatemala, the authors examine practical problems in using expert testimony in asylum proceedings, including the role of the anthropologist in countering political interference, cultural insensitivity, lack of impartiality, and lack of information. Also, Gill, N. & Good, A., eds., *Asylum Determination in Europe: Ethnographic Perspectives* (2019); Good, A., *Anthropology and Expertise in the Asylum Courts* (2007); Akram, S. M., ‘Orientalism Revisited in Asylum and Refugee Claims’ (2000) 12 *IJRL* 7.

³⁸⁹ The UK Upper Tribunal has referred to various guidelines as ‘credibility indicators’, that provide a helpful framework for a more structured approach to the evidence, ‘in the round’: *KB & AH (credibility—structured approach) Pakistan* [2017] UKUT 00491 (IAC).

³⁹⁰ *Minister for Employment and Immigration v Satiacum* [1989] FCJ No. 505; (1989) 99 NR 171, Federal Court of Appeal of Canada, citing Lord MacMillan in *Jones v Great Western Railway Co* (1930) 47 TLR 39 at 45.

³⁹¹ Cf. Conseil d’Etat, 2/6 SSR (7 nov. 1990) 93.993, *Serwaah*, in which the court ruled that as the *Commission des recours de réfugiés* does not determine questions of civil obligation, its composition (including a member of the council of OFPRA, the initial decision-maker), does not violate art. 6 ECHR 50.

³⁹² See Legomsky, S. H., ‘Political Asylum and the Theory of Judicial Review’ (1989) 73 *Minnesota Law Review* 1205; cf. *Imafu v Minister for Justice Equality & Law Reform* [2005] IEHC 416; *Ashu v Refugee Appeals Tribunal* ([n 370](#)); *R.K.S. v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* ([n 341](#)).

³⁹³ Under ss. 101 and 103 of the UK Nationality, Immigration and Asylum Act 2002, the jurisdiction of the Asylum and Immigration Tribunal (AIT) and any reviewing court was limited to points of law. Further to the Tribunals, Courts and Enforcement Act 2007, the functions of the AIT were transferred to the First-tier Tribunal and the Upper Tribunal in 2010: *Transfer of Functions of the Asylum and Immigration Tribunal Order 2010*, SI 2010 No. 21, art. 2; see also Immigration Act 2014. See also Rehaag, S., ‘Judicial Review of Refugee Determinations: The Luck of the Draw?’ (2012) 38 *Queen’s Law Journal* 1; Rehaag, S., ‘Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw’ (2019) 45 *Queen’s Law Journal* 1.

³⁹⁴ *T. (A. M.) v Refugee Appeals Tribunal and Minister for Justice, Equality & Law Reform* ([n 370](#)).

³⁹⁵ See *Imafu v Minister for Justice Equality & Law Reform & Ors* ([n 392](#)); *Ashu v The Refugee Appeals Tribunal & Anor* ([n 370](#)); *R.K.S. v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* ([n 341](#)). Although in principle control may be exercised on the basis of error of fact, as well as law, in practice initial decision-makers rarely rely on an immaterial fact or completely misinterpret the facts presented.

³⁹⁶ *SB (Sri Lanka) v Secretary of State for the Home Department* ([n 355](#)) paras. 41–9.

³⁹⁷ Cf. Hamlin, R., *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada and Australia* (2014).

³⁹⁸ Bohmer, C. & Shuman, A., *Political Asylum Deceptions: The Culture of Suspicion* (2018); Ramji-Nogales, Schoenholtz, & Schrag ([n 375](#)); Amnesty International, ‘**Still Human, Still Here:** Why so many initial asylum decisions are overturned on appeal in the UK’ (Apr. 2013).

³⁹⁹ See *Jabari v Turkey*, App. No. 40035/98 (11 Jul. 2000), where the European Court of Human Rights expressly stated that, given the irreversible nature of art. 3 harm, ‘an effective remedy under Article 13 requires *independent and rigorous scrutiny* of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and *the possibility of suspending the implementation of the measure impugned*’ (emphasis added). Also, in *M.S.S. v Belgium and Greece* ([n 331](#)) paras. 293, 389, the Court criticized the practice in certain review procedures of ‘increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk’.

⁴⁰⁰ Cf. the debate over ‘anxious scrutiny’, and the idea that closer scrutiny may be called for in the case of public authority decisions relating to fundamental human rights: *R v Secretary of State for the Home Department, ex p. Bugdaycay* [1986] UKHL 3, [1987] AC 514, 531 (Lord Bridge); Craig, P., ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ [2015] *Public Law* 60; Lord Sumption, ‘Anxious Scrutiny’ ALBA Lecture (4 Nov. 2014): <https://www.supremecourt.uk/docs/speech-141104.pdf>.

⁴⁰¹ See further Goodwin-Gill ([n 218](#)) 23–4, 30–1.

⁴⁰² Cf. art. 65, Constitution of the Netherlands (self-executing treaties have force of law as from publication, taking precedence over existing statutes and those which follow); arts. 25 and 59, Basic Law (Grundgesetz) of the Federal Republic of Germany; arts. 53 and 55, 1958 Constitution of France.

⁴⁰³ Hong Kong’s 1981 law actually *defined* a Vietnamese refugee as a person who ‘(a) was previously resident in Vietnam; and (b) is permitted to remain in Hong Kong as a refugee pending his resettlement elsewhere’: Immigration Amendment Ordinance 1981 (No. 35/81) s. 2. It also provided for sanctions to encourage onward movement by making it a condition of stay that an offer of resettlement elsewhere should not be refused ‘without reasonable excuse’: *ibid.*, s. 3; see also further amendments in 1982: Immigration Amendment Ordinance 1982 (No. 42/82) s. 7; Mushkat, R., ‘Hong Kong as a country of temporary refuge: an interim analysis’ (1982) 12 *Hong Kong Law Journal* 157.

⁴⁰⁴ See, for example, art. 25, EU Qualification Directive (recast).

⁴⁰⁵ See Ch. 8, s. 1.1.1.

⁴⁰⁶ UNHCR's decisions on refugee status, although possessing an international character, do not have the same binding character as, say, the 'housekeeping' or technical resolutions of international organizations, which may directly create obligations for member States.

⁴⁰⁷ Executive Committee Conclusion No. 12 (XXIX) on the Extraterritorial Effect of the Determinations of Refugee Status (1978).

⁴⁰⁸ 1951 Convention, Schedule, para. 7.

⁴⁰⁹ See arts. 12, 14, and 16, dealing with those rights, the exercise of which is not necessarily related to the refugee's 'lawfully staying' in the territory of a Contracting State: UNHCR, 'Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees': EC/SCP/9 (24 Aug. 1978) para. 18; *The Queen (Al Rawi and Others) v Secretary of State for Foreign and Commonwealth Affairs and Another (United Nations High Commissioner for Refugees intervening)* Written Submissions on Behalf of the Office of the United Nations High Commissioner for Refugees (2008) 20 IJRL 675, 684–5, paras. 36–9.

⁴¹⁰ Executive Committee Conclusion No. 12 (1978). It was also accepted that a decision by one State *not* to recognize refugee status does not preclude another State from examining a new request by the person concerned.

⁴¹¹ Goodwin-Gill (n 17) 45–9.

⁴¹² Cf. *R (on the application of Al Rawi) v Secretary of State for Foreign Affairs* discussed above (n 98).

⁴¹³ See, for example, *M.G. v Bulgaria*, App. No. 59297/12, Fourth Section (25 Mar. 2014)—a refugee recognized first in Poland and then in Germany was arrested by Bulgarian border officials further to a Red Notice and request by Russia, his country of origin. Despite UNHCR's intervention, he was detained pending extradition. The European Court of Human Rights issued a Rule 39 request and after a thorough review of the facts, held unanimously that extradition would constitute a violation of art 3 ECHR 50. Cf. *Ismail v Secretary of State for the Home Department* [2013] EWHC 663 (Admin), in which the court noted that, if a foreign judgment obtained in flagrant disregard of justice were served on the claimant, he would be vulnerable to a Red Notice and could not leave the UK for fear of arrest.

⁴¹⁴ INTERPOL is not part of the UN system, but an inter-governmental organisation with 194 member countries and headquarters in Lyon, France: <https://www.interpol.int/>; on the various notices, see <https://www.interpol.int/en/How-we-work/Notices/About-Notices>.

⁴¹⁵ Arts. 2, 3, Constitution of the International Criminal Police Organization—INTERPOL: doc. I/CONS/GA/1956 (2017).

⁴¹⁶ INTERPOL's Rules on the Processing of Data: Doc. III/IRPD/GA/2011 (2019). See *Trushin v National Crime Agency* [2014] EWHC 3551 (Admin)—a claim that, in politically motivated proceedings, the UK's National Crime Agency had improperly processed the claimant's personal data in relation to the continued interest of the Russian authorities to secure his return, which was inconsistent with data protection principles, his status as a

refugee, his European Convention rights and rights under the EU Charter.

⁴¹⁷ See Fair Trials, ‘Strengthening respect for human rights, strengthening INTERPOL’ (2013): <https://www.fairtrials.org>; Semmelman, J. & Spencer Munson, E., ‘INTERPOL Red Notices and Diffusions: Powerful—And Dangerous—Tools of Global Law Enforcement’ *The Champion* (May 2014): <https://www.nacdl.org>; UNHCR, ‘Guidance Note on Extradition and International Refugee Protection’ (Apr. 2008); Parliamentary Assembly of the Council of Europe, ‘Extradition of refugees and the obligation of ‘non-refoulement’ of member States of the Council of Europe’, Written Question No. 510 to the Committee of Ministers and Reply, doc. 11192 (23 Feb. 2007). See also Apuzzo, M., ‘How Strongmen Turned Interpol Into Their Personal Weapon’ *The New York Times* (22 Mar. 2019); Finlay, L., ‘Explainer: what is an Interpol red notice and how does it work?’ *The Conversation* (30 Jan. 2019); European Parliament, ‘Misuse of Interpol’s Red Notices and impact on human rights—Recent developments’, Study requested by the Subcommittee on Human Rights (DROI), Policy Department for External Relations, Directorate General for External Policies of the Union PE 603.472 (Jan. 2019).

⁴¹⁸ See Fair Trials ([n 417](#)).

⁴¹⁹ INTERPOL text on refugee policy—Excerpts: <https://www.fairtrials.org/wp-content/uploads/INTERPOL-TEXT-ON-REFUGEE-POLICY.pdf>; Nemets, Y. L., ‘INTERPOL’s New Policy on Refugees: Is Everything Settled?’ (26 Aug. 2016): <https://ssrn.com/abstract=2843205>.

⁴²⁰ Among others, see McGowan, M., ‘Emails show Border Force considered cancelling refugee footballer Hakeem al-Araibi’s visa’ *Guardian* (11 Oct. 2019).

⁴²¹ ICPO-INTERPOL res. No. 9, GA-2017-86-RES-09, preambular para. 7.

⁴²² Working Group on International Cooperation, Conference of the Parties to the United Nations Convention against Transnational Organized Crime. Report on the Meeting held in Vienna on 16 Oct. 2018: UN doc. CTOC/COP/WG.3/2018/6 (30 Oct. 2018) paras. 2(h), 3–16; also, ‘Challenges faced in expediting the extradition process, including addressing health and safety and other human rights issues, as well as litigation strategies utilized by defendants to delay the resolution of an extradition request.’ Background paper prepared by the Secretariat: UN doc. CTOC/COP/WG.3/2018/5 (14 Aug. 2018) paras. 22–38.

⁴²³ Goodwin-Gill ([n 17](#)) 178–9, 230, 255–61, 294.

Displacement related to the Impacts of Disasters and Climate Change

1. Introduction

The links between climate change, disasters, and other causes of displacement are now undisputed. There is scientific consensus that the effects of climate change are aggravating and amplifying many ‘natural’ environmental hazards, including sudden-onset disasters such as flooding, cyclones, storm surges, waterlogging, and salinity intrusion, and slow-onset processes like desertification and coastal erosion, including through rising sea levels.¹ This, in turn, may threaten a range of human rights, including the rights to life, health, housing, culture, means of subsistence, and the right to be free from inhuman or degrading treatment.² The most drastic impacts of climate change are likely to be felt in the poorest parts of the world where human rights protection is often weak.³ As the Intergovernmental Panel on Climate Change (IPCC) has noted, ‘[p]eople who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.’⁴ Starting from a place of disadvantage hampers people’s responsive capacity and resilience.

Disasters linked to sudden-onset natural hazards continue to trigger the largest number of new internal displacements annually—76 per cent in 2020 (30.7 million people), compared to 26 per cent triggered by conflict (9.8 million people).⁵ For instance, large proportions of Vanuatu’s population were displaced by Cyclone Pam in 2015⁶ and by Cyclone Harold just five years later.⁷ Most of this was temporary, and all was internal—as most such displacement is anticipated to be⁸—but it is a phenomenon likely to recur more and more often, especially as climate change increases the severity of some sudden-onset events, such as the intensity of cyclones and rainfall in some regions. In the northern hemisphere, there is less sea ice in the Arctic Ocean than ever before, and the Alaskan permafrost is melting. This is resulting in rapid erosion and flooding, jeopardizing the ongoing habitability of the land, threatening livelihoods, and prompting communities to request permanent relocation.⁹

The Internal Displacement Monitoring Centre (IDMC) prepares annual estimates of people evacuated or forced to flee owing to rapid-onset hazards, but little information is available regarding the duration of displacement, rates of return, post-flight migration patterns, or adaptation. There are also no global estimates of the numbers of people displaced by slow-onset hazards, such as drought, environmental degradation, and resource conflicts, which makes the risk estimates ‘very conservative’.¹⁰ Such movement is difficult to monitor because ‘it encapsulates a wide range of phenomena, drivers, triggers, impacts and movement types’ and can be hard to distinguish from internal migration.¹¹ However, in 2018, for the first time, the IDMC was able to estimate the number of new displacements associated with drought in sub-Saharan Africa, and the World Bank has additionally provided estimates for South Asia and Latin America, (although not without some criticism as to the methodology).¹²

The drivers of displacement are multi-causal and complex, to the point perhaps at which disaggregation gets in the way of a necessary focus on protection needs.¹³ In addition to conflict, serious human rights abuses, and poor governance, people ‘move because of acute poverty, the collapse of traditional livelihoods in a context of globalization and rapid urbanization, the effects of climate change, natural disasters, and environmental degradation which often exacerbate competition over scarce resources. Often these various factors overlap or reinforce others’.¹⁴ In this way, climate change acts as a threat multiplier¹⁵ and can also exacerbate existing displacement.¹⁶ While targeted policy interventions may significantly reduce the risk and extent of future displacement, the science indicates that irrespective of what mitigation or adaptation strategies are put in place now, some displacement is inevitable.¹⁷ Furthermore, as the IDMC has observed, ‘[u]nresolved displacement and a failure to address the drivers of displacement risk will, in turn, result in more displacement in the future.’¹⁸ In addressing displacement in this context as in others, protection needs must be front and centre.

This chapter examines the nature of movement occasioned by the impacts of disasters and climate change.¹⁹ It considers the law as it pertains to internally displaced persons (IDPs), as well as the limits and capacity of the international and regional legal frameworks that may apply to those who are displaced across an international border (refugee law, human rights law, and the law on statelessness). It examines developments at the international and regional policy-making levels over the past decade, as questions about the linkage between

climate change and displacement started to be considered more systematically. It recognizes that while a number of international instruments now include language on climate change, disasters, and displacement (section 6.2 below), including the 2018 Global Compact for Safe, Orderly and Regular Migration,²⁰ more is required to give full effect to these undertakings, both with regard to the capacity to anticipate displacement, and to determine what kind of ‘protection’ is called for, by whom, and where.

1.1 Terminology and concepts

This chapter uses the shorthand term ‘disaster displacement’ to encompass displacement linked to the impacts of disasters and/or climate change.²¹ Displacement may be triggered by sudden-onset disasters, slow-onset processes, or a combination of both.²² Some sudden-onset events are generally not affected by climate change, such as earthquakes,²³ whereas others are—for instance, climate change may increase the intensity of cyclones and rainfall in some regions. Slower-onset impacts (such as sea-level rise, erosion, and desertification) may result in a more gradual deterioration of physical conditions that ultimately render land uninhabitable for human settlement. They may also exacerbate extreme weather events, such as storm surges, king tides, and flooding,²⁴ cumulatively weakening people’s resilience over time as traditional coping mechanisms are challenged. This, in turn, may contribute to further displacement.²⁵ Whether climate change is a contributing factor to a disaster or not, the protection needs of those displaced are much the same, rendering sharp distinctions between the two meaningless from a human rights perspective.²⁶

While climate change and disasters affect mobility, they are not the sole cause.²⁷ Rather, they interact with a range of economic, social, and political drivers, which themselves affect movement (such as impoverishment, environmental degradation, recourse scarcity, lack of livelihood opportunities, and so on).²⁸ There is a need to better articulate—and constantly enrich—understandings of the phenomenon, such as the interaction between slow-onset factors and more traditional drivers of movement, in order to understand when and why people may move, possible predictors of future displacement, and the kinds of solutions that will be most appropriate and sustainable.²⁹ This is also of fundamental importance in determining what legal frameworks should apply, and how.

Focusing on the human rights that are compromised by the impacts of climate

change and disasters, rather than on what ‘causes’ movement, means that complex questions relating to climate change and causation are avoided—which, in any case, are not directly relevant to establishing whether or not a right has been violated.³⁰ Not only is it a ‘fundamentally unanswerable question’ scientifically whether a particular event can be conclusively attributed to climate change,³¹ but, as Kälin and Schrepfer argue, ‘a responsibility-based approach to population movements in the context of climate change is not fruitful’,³² in part because it ‘shifts a wider discourse to a narrow legal approach which arguably complicates rather than facilitates an adequate solution to questions arising in this context’.³³

The following sections outline the scope of existing international legal frameworks to protect people displaced in the context of disasters and climate change.

2. Internally displaced persons

As noted above, most disaster displacement will occur within countries rather than across international borders.³⁴ Internal displacement may transform into cross-border displacement if it is not adequately addressed,³⁵ although the data cannot yet substantiate this in any detail.³⁶

Each State has the primary responsibility to promote and protect the human rights of all those within its territory or jurisdiction—both citizens and non-citizens—including when they are displaced. With respect to the latter, States’ obligations have been clarified by the 1998 Guiding Principles on Internal Displacement³⁷ and other instruments.³⁸ The Guiding Principles clearly encompass disaster displacement³⁹ and are recognized by the international community as an ‘important international framework for the protection of internally displaced persons’.⁴⁰ They set out standards for protection before, during, and after displacement.⁴¹ The key challenge lies in integrating them into practice, strengthening their normative and operational implementation in the context of climate change and disasters, and enhancing the capacity of relevant authorities to apply them.⁴² Both Fiji and Vanuatu, for instance, have developed guidelines on displacement in the context of climate change and disasters to assist the government and other stakeholders ‘to address and reduce vulnerabilities associated with displacement’ and to consider ‘sustainable solutions to prevent and minimize the drivers of displacement on the affected

communities in relation to climate change and disaster-associated events'.⁴³

In the African context, the international legal protection of IDPs is reflected in the 2006 Great Lakes IDP Protocol⁴⁴ and the 2009 African Union Convention for the Protection and Assistance of Internally Displaced in Africa, known as the Kampala Convention.⁴⁵ Both specifically encompass the disaster displaced, and the Kampala Convention contains an express provision requiring States parties to 'take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change'.⁴⁶ While it 'sets an international precedent as the first legally binding regional instrument proving legal protection for climate change displaced persons'⁴⁷ and is a 'practical and important tool', ratifications remain low and '[m]uch work ... remains to be done to translate this important instrument into practice and to secure concrete improvements in the protection of and assistance to internally displaced persons'.⁴⁸

The Nansen Initiative's Protection Agenda, endorsed by 109 States, sets out a number of potentially 'effective practices' in this regard, including:

- Reviewing domestic legislation or policies on internal displacement to identify whether the notion of IDPs includes those displaced in disaster contexts, and if not consider expanding that notion in line with the UN Guiding Principles on Internal Displacement and relevant (sub-)regional instruments.
- Reviewing domestic legislation and policies on disaster risk management to identify whether they contain specific and adequate provisions addressing all stages of disaster related internal displacement and, if not, revise such laws and policies in line with the UN Guiding Principles on Internal Displacement and relevant (sub-)regional instruments.
- Specifically incorporating IDP protection considerations, and clarifying roles and responsibilities of relevant actors within disaster risk reduction and humanitarian response plans, as well as relevant development plans, in accordance with respect for the human rights of IDPs.
- Strengthening the institutional capacity and resources of national and local authorities to enhance protection and support for IDPs in disaster contexts.
- Ensuring that projects and programs regarding humanitarian assistance, early recovery and durable solutions in disaster contexts provide meaningful information and opportunities for consultation with and participation by displacement-affected persons or groups of person, those at risk of displacement and host communities.⁴⁹

3. The application of international refugee law

When international borders are crossed, the question of whether and what legal protection is required is less straightforward. While it is important to clarify the scope of refugee law in the context of disaster displacement, it should not be used to constrain conceptual or normative developments. As noted above, drivers of displacement are typically multi-causal, and conflict, persecution, and disasters can be inter-linked. A detailed study undertaken for UNHCR in 2018 emphasized that ‘the impacts of a disaster may create conditions that reinforce or bolster claims for refugee status under the Refugee Convention’.⁵⁰ This was reflected in ‘legal considerations’ released by UNHCR in 2020, which underscored the need to consider the broader ‘social and political characteristics of the effects of climate change or the impacts of disasters’ and their potentially ‘significant adverse effects on State and societal structures and individual well-

being and the enjoyment of human rights' when assessing protection claims in this context.⁵¹ As such, it is imperative that refugee law is not automatically dismissed where the impacts of climate change or disasters are concerned.

Apart from the interaction between conflict, violence, and disasters, which may amount to persecution, refugee law may apply in other circumstances as well. First, some people who flee across a border in the aftermath of a disaster may include Convention refugees persecuted for reasons unrelated to the disaster. Secondly, persecution can occur in disaster situations. For example, if a government were to withhold humanitarian assistance from people displaced by the impacts of a disaster, sideline the recovery needs of marginalized groups, or target individuals for engaging in disaster-relief work,⁵² then they might qualify as refugees under the Refugee Convention definition.⁵³ New Zealand jurisprudence, which is the most developed in this field, has acknowledged that if a government were to restrict access to fresh water supplies or agricultural land for a Convention reason, then the refugee definition might be satisfied,⁵⁴ but it would be the act or omission by government that gave rise to the well-founded fear of harm, rather than the disaster or resource scarcity itself. Thirdly, secondary impacts of a disaster, such as 'increases in gender-based violence in temporary shelters, discrimination in assistance and solutions, shortcomings in evacuation procedures, etc'⁵⁵ might also found a conventional refugee claim; the disaster itself would merely provide the context. For instance, in the aftermath of the 2010 Haiti earthquake, Panama and Peru recognized a number of Haitians as Convention refugees, but 'the basis of their recognition as individual refugees was not the earthquake directly but rather a well-founded fear of persecution by non-State actors that arose from the vacuum of governmental authority after the earthquake in Haiti'.⁵⁶ As Scott notes, '[t]he vast majority of [refugee] cases that arise in the context of "natural" disasters and climate change do not reflect an express concern articulated by the claimant about being exposed to disaster-related harm if returned';⁵⁷ rather, the disaster forms the backdrop to the claim. Importantly, though, decision-makers need to be aware of 'the deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated' and ensure that individual claims are properly scrutinized within this context.⁵⁸ On their own, however, the impacts of climate change or disasters will generally not satisfy the meaning of 'persecution' under the Refugee Convention. The problem is not that harms may be socio-economic in nature: as Foster explains, '[t]here is evidence that from the earliest days of its

operation [that] some types of socio-economic claims were considered to fall within the purview of the Refugee Convention definition.⁵⁹ Rather, ‘persecution’ is interpreted as requiring human agency,⁶⁰ and part of the problem is identifying a ‘persecutor’. While it could be argued that historically-high emitters of carbon emissions (for example, industrialized States) are the ‘persecutors’ in this case, at times they may be the very countries in which people wish to seek protection. This represents a reversal of the traditional refugee paradigm,⁶¹ which the New Zealand Court of Appeal described as an attempt ‘to stand the Convention on its head’.⁶² Furthermore, even if the impacts of disasters or climate change were alone accepted as constituting ‘persecution’, it would be difficult to establish a link with one or more of the five Convention grounds,⁶³ given that such impacts are largely indiscriminate.⁶⁴ While the jurisprudence on socio-economic persecution has developed significantly in the intervening years, it is still the case that courts around the world do not regard the Refugee Convention as protecting victims of disasters *per se*.⁶⁵

Since 2000, there have been at least 30 cases in Australia and New Zealand in which decision-makers have considered whether individuals from the small, low-lying Pacific island States of Tuvalu and Kiribati are eligible for protection from the future impacts of climate change.⁶⁶ To date, no case has succeeded on this basis. Decision-makers have explained that the applicants were not ‘differentially at risk of harm amounting to persecution due to any one of these five grounds’, and that ‘all citizens face[d] the same environmental problems and economic difficulties’ and were ‘unfortunate victims … of the forces of nature’.⁶⁷ Since 2013, far more detailed and nuanced analysis has emerged,⁶⁸ with an acknowledgement that the complex relationship between environmental degradation, disasters, and human vulnerability (which can be personal as well as situational⁶⁹) means that protection under the Refugee Convention should not automatically be ruled out,⁷⁰ but that human rights law, rather than refugee law, seems to offer the most scope for protection in such circumstances.⁷¹

Regional refugee law may provide some protection for the disaster displaced, although much remains to be formally tested.⁷² As noted in Chapter 2, in Africa, the OAU Convention provides protection where a person is compelled to leave on account of events seriously disturbing public order in either part or the whole of his country of origin or nationality’,⁷³ while in Latin America, the Cartagena Declaration extends to ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign

aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.⁷⁴ The 2014 Brazil Declaration, adopted on the 30th anniversary of the Cartagena Declaration, recognizes cross-border displacement in the context of climate change and disasters as a new challenge but does not describe those displaced as 'refugees'.⁷⁵ In Europe, protection is theoretically available under the Temporary Protection Directive⁷⁶ and the Qualification Directive.⁷⁷

The prevailing view among relevant States is that disasters will not, on their own, engage the regional refugee definitions unless there is also a connection with a broader breakdown of public order or protection.⁷⁸ Thus, while African States have typically permitted people fleeing disasters to remain at least temporarily, they have generally refrained from characterizing this as a legal obligation.⁷⁹ For instance, in 2002, Uganda gave temporary refuge to people fleeing the eruption of Mount Nyiragongo in Goma in the Democratic Republic of Congo, but indicated that it did not regard them as refugees under the OAU Convention's expanded definition.⁸⁰

UNHCR argues that 'an evolutionary approach to interpretation' means that 'people displaced by the adverse effects of climate change and disasters can be refugees under [the OAU and Cartagena] regional refugee criteria'⁸¹ because such impacts may amount to events 'seriously disturbing public order'. In particular, where there are inter-linkages between displacement drivers, such as disasters, conflict, widespread violence, and/or a breakdown of national government systems, the OAU Convention may be relevant. This was apparent in 2011–12 when Somalis fleeing on account of conflict, drought, and a lack of protection and assistance were reportedly granted refugee status pursuant to that instrument.⁸² The application of the OAU Convention in that case was a combination of the fact that,

famine threatened their lives, domestic authorities able to help them did not exist, and the ongoing conflict and violence greatly hindered international organizations' capacity to protect and assist Somalis during the famine, [which] justified considering them as victims of an event 'seriously disturbing public order in either part or the whole' of the country that 'compelled' them to seek refuge abroad.⁸³

Similarly, the fact that some Central and South American States recognized Haitians applying for asylum following the 2010 earthquake as refugees under the Cartagena Declaration definition was because of the breakdown in law and

order generated by the earthquake, or the lack of protection and increased insecurity faced by those displaced.⁸⁴ Without such a link, however, it is unlikely that the expanded regional refugee definitions would be applied.⁸⁵ ‘The rationale for this view’, according to Cantor, is that ‘serious disturbances of public order ... must have a connection with the institutional or political world’.⁸⁶

4. Human rights law

International human rights law establishes minimum standards of treatment that States must afford to individuals within their territory or jurisdiction. This includes an obligation to respect, protect, and fulfil human rights to protect people from certain forms of foreseeable harm.⁸⁷ If States do not take positive steps to realize the rights to life, health, adequate food, and so on, or provide adequate safeguards against known risks⁸⁸—including return to such risks—then this obligation may be breached. As outlined in Chapter 7, the principle of *non-refoulement* in human rights law protects people from forcible return to life-threatening circumstances or other cruel, inhuman, or degrading treatment.⁸⁹

While existing jurisprudence does not preclude the negative impacts of disasters and climate change from founding a non-removal claim, substantial progressive development of the principle of *non-refoulement* under human rights law would be required before this could be considered an effective remedy. It is also important to note that in such cases, an internal flight alternative may be regarded as reasonable.⁹⁰

Since decision-making bodies have traditionally failed to accord the same weight to breaches of economic, social, and cultural rights as they have to civil and political rights,⁹¹ risks to socio-economic rights are often ‘re-characterized’ as ‘inhuman or degrading treatment’ to which a clear *non-refoulement* obligation attaches.⁹² Courts have recognized that ‘destitution’ or ‘dire humanitarian conditions’ may amount to inhuman or degrading treatment, especially if they cumulatively reach a sufficient level of severity.⁹³ Conditions in an area affected by a disaster, or which is severely environmentally-degraded, may mean that returning someone there could expose them to a real risk of death or inhuman or degrading treatment. This is especially so when the situation is considered holistically—for example, if the area is disaster-prone, there are extreme water shortages, crops cannot grow, and the risk of illness is heightened.⁹⁴

4.1 Protection from arbitrary deprivation of life

The right to life is inextricably connected to other human rights, such as the right to an adequate standard of living and the right not to be deprived of a means of subsistence, each of which may be compromised by the impacts of climate change and disasters.⁹⁵ The Convention on the Rights of the Child links the right to life to the State's duty 'to ensure to the maximum extent possible the survival and development of the child',⁹⁶ and the Committee on the Rights of the Child has explained that it must be implemented holistically, 'through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, [and] a healthy and safe environment'.⁹⁷

Regionally, the Inter-American Commission on Human Rights has recognized that realization of the right to life is necessarily linked to and dependent on the physical environment.⁹⁸ Emphasizing 'the direct and immediate connection that exists between the rights to life and to personal integrity in the area of human health care', the Inter-American Court of Human Rights has noted that removal could in some cases violate international law, for instance if this 'would result in harming or a serious deterioration in the person's health or, even, when it could lead to her or his death'.⁹⁹

Likewise, the European Court of Human Rights has accepted that the right to life is linked to the right to a healthy environment and that environmental damage can affect the rights to life, property, home, and private life.¹⁰⁰ In particular, the obligation to protect the right to life may also include protection from environmental harm.¹⁰¹ In *Budayeva v Russia*, the court held that this duty extends to protection from disasters where the authorities know, or ought to know, of an actual or imminent danger but do not take reasonable precautionary measures, noting that '[t]he scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation'.¹⁰² However, '[a]n impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources ... This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature'.¹⁰³

Human rights treaties in Africa and Latin America specifically recognize the

right to a safe environment.¹⁰⁴ Article 24 of the 1981 African Charter on Human and Peoples' Rights provides that all peoples 'shall have the right to a general satisfactory environment favourable to their development'. This has been interpreted by the African Commission on Human and Peoples' Rights as obliging States to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.¹⁰⁵

The New Zealand Immigration and Protection Tribunal has expressly acknowledged that the right to life may be compromised by the impacts of disasters and climate change—a view endorsed by the UN Human Rights Committee, discussed below¹⁰⁶—noting that 'the prohibition on arbitrary deprivation of life must take into account the positive obligation on the state to fulfil the right to life by taking programmatic steps to provide for the basic necessities for life'.¹⁰⁷ However, the Tribunal has drawn a distinction between man-made and natural hazards on the basis that the State has less control over the latter.¹⁰⁸ Thus, where a family from Tuvalu argued that they would be in danger of being arbitrarily deprived of their lives if returned—*inter alia* on account of the impacts of climate change (in particular, a lack of fresh drinking water and sea-level rise)—the Tribunal found that while life in Tuvalu would be more challenging than in New Zealand, there was insufficient evidence to establish that it would be so precarious as a result of any act or omission by the government of Tuvalu that they would be in danger of being arbitrarily deprived of it.¹⁰⁹

In late 2019, the UN Human Rights Committee published its views on one of the New Zealand cases noted above. Mr Teitiota from Kiribati argued that New Zealand's rejection of his protection claim exposed him to a real risk of being arbitrarily deprived of his life. He stated that if returned, his right to life would be at risk on account of insufficient fresh water, overcrowding, inundation, erosion, and land disputes, stemming from the effects of climate change and sea-level rise. The Committee accepted that, in principle, the effects of climate change could expose people to such risks, 'thereby triggering the *non-refoulement* obligations of sending states'.¹¹⁰ It observed, too, that 'the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized', implying that protection should be forthcoming before an immediate risk to life arises.¹¹¹ However, it endorsed the New Zealand Tribunal's reasoning that risks materializing in 10 to 15 years

would not yet substantiate a protection claim, since there was time for ‘intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population’.¹¹²

4.2 Protection from inhuman or degrading treatment

In the relevant jurisprudence to date (from New Zealand, the United Kingdom, and the European Court of Human Rights), protection has only been forthcoming where exposure to dire humanitarian conditions or deprivation of socio-economic rights is linked to the deliberate action or inaction of a State, rather than to those conditions per se.¹¹³

In New Zealand, which has the most developed case law on displacement in the context of disasters and climate change, the need to show a real risk of inhuman or degrading ‘treatment’ has been interpreted as requiring a positive act or omission by an authority that ‘transcend[s] failure of the state’s general economic policies to provide for an adequate standard of living’.¹¹⁴ As such, the New Zealand Tribunal has found that a State’s incapacity to respond to a disaster will generally be insufficient to constitute ‘treatment’, but if a State were to withhold post-disaster assistance on a discriminatory basis, or arbitrarily withhold access to available foreign assistance when domestic capacity were lacking, this could potentially constitute ill-treatment of the disaster-affected population.¹¹⁵ The principle of *non-refoulement* therefore does not provide a remedy against removal to general poverty, unemployment, or a lack of resources or medical care (except in the most exceptional circumstances, discussed below).¹¹⁶

In the seminal case of *D v United Kingdom*, the European Court of Human Rights considered whether returning a terminally ill man to a country with inadequate medical treatment would breach the prohibition on removal to a real risk of inhuman or degrading treatment under article 3 of the European Convention on Human Rights. The applicant, a man from St. Kitts, had been receiving treatment for HIV while imprisoned in the United Kingdom. In the advanced stages of an incurable illness, it was an ‘established fact that the withdrawal of his current medical treatment would hasten his death on account of the unavailability of similar treatment in St Kitts’.¹¹⁷ He argued that by removing him to St. Kitts, the UK authorities would ‘condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution’,

which would constitute inhuman and degrading treatment.¹¹⁸

The European Court of Human Rights stated that the ‘fundamental importance’ of article 3 ECHR 50 meant that the court ‘must reserve to itself sufficient flexibility’ to consider its application in contexts other than those where harm emanated from intentionally inflicted acts by the State.¹¹⁹ As it explained in the subsequent case of *N v United Kingdom*, it could examine a claim where ‘[t]he source of the risk of proscribed treatment in the receiving country stemmed from factors which could not engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, did not in themselves infringe the standards of Article 3.’¹²⁰

D v United Kingdom is often assumed to support the proposition that in exceptional cases, return to socio-economic conditions that are ‘inhuman or degrading’ is precluded. However, that misinterprets the court’s finding. It was in fact the UK’s provision of medical treatment to him, its withdrawal of that treatment, and then (perhaps incidentally)¹²¹ its decision to remove him to circumstances where such treatment could not be continued¹²² that *directly engaged the UK’s responsibility* under article 3. As the court explained:

Although it cannot be said that the conditions which would confront him in the receiving country *are themselves* a breach of the standards of Article 3 (art. 3), *his removal* would expose him to a real risk of dying under most distressing circumstances *and would thus amount to inhuman treatment.*¹²³

The factual threshold for ‘inhuman or degrading treatment’ in such cases is very high. In *D v United Kingdom*, poor medical conditions in St. Kitts that could ‘further reduce [the applicant’s] already limited life expectancy and subject him to acute mental and physical suffering’;¹²⁴ the lack of any assurance that he would get a hospital bed; the absence of strong family ties or other moral or social support; the fact that his lack of shelter and proper diet in St. Kitts could expose him to infections that could not be properly treated; and generally poor health and sanitation conditions in St. Kitts¹²⁵ did not themselves breach article 3.¹²⁶

In *MSS v Belgium and Greece*, however, the court found that Belgium had breached its article 3 obligations by returning an asylum seeker to Greece, knowingly exposing him to detention and living conditions that amounted to degrading treatment:¹²⁷

[I]living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.¹²⁸

Subsequently, in *Sufi and Elmi v United Kingdom*, the court held (inter alia) that where it was reasonably likely that someone returned to Somalia would end up in an IDP or refugee camp, he or she would face a real risk of being exposed to inhuman or degrading treatment on account of the dire humanitarian conditions there.¹²⁹ It noted that although those conditions were partly a result of drought in Somalia, they were ‘predominantly due to the direct and indirect actions of the parties to the conflict’.¹³⁰ As such, the court distinguished its approach in *N v United Kingdom* (in which the alleged harm ‘emanate[d] not from the intentional acts or omission of public authorities or non-State bodies but from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country’¹³¹). Instead, it followed its approach in *MSS v Belgium and Greece*, requiring it ‘to have regard to an applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame’.¹³²

In other words, ‘[i]f the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State’s lack of resources to deal with a naturally occurring phenomenon, such as a drought’, then the test in *N v United Kingdom* would apply, but where they were ‘predominantly due to the direct and indirect actions of the parties to the conflict’, then the approach in *MSS* would apply.¹³³ Costello doubts whether such a distinction is workable.¹³⁴

In *SHH v United Kingdom*, the court sought to clarify the application of the different principles.¹³⁵ The applicant in that case argued that he would be at risk if removed to Afghanistan on two grounds linked to disability—first, because he would be particularly vulnerable to violence and at greater risk of further injury or death in the ongoing armed conflict, and secondly, because he would face living conditions and discrimination due to his lack of family support in Afghanistan, in violation of article 3 ECHR 50.

The court distinguished the case from *MSS* on the basis that it concerned conditions in a State that was not party to ECHR 50, namely Afghanistan. Accordingly, it could not be held accountable under article 3 for failures to

provide adequate welfare assistance to people with disabilities.¹³⁶ It further distinguished the court's approach in *Sufi and Elmi* on the grounds that, in that case, 'there was clear and extensive evidence before the Court that the humanitarian crisis in Somalia was predominately due to the direct and indirect actions of all parties to the conflict who had employed indiscriminate methods of warfare and had refused to permit international aid agencies to operate',¹³⁷ whereas in the instant case, the court was unable to 'conclude that the situation in Afghanistan, albeit very serious as a result of ongoing conflict, is comparable to that of south and central Somalia'.¹³⁸

Accordingly, the court applied the approach in *N v United Kingdom* because both cases concerned future harm emanating from a lack of sufficient resources, rather than intentional acts or omissions by the authorities.¹³⁹ In the instant case, the evidence did not permit the court to find that it was 'a very exceptional one where the humanitarian grounds against removal are compelling'.¹⁴⁰

In terms of how far into the future the risk assessment extends, the test now is whether removal would give rise to 'a real risk ... of being exposed to a serious, rapid and irreversible decline in [the applicant's] state of health resulting in intense suffering or to a significant reduction in life expectancy'.¹⁴¹ The applicant does not need to be 'at imminent risk of dying', but removal must nevertheless result in 'a real and concrete risk'¹⁴² of treatment contrary to article 3, assessed 'by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State'.¹⁴³ This test has been approved by the CJEU.¹⁴⁴

Could poor socio-economic conditions in a country of origin *alone* constitute inhuman or degrading treatment, such that return would be unlawful?¹⁴⁵ The line of authority above suggests that without a deliberate act or omission by the State, it would be extremely difficult to establish. New Zealand decision-makers have similarly accepted that while disasters may 'provide a context in which a claim for recognition as a protected person' might be grounded,¹⁴⁶ the ill-treatment cannot be constituted by a State's general incapacity to respond to a disaster: it requires a deliberate act or omission (such as withholding post-disaster assistance).¹⁴⁷ Furthermore, if a State is taking steps within its power to protect those within its territory or jurisdiction from disasters or the adverse impacts of climate change—such as through disaster risk reduction or climate adaptation measures—then it is unlikely to be considered to have abrogated its obligations under human rights law.¹⁴⁸ The rationale is that 'it is simply not within the

power’ of a State ‘to mitigate the underlying environmental drivers of these hazards’, and ‘equat[ing] such inability with a failure of state protection goes too far ... plac[ing] an impossible burden on a state’.¹⁴⁹ An assessment of States’ positive obligations to protect life must therefore be ‘shaped by this reality’.¹⁵⁰ This reflects the European Court of Human Rights’ approach which seems to require less of States when it comes to ‘natural’ versus ‘man-made’ hazards.¹⁵¹

The *Teitiota v New Zealand* matter before the Human Rights Committee did not expressly raise an article 7 ICCPR 66 claim, although the Committee did acknowledge that ‘the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states’.¹⁵² Just as for the article 6 claim, a central consideration for article 7 would have been Kiribati’s capacity to respond to the alleged harm (including with international assistance),¹⁵³ and the threshold would have remained high: ‘[t]hat a real risk of irreparable harm such as that contemplated by articles 6 and 7 ... must be personal, that it cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.’¹⁵⁴ A distinct question, however, would have been whether the conditions in Kiribati could be said to amount to cruel, inhuman, or degrading treatment—which may have led to a slightly different analysis from the right to life claim. First, unlike the approach in New Zealand, the Committee’s jurisprudence does not expressly limit cruel, inhuman, or degrading treatment to positive acts or omissions.¹⁵⁵ Secondly, it is possible that the Committee might have moved towards the European line of reasoning, finding that the act of removal itself, as ‘a crucial element in the chain of events’, could amount to inhuman or degrading treatment were it to result in a person’s ‘most basic human rights [being] seriously violated’.¹⁵⁶ While the evidence and reasoning suggest this shift would have been unlikely in the instant case, it is something to watch in the future.

4.2.1 Children

Finally, when it comes to claims concerning children, the State’s obligation to consider a child’s best interests as a primary consideration in any decision affecting him or her may offer additional scope for protection.¹⁵⁷ This issue was raised in *AD (Tuvalu)*. While the New Zealand Tribunal acknowledged that, ‘by reason of their young age, the appellant children are inherently more vulnerable

to the adverse impacts of natural disasters and climate change than their adult parents', it concluded that on the evidence before it, the government of Tuvalu was 'sensitised to the specific vulnerabilities of children such that the appellant children in this case are not in danger of being arbitrarily deprived of their young lives if returned to Tuvalu, and they are not, as children, in danger of being subjected to cruel, inhuman or degrading treatment'.¹⁵⁸ In the subsequent humanitarian claim (based on compassionate considerations), the Tribunal recognized that article 3 CRC 89 required it to make the children's best interests a primary consideration.¹⁵⁹ Since the children had lived their whole lives in New Zealand and had never been to Tuvalu, the older child was at school in New Zealand, and 'their young age makes them inherently more vulnerable to natural disasters and the adverse impact of climate change',¹⁶⁰ the Tribunal found that the children's best interests were 'clearly ... to remain living with their parents in New Zealand as part of an extended family group'.¹⁶¹ Scott argues that this decision 'reinforces doctrinal arguments concerning the significant power of the CRC in protecting children from removal to countries where they risk being exposed to serious harm'.¹⁶² Future cases might also consider the principle of intergenerational equity,¹⁶³ and whether, in assessing a child's rights, a longer timeframe for analysis should be entertained.¹⁶⁴

4.2.2 Internal flight alternative

In some cases, an internal flight alternative might be considered reasonable.¹⁶⁵ The removal of an individual is not precluded even if the general standards of living in the country of origin are lower than those in the State in which protection was sought. However, the position would be different 'if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment'.¹⁶⁶ Furthermore, as UNHCR's Guidelines on the internal flight alternative state:

It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence *below at least an adequate level of subsistence* ... Conditions in the area must be such that *a relatively normal life can be led* in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.¹⁶⁷

Importantly, the Guidelines recognize that access to land and resources may be impossible in particular parts of a country on account of cultural or ethnic considerations, which would preclude internal relocation. They also note that the internal flight alternative is inappropriate if it requires movement to areas such as urban slums where conditions of severe hardship would ensue.¹⁶⁸ These factors are particularly relevant in the context of climate change and disasters.

5. ‘Disappearance’ of the State

Apart from the core protection principles it embodies, the statelessness regime holds little promise as a normative framework to assist the disaster displaced. There are too many variables involved, including unsettled questions in international law as to when a State would cease to exist on account of physical disappearance.¹⁶⁹ Nevertheless, since the territorial integrity of some low-lying small island States is at risk from the slow-onset impacts of climate change, in particular sea-level rise, the statelessness question continues to feature.

As explained in detail elsewhere,¹⁷⁰ the protection afforded by the treaties on the status of stateless persons and statelessness is expressly confined to those ‘not considered as a national by any State under the operation of its law’.¹⁷¹ It does not extend to people who are *de facto* stateless—that is, people who formally have a nationality but which is ineffective in practice.

Unless a State were to deprive its citizens of nationality, which is generally unlawful under international law,¹⁷² the statelessness definition could only be triggered if the State were considered no longer to exist. In other words, people would be rendered stateless because there was no longer a State to consider them as nationals under the operation of its law. This is not only a convoluted legal argument which remains subject to much conjecture, but also one which is unlikely to offer much protection in reality.

First, the law on the extinction of States does not contemplate their physical disappearance. Rather, it has been used to regulate the formal dissolution of States in cases of absorption (by another State, such as through a referendum), merger (with another State, such as the reunification of East and West Germany), and dissolution (with the emergence of successor States, as in the break-up of the former Yugoslavia). In view of this gap, scholars have taken an inverse approach to the creation of States to determine if and when statehood might be lost on account of the impacts of climate change.

For a ‘State’ to come into existence, it must have a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States.¹⁷³ While all four criteria are required for a State to emerge and be recognized by other States, the absence of one or more elements does not automatically mean the end of a State.¹⁷⁴ This derives from the strong presumption of continuity of existing States,¹⁷⁵ which may account for the fact that since the establishment of the UN Charter in 1945,¹⁷⁶ there have been very few cases of extinction of States and virtually none of involuntary extinction.¹⁷⁷ It is also significant that so-called ‘failed States’ have continued to be recognized as States even during the period when they were objectively failing.¹⁷⁸

In light of the strong presumption of continuity, and the absence of a self-executing mechanism for extinction, it is very likely that other States would continue to recognize a deteriorating small island State *qua* State, even if it experienced a ‘very extensive loss of actual authority’.¹⁷⁹ Past practice suggests that the international community would be willing to continue to accept the status quo for some time, even where the facts no longer supported the State’s continued existence. Indeed, in the context of climate change, Kälin has argued that it is ‘difficult to imagine that any other UN member state would want to tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion from ... international organisations’.¹⁸⁰ Presumably, the ‘deterritorialized’ State would continue to interact as part of the community of nations for some time.¹⁸¹

Secondly, long before a State physically ceases to exist, people will need to move as fresh water supplies decline, temperatures become intolerable, and areas become uninhabitable.¹⁸² It could be many decades or longer before the territory itself ‘disappears’, by which time many former inhabitants (and their descendants) may be residing in other States, including as citizens. As such, the timeframes between leaving one’s country and needing protection elsewhere are mismatched. Additionally, rather than the loss of territory signalling the State’s demise, it is far more likely that a loss of population, and with it, effective government, will be the first signs that a State has started to ‘disappear’ as a legal entity.¹⁸³

Thirdly, the treaties on the status of stateless persons and the reduction of statelessness fall short of near-universal ratification and few States have formal statelessness determination procedures in place to ensure that stateless people’s protection needs are properly identified and an appropriate legal status is

forthcoming. In conclusion, while the law on statelessness may reflect international recognition of the need to ensure protection, it is unlikely to have much practical utility for the (former) inhabitants of small island States. In addition to the definitional obstacles that limit its application in the present context, the statelessness regime, like the refugee regime, is reactive rather than proactive: it is generally only ‘triggered’ if a person is physically in another State, and does not provide a mechanism to enter another country in advance of anticipated harm.

Nevertheless, some useful lessons could be adapted from the statelessness context, such as the need to ensure that births are registered, laws are reformed so that women can pass on their nationality to their children, and processes for proving one’s identity are modified where registries have been destroyed (for example due to flooding). All these factors may be pertinent in disaster situations, especially where people are displaced permanently and cannot pass on their nationality to their children. Institutionally, UNHCR may have an important role to play in highlighting and urging States to address these issues. With a mandate to prevent and reduce statelessness, it is empowered to advocate on behalf of affected populations and to try to prevent future statelessness.¹⁸⁴

6. International processes and developments

Over the past decade, a deliberate scholarly and institutional focus on the impacts of disasters and climate change on human mobility has not only enhanced awareness and understanding of the issues, but has also resulted in normative developments. The adoption in late December 2010 of paragraph 14(f) of the Cancún Adaptation Framework, pursuant to which States were invited to ‘enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels’,¹⁸⁵ provided a particular catalyst for action. The creation of the Nansen Initiative on Disaster-Induced Cross-Border Displacement (2012–15) and its successor, the Platform on Disaster **Displacement (2016–)**, provided a focal point for more coordinated research, advocacy, and policy-making.¹⁸⁶

6.1 The Nansen Initiative and the Platform on Disaster Displacement

The background to the Nansen Initiative has been explained in detail

elsewhere.¹⁸⁷ In short, a concerted effort by UNHCR in 2011 to secure States' agreement on the development of a global guiding framework on cross-border displacement for situations not covered by the Refugee Convention (including displacement in the context of climate change and disasters),¹⁸⁸ was unsuccessful, with only five States formally supporting the idea: Costa Rica, Germany, Mexico, Norway, and Switzerland. However, acknowledging that a more coherent international approach was required to meet the protection needs of the disaster displaced, they pledged:

to cooperate with interested states and other relevant actors, including UNHCR, with the aim of obtaining a better understanding of such cross border movements at relevant regional and sub-regional levels, identifying best practices and developing consensus on how best to assist and protect the affected people.¹⁸⁹

Norway and Switzerland jointly launched an intergovernmental process 'to build consensus on a protection agenda addressing the needs of people displaced across borders by natural disasters in the context of disasters and the effects of climate change'.¹⁹⁰ The Nansen Initiative on Disaster-Induced Cross-Border Displacement was thus conceived. As a State-led, yet bottom-up consultative process, it represented the most significant institutional development on climate change, disasters, and human mobility up to that point in time. A series of sub-regional consultations, civil society meetings, and expert meetings between 2013 and 2015 helped to generate more nuanced understandings about the phenomena in different regions of the world, drawing on the views of governments, experts, and affected communities themselves. Focusing on preparedness prior to displacement, protection and assistance during displacement, and solutions following displacement, the Nansen Initiative sought to identify people's needs, as well as existing good practices used by States. It brought together a variety of otherwise disparate policy areas to generate a more holistic appreciation of the issues, and devised a 'toolbox' of interventions to address them.

The culmination of the Nansen Initiative process was the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, a non-binding document which consolidated the outcomes from the regional consultations and put forward a number of priority areas and recommendations for future work at the national, regional, and international levels.¹⁹¹ It also outlined the normative gaps in addressing displacement, migration, and planned relocation, and set out a number of effective practices

that States could already incorporate into their own laws and policies,¹⁹² without having to develop a global guiding framework or a new treaty (which was considered to be premature and politically unpalatable).¹⁹³ The Protection Agenda was endorsed by 109 States.

In 2016, the successor body to the Nansen Initiative—the Platform on Disaster Displacement—began to address the three priority areas identified for further action:

1. Collecting data and enhancing knowledge on cross-border disaster-displacement;
2. Enhancing the use of humanitarian protection measures for cross-border disaster-displaced persons, including mechanisms for lasting solutions, for instance by harmonizing approaches at (sub-)regional levels;
3. Strengthening the management of disaster displacement risk in the country of origin by:
 - A. Integrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes;
 - B. Facilitating migration with dignity as a potentially positive way to cope with the effects of natural hazards and climate change;
 - C. Improving the use of planned relocation as preventative or responsive measure to disaster risk and displacement;
 - D. Ensuring that the needs of IDPs displaced in disaster situations are specifically addressed by relevant laws and policies on disaster risk management or internal displacement.¹⁹⁴

The role of humanitarian protection, migration, and planned relocation are discussed in section 7 below.

Finally, it should be noted that the International Law Commission's draft articles on the protection of persons in disasters articulate a number of relevant principles, including respect for human dignity, human rights, and the principles of humanity, neutrality, impartiality, and non-discrimination.¹⁹⁵

6.2 Other international processes

Coinciding with the work of the Nansen Initiative and Platform on Disaster Displacement—and partly on account of it—important language on disasters,

climate change, and human mobility was incorporated in a range of international instruments, including the Sendai Framework for Disaster Risk Reduction 2015–2030,¹⁹⁶ the 2030 Agenda for Sustainable Development and Sustainable Development Goals,¹⁹⁷ the 2015 Paris Outcome on climate change (as part of the UNFCCC process),¹⁹⁸ the Agenda for Humanity (annexed to the UN Secretary-General’s report for the 2016 World Humanitarian Summit),¹⁹⁹ the New York Declaration for Refugees and Migrants,²⁰⁰ and the two Global Compacts on Refugees and Migration.²⁰¹ A specialized Task Force on Displacement was also developed as part of the UNFCCC process ‘to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change’.²⁰²

The New York Declaration and the two Global Compacts recognize the adverse effects of climate change, disasters, and other environmental factors as drivers of displacement, noting their interlinkages with other factors.²⁰³ The Migration Compact contains the most detailed undertakings (albeit non-legally binding), committing the international community to ‘[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin’,²⁰⁴ and singling out ‘[n]atural disasters, the adverse effects of climate change, and environmental degradation’, in particular. The Compact states that to realize their commitments, States will draw from the following actions: (a) strengthen information-sharing and analysis to better understand and address mobility in the context of disasters, climate change and environmental degradation; (b) develop adaptation and resilience strategies, which may include migration; (c) integrate displacement considerations into disaster preparedness strategies; (d) ensure access to humanitarian assistance and promote sustainable outcomes that increase resilience and self-reliance; and (e) develop coherent approaches to address the challenges of migration movements in this context.²⁰⁵ Pursuant to the Migration Compact, States also commit to respecting the prohibition on returning migrants to situations of irreparable harm, and ensuring the effective respect, protection, and fulfilment of their human rights.²⁰⁶ Objective 5 encourages States to ‘[e]nhance the availability and flexibility of pathways for regular migration’. For those compelled to leave on account of ‘sudden-onset natural disasters and other precarious situations’, this could include ‘humanitarian visas, private sponsorships, access to education for children, and temporary work permits’.²⁰⁷ For those compelled to leave on account of ‘slow-onset natural disasters, the adverse effects of climate change,

and environmental degradation’, and where adaptation or return is not possible, this could include ‘planned relocation and visa options’.²⁰⁸

While the impacts of climate change, disasters, and environmental degradation do not have the same prominence in the Refugee Compact, that instrument nevertheless acknowledges that ‘external forced displacement may result from sudden-onset natural disasters and environmental degradation’.²⁰⁹ Paragraph 8 recognizes that ‘[w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements’.²¹⁰ A section entitled ‘Identifying international protection needs’ notes that complementary ‘measures to assist those forcibly displaced by natural disasters ... as well as practices such as temporary protection and humanitarian stay arrangements’²¹¹ should be supported.

7. Preventing displacement and finding durable solutions

While refugee and human rights law provide some scope to assist those escaping the impacts of disasters and climate change, it seems that a more sustainable approach lies in the creation of wider-ranging, more systemic policies that can better address the nature of such movement. In particular, pre-emptive strategies, ranging from disaster risk reduction and climate change adaptation, through to migration opportunities and planned relocation, may help to avert displacement altogether, or at least mean that people are displaced for shorter periods of time and can return and rebuild more quickly.

The Nansen Initiative’s Protection Agenda sets out a toolbox of strategies to strengthen resilience and manage the risks of future displacement.²¹² Its core recommendations are that States should: (a) integrate mobility into disaster risk reduction and climate change adaptation strategies;²¹³ (b) ensure that the needs of IDPs displaced in the context of climate change and disasters are addressed by relevant laws,²¹⁴ (c) review and develop humanitarian protection mechanisms for (at least temporary) admission and stay;²¹⁵ (d) enhance migration opportunities as a positive form of adaptation (‘migration with dignity’);²¹⁶ and (e) consider the use of planned relocation as a preventative or remedial measure.²¹⁷

The development of proactive, systematic approaches that enable people to cope with, or adapt to, adverse environmental conditions is a more human rights-sensitive approach than reliance on remedial responses once people have been displaced. Such approaches give people a greater degree of agency and choice

about if and when to move, and can ‘reduce vulnerability to climate change and enhance human security’.²¹⁸ As States themselves have recognized,²¹⁹ migration can itself be a form of adaptation and risk management, especially if it is carefully managed and supported by good development policies and targeted investment, including skills training and job creation initiatives.²²⁰ In particular, temporary or circular migration can facilitate livelihood diversification and remittances, in turn increasing the resilience of those who remain at home. However, since international law does not squarely address the right of admission and stay of those who migrate in anticipation of, or in response to, disasters, the extent to which migration can be used as an adaptation strategy will depend upon the legal and policy frameworks put in place at national and regional levels.²²¹

In certain circumstances, States may have a duty to evacuate people on a temporary basis to safeguard the right to life.²²² Beyond this, planned relocations can be a more permanent preventative measure to assist people to move away from areas at risk of disasters or long-term environmental degradation, or as a durable solution for people who have been displaced and cannot safely return home. Past practices, particularly from the development context, show that relocations are inherently complex, often resulting in greater vulnerability, impoverishment, and social fragmentation.²²³ This is the case even when they occur within a country, as most have; it is even more fraught and legally complicated in cases of cross-border relocation.²²⁴ Expert guidance has been developed to identify the necessary steps States must take to consult with, and obtain informed consent from, affected communities; respect the rights and interests of different stakeholders; and ensure that lives and livelihoods can be rebuilt.²²⁵ Some governments have already developed national relocation guidelines,²²⁶ while in other cases, communities themselves have engaged in their own consultation processes and have approached the authorities for assistance with relocation.²²⁷

While protection gaps remain with respect to individuals displaced across a border by the adverse impacts of disasters and climate change, State practice shows a tendency to admit a person, or at least refrain from removing him or her, where:

- I. An on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to his/her life or safety;
- II. as a direct result of the disaster, the person has been wounded, lost family members, and/or lost his/her (means of) livelihood; and/or
- III. in the aftermath and as a direct result of the disaster, the person faces a real risk to his/her life or safety or very serious hardship in his/her country, in particular due to the fact that he/she cannot access needed humanitarian protection and assistance in that country,
 - A. because such protection and assistance is not available due to the fact that government capacity to respond is temporarily overwhelmed, and humanitarian access for international actors is not possible or seriously undermined, or
 - B. because factual or legal obstacles make it impossible for him/her to reach available protection and assistance.²²⁸

However, while some 50 States have ‘received or refrained from returning people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, tsunamis, and earthquakes’,²²⁹ responses have at times been ad hoc and uncertain.²³⁰ Legislation created specifically to protect people displaced in the context of disasters, climate change, and/or environmental degradation is rare.²³¹ Cantor argues that, ironically, domestic provisions that once protected people from disasters were abandoned as States began to ratify the international refugee treaties and adopt the ‘universal’ refugee definition.²³² UNHCR’s Guidelines on Temporary Protection or Stay Arrangements could assist States to craft more systematic responses,²³³ and specific regional guidance has been developed in the Americas.²³⁴

One shortcoming, though, is that admission, stay, and non-removal in the disaster context are often only temporary. If return is not possible at the end of a time-bound period of protection, solutions need to be forthcoming that enable people to rebuild their lives. When it comes to more permanent stay, the traditional trio of durable solutions for refugees—voluntary return, resettlement, and local integration—needs to be reconsidered and supplemented in the context of climate change and disasters. For instance, return may not be possible if land has become too environmentally precarious for continued human settlement, which means that States will need to find solutions that enable people to integrate into the communities into which they move, or to settle elsewhere.²³⁵ Even if return is

feasible, then flexible arrangements—such as ‘[a]llowing temporary visits to the place of origin during displacement to manage land and property issues and to participate in recovery and reconstruction processes’—will better prepare people for eventual return.²³⁶ National migration laws, though not originally designed to assist people crossing borders in the context of disasters, may provide some recourse.²³⁷ For instance, Cantor provides a detailed account of how ‘ordinary’ and ‘exceptional’ migration categories have been used across States in the Americas to accommodate ‘international mobility challenges linked to environmental factors’,²³⁸ including by expediting visa or permanent residency applications for people from affected States, thus enabling them to enter or remain for work, education, or family reunion purposes.²³⁹ Free movement agreements could also facilitate admission and stay in the aftermath of a disaster.²⁴⁰

Despite some evident gaps, there is not a complete absence of law when it comes to the protection of people displaced across borders in the context of disasters and climate change, and many effective practices could be implemented immediately. It is premature to push for a new standard-setting agreement at the global level, given the lack of political will among States to develop a new normative framework. Indeed, an over-emphasis on this could distract from the distinct need for good practices and legislative change at the local, national, bilateral, and regional levels, which together form part of a global effort. This does not rule out the progressive development of international law, but nor is it contingent on it.²⁴¹

¹ See generally Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report. Contribution of Working Group I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014); Government Office for Science (UK), *Foresight: Migration and Global Environmental Change: Future Challenges and Opportunities* (2011). For examples of the impacts on human movement, see Adger, W. N. and others, ‘Human Security’, in IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 769–70.

² See generally, UN Human Rights Council, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’: UN doc. A/HRC/10/61 (15 Jan. 2009) Annex; *Sacchi v Argentina*, Communication to the Committee on the Rights of the Child (lodged 23 Sep. 2019)

<https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf>, arguing that the ‘climate crisis is a children’s rights crisis’ (para. 13).

³ Humphreys, S., ‘Introduction: Human Rights and Climate Change’, in Humphreys, S., ed., *Human Rights and Climate Change* (2010) 1.

⁴ IPCC ([n 1](#)) 54.

⁵ Internal Displacement Monitoring Centre (IDMC), *GRID 2021: Global Report on Internal Displacement* (2021) 8. As yet, there is no reliable data on cross-border displacement in this context since it is not systematically monitored, but there is evidence that most people tend to remain in countries within the same geographical region: IDMC, *Global Report on Internal Displacement 2017* (2017) 53; see also Ponserre, S. & Ginnetti, J., *Disaster Displacement: A Global Review, 2008–2018* (IDMC, 2019).

⁶ Dornan, M., ‘Vanuatu after Cyclone Pam: The Economic Impact’ *Devpolicy Blog* (10 Apr. 2015) <http://devpolicy.org/vanuatu-after-cyclone-pam-the-economic-impact-20150410/>; Wewerinke-Singh, M. & van Geelen, T., ‘Protection of Climate Displaced Persons under International Law: A Case Study from Mataso Island, Vanuatu’ (2018) 19 *Melbourne Journal of International Law* 666.

⁷ du Parc, E. & Bolo Spieth, N., ‘Tropical Cyclone Harold and COVID-19: A Double Blow to the Pacific Islands’, IDMC *Expert Opinion* (April 2020) <https://www.internal-displacement.org/expert-opinion/tropical-cyclone-harold-and-covid-19-a-double-blow-to-the-pacific-islands>.

⁸ Government Office for Science ([n 1](#)) 9–10, 37; Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific: Final Report* (2012) viii, 4; Scott, M. & Salamanca, A., eds., *Climate Change, Disasters, and Internal Displacement in Asia and the Pacific: A Human Rights-Based Approach* (2021).

⁹ See, for example, Bronen, R., ‘Climate-Induced Displacement of Alaska Native Communities’ (Brief, Brookings–LSE Project on Internal Displacement, 30 Jan. 2013). In 2020, four coastal Tribes in Louisiana and one Alaska Tribe (Kivalina) lodged a complaint with 10 UN Special Rapporteurs. They alleged that the US government had knowingly failed to protect their human rights, resulting in ‘the loss of sacred ancestral homelands, destruction to sacred burial sites and the endangerment of cultural traditions, heritage, health, life and livelihoods’ and interference with ‘tribal nation sovereignty and self-determination’: ‘Rights of Indigenous People in Addressing Climate-Forced Displacement’ (15 Jan. 2020) 9. More generally, see Ionesco, D., Mokhnacheva, D., & Gemenne, F., *The Atlas of Environmental Migration* (2017).

¹⁰ IDMC, *GRID 2018: Global Report on Internal Displacement* (2018) 52 (fn omitted). See also IDMC, *Global Report on Internal Displacement 2016* (2016) 14–31, 36, 65–6, 79; IDMC, *Global Report on Internal Displacement 2017* (2017) 31. On total global economic losses from disaster events in 2016, see [Swiss Re Institute, Natural Catastrophes and Man-Made Disasters in 2016: A Year of Widespread Damages](#), Sigma Report No. 2/2017 (2017).

¹¹ IDMC, *GRID 2019: Global Report on Internal Displacement* (2019) 73; see also v; IDMC 2021 (n 5) 92.

¹² IDMC 2018 (n 10) 18, 80. The World Bank suggests that around 2.8 per cent of the population of Sub-Saharan Africa, South Asia, and Latin America could be internally displaced on account of the slow-onset impacts of climate change: Rigaud, K. and others, *Groundswell: Preparing for Internal Climate Migration* (2018) xix. See the methodological concerns expressed by Abubakar, I. and others, ‘The UCL–Lancet Commission on Migration and Health: The Health of a World on the Move’ (2018) 392 *The Lancet Commission* 2606. On the development of a robust method to count climate change-related movement, see Kelman, I., ‘Imaginary Numbers of Climate Change Migrants?’ (2019) 8 *Social Sciences* 131.

¹³ As the former Assistant High Commissioner for Protection, Volker Türk, explained at the Global Consultation for the Nansen Initiative on Disaster-Induced Cross-Border Displacement in October 2015, people increasingly leave their homes ‘as a result of the interaction between environmental degradation, natural hazards, and climate change and the effects of rapid urbanisation, water insufficiency, and food and energy insecurity’, exacerbated by ‘[d]esertification, drought, flooding, and the growing severity of disasters’: Türk, V., ‘Keynote Address: The Nansen Initiative on Disaster-Induced Cross-Border Displacement’, *Global Consultation Conference Report: Geneva, 12–13 October 2015* (Dec. 2015) 67–8.

¹⁴ UNHCR, *UNHCR’s Strategic Directions 2017–2021* (2017) 7.

¹⁵ This was recognized by the UN Security Council in an open debate on the topic ‘Addressing the impacts of climate-related disasters on international peace and security’, tabled by the Dominican Republic in Jan. 2019: ‘Climate Change Recognized as “Threat Multiplier”, UN Security Council Debates Its Impacts on Peace’ *UN News* (25 Jan. 2019), cited in Türk, V. & Garlick, M., ‘Addressing Displacement in the context of Disasters and the Adverse Effects of Climate Change: Elements and Opportunities in the Global Compact on Refugees’ (2019) 31 *IJRL* 389.

¹⁶ IDMC 2017 (n 10) 11.

¹⁷ Government Office for Science (n 1) 9–10; see also Adger and others (n 1).

¹⁸ IDMC 2017 (n 10) 9.

¹⁹ Note, too, the earlier scholarship on so-called ‘environmental migration’: for example, Jacobsen, J. L., ‘Environmental Refugees: A Yardstick of Habitability’ (1988) *Worldwatch Paper* 86; Suhrke, A. & Visentin, A., ‘The Environmental Refugee: A New Approach’ [1991] *Ecodecision* 73; Myers, N., ‘Environmental Refugees in a Globally Warmed World’ (1993) 43 *BioScience* 752; McCue, G. S., ‘Environmental Refugees: Applying International Environmental Law to Involuntary Migration’ (1993) 6 *Georgetown International Environmental Law Review* 151; Suhrke, A., ‘Environmental Degradation and Population Flows’ (1994) 47 *Journal of International Affairs* 473; Hugo, G., ‘Environmental Concerns and International Migration’ (1996) 30 *IMR* 105; Kibreab, G., ‘Environmental Causes and

Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21 *Disasters* 20; Hartmann, B., 'Population, Environment and Security: A New Trinity' (1998) 10 *Environment and Urbanization* 113; Cooper, J. B., 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 *New York University Environmental Law Journal* 480; Lonergan, S., 'The Role of Environmental Degradation in Population Displacement' (1998) 4 *Environmental Change and Security Project Report* 5.

²⁰ Global Compact for Safe, Orderly and Regular Migration: UN doc. A/RES/73/195 (19 Dec. 2018).

²¹ This chapter adopts the conceptualization of 'disaster' used by the UN Office for Disaster Risk Reduction (UNDRR): 'Disasters are often described as a result of the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences. Disaster impacts may include loss of life, injury, disease and other negative effects on human physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation', and adopted by the Nansen Initiative: see The Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (2015) 16. Whereas hazards are 'natural', 'disasters' are contingent on underlying social, economic, political, and environmental factors, linked to people's exposure and vulnerability. This is why the term 'natural disaster' is avoided: see, for example, Wisner, B. and others, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2nd edn., 2004).

²² IDMC has developed a global model to assess the risk of displacement associated with sudden-onset hazards, which estimates average annual displacement of 13.9 million people. This does not include people displaced as a result of pre-emptive evacuations or slow-onset hazards. See text to nn 10–12.

²³ Although note recent scientific work suggesting a link: McGuire, B., *Waking the Giant: How a Changing Climate Triggers Earthquakes, Tsunamis, and Volcanoes* (2016).

²⁴ Climate Council, 'Damage from Cyclone Pam Was Exacerbated by Climate Change' (Briefing Statement, 2015) 3

<http://www.climatecouncil.org.au/uploads/417d45f46cc04249d55d59be3da6281c.pdf>.

²⁵ McAdam, J. and others, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (Fridtjof Nansen Institute and Kaldor Centre for International Refugee Law, FNI Report 1/2016) para. 53. What transforms a 'hazard' into a 'disaster' is that people's coping capacity is exceeded. See also Office of the High Commissioner for Human Rights (OHCHR) and the Platform on Disaster Displacement (PDD), *The Slow Onset Effects of Climate Change and Human Rights Protection for Cross-Border Migrants*: UN doc. A/HRC/37/CRP.4 (22 Mar. 2018).

²⁶ From a 'climate justice'/State responsibility perspective, a focus on climate change may have a role to play; see Thornton, F., *Climate Change and People on the Move: International*

Law and Justice (2018). However, as explained elsewhere, focusing on the complex issue of causation and responsibility may divert attention away from the protection needs of the displaced: Kälin, W. & Schrepfer, N., ‘*Protecting People Crossing Borders in the context of Climate Change: Normative Gaps and Possible Approaches*’ UNHCR Legal and Protection Policy Research Series, PPLA/2012/01 (2012) 10; McAdam, J., *Climate Change, Forced Migration, and International Law* (2012) 96. See also text to nn 32–3.

²⁷ As IDMC 2017 (n 10) 39 notes: ‘Focusing on a single cause distorts and oversimplifies the context and, without further analysis, may hamper the identification of appropriate solutions. Complex combinations of both natural and human factors that intertwine to influence the risk of future displacement call for a more holistic interpretation that includes not only triggers, but also the latent and structural factors that determine how exposed and vulnerable people are to hazards in the first place.’ Climate change amplifies the risk of more severe and more frequent disasters, rather than ‘causing’ discrete events to occur: Huber, D. G. & Guldridge, J., ‘Extreme Weather and Climate Change: Understanding the Link and Managing the Risk’ (2011) 2 <http://www.c2es.org/docUploads/white-paper-extreme-weather-climate-change-understanding-link-managing-risk.pdf>; see also National Academies of Sciences, Engineering and Medicine, *Attribution of Extreme Weather Events in the context of Climate Change* (The National Academies Press, 2016); Stott, P. A., ‘Attribution of Extreme Weather and Climate-Related Events’ (2016) 7 *WIREs Climate Change* 23. On attribution and legal causation, see Marjanac, S. & Patton, L., ‘Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?’ (2018) 36(3) *Journal of Energy and Natural Resources Law* 265.

²⁸ In this sense, the phenomenon forms part of the broader global mobility dynamic.

²⁹ See, for example, a case study on the multi-causal factors involved in the context of drought in the Horn of Africa: IDMC 2017 (n 10) 40–1.

³⁰ McAdam (n 26) 23–4, 92–6;

³¹ Huber & Guldridge (n 27) 2; see also Kelman (n 12).

³² Kälin & Schrepfer (n 26) 8.

³³ *Ibid.*, 10.

³⁴ See n 8.

³⁵ Protection Agenda (n 21) vol. 1, para. 99.

³⁶ IDMC notes that ‘there is still insufficient data to determine how many of the people who flee or migrate across borders were IDPs before doing so’: IDMC 2017 (n 10) 49. Its 2019 report, however, states that in relation to El Salvador, Honduras, and Guatemala, ‘[i]t is clear ... that many IDPs fail to find safety and security in their own country, leading to significant numbers of cross-border movements within and beyond the region’: IDMC 2019 (n 11) 41 (fn omitted); see also IDMC, *GRID 2020: Global Report on Internal Displacement* (2020) 59–60.

³⁷ Guiding Principles on Internal Displacement: UN doc. E/CN.4/1998/53/Add.2 (11 Feb. 1998).

³⁸ See, for example, International Law Commission (ILC), ‘Protection of Persons in the event of Disasters’, Draft Articles and Commentary, in *Report of the International Law Commission*, 68th Session: UN doc. A/71/10 (2016) Ch. IV; Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Brookings–Bern Project on Internal Displacement, 2011); Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross & Red Crescent Societies, 2007); International Law Association (ILA), Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise, Annex to Res. 6/2018 (Aug. 2018); [Peninsula Principles on Climate Displacement within States \(Displacement Solutions, 2013\)](#); Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster (Brookings–Bern Project on Internal Displacement, 2008). Ferris and Bergmann argue that ‘more efforts should be focused on developing soft law rather than trying to fit those displaced because of the effects of climate change into existing legal frameworks’: Ferris, E. & Bergmann, J., ‘Soft Law, Migration and Climate Change Governance’ (2017) 8 *Journal of Human Rights and the Environment* 6, 6. The ILC is examining ‘[i]ssues related to the protection of persons affected by sea-level rise’, including ‘[w]hether there are any international legal principles applicable to the evacuation, relocation and migration abroad of persons caused by the adverse effects of sea-level rise: *Report of the International Law Commission*, 70th Session: UN doc. A/73/10 (2018) 329.

³⁹ Guiding Principles on Internal Displacement ([n 37](#)) Introduction, para. 2.

⁴⁰ UNGA res. 60/1, ‘World Summit Outcome’ (16 Sep. 2005) para. 132.

⁴¹ See generally [Ch. 2](#), s. 3.3.1. For discussion of internal displacement in the context of disasters and climate change, see Protection Agenda ([n 21](#)) vol. 1, paras. 99–105, 123–4. The challenge lies in strengthening the normative and operational implementation of these instruments: see Kälin, W., ‘Conceptualising Climate-Induced Displacement’, in McAdam, J., ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) 94; see also Kälin & Schrepfer ([n 26](#)).

⁴² McAdam and others ([n 25](#)) para. 76; ILA, Committee on International Law and Sea Level Rise, *Interim Report* (2016) 25.

⁴³ Republic of Fiji, *Displacement Guidelines in the context of Climate Change and Disasters* (2019) 3; Government of Vanuatu, National Policy on Climate Change and Disaster-Induced Displacement (2018).

⁴⁴ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons (30 Nov. 2006) arts. 1, 3(2), 3(5), 6(4)(c).

⁴⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 22 October 2009, entered into force 6 December 2012) 49 *ILM* 86, art. 1(k). As at 30 April 2021, 31 of 55 States had ratified the treaty: <https://au.int/treaties>.

⁴⁶ *Ibid.*, art. 5(4).

⁴⁷ Lesotho in Nansen Initiative ([n 16](#)) 139. Lesotho also suggested that ‘there are many provisions of the Convention, which could guide the formulation of a possible future legal mechanism providing for cross-border climate change displacement.’ The Ugandan representative stated that it ‘is already a great achievement in filling the legal gap in the international convention on refugees’: Uganda, 189. The Kampala Convention provides that ‘States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change’: Kampala Convention ([n 45](#)) art. 5(4).

⁴⁸ Beyani, C., ‘Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons’: UN doc. A/HRC/26/33 (4 Apr. 2014) para. 79. Some States have developed national laws or policies, including Kenya which has not ratified the treaty: Wood, T., *Protection and Disasters in the Horn of Africa: Norms and Practice for Addressing Cross-Border Displacement in Disaster Contexts* (The Nansen Initiative on Disaster-Induced Cross-Border Displacement, Technical Paper, 2013) 18. The Great Lakes IDP Protocol is part of the 2006 Pact on Security, Stability and Development in the Great Lakes Region, which was signed by all Member States of the International Conference on the Great Lakes Region.

⁴⁹ Protection Agenda ([n 21](#)) vol. 1, para. 100.

⁵⁰ Weerasinghe, S., *In Harm’s Way: International Protection in the context of Nexus Dynamics between Conflict or Violence and Disaster or Climate Change*, UNHCR Legal and Protection Policy Research Series, PPLA/2018/05 (Dec. 2018) 10. The linkage is described as ‘nexus dynamics’: ‘situations where conflict and/or violence and disaster and/or adverse effects of climate change exist in a country of origin’ (19). See also Weerasinghe, S., *Refugee Law in a Time of Climate Change, Disaster and Conflict*, UNHCR Legal and Protection Policy Research Series, PPLA/2020/01 (Jan. 2020) 80–100.

⁵¹ UNHCR, ‘Legal Considerations regarding Claims for International Protection Made in the context of the Adverse Effects of Climate Change and Disasters’ (1 Oct. 2020) para. 5 (fn omitted) This is the approach advocated by Scott, M., *Climate Change, Disasters and the Refugee Convention* (2020) Ch. 3.

⁵² In *Refugee Appeal No. 76374* (28 Oct. 2009), the New Zealand Refugee Status Appeals Authority found that the applicant was a refugee because she had been targeted for coordinating disaster relief after Cyclone Nargis in Myanmar. In a different context, see Hathaway, J., ‘Food Deprivation: A Basis for Refugee Status?’ (2014) 81 *Social Research* 327.

⁵³ See *AF (Kiribati)* [2013] NZIPT 800413, paras. 55–70. See also McAdam, J., ‘The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement’ (2015) 3 *Migration Studies* 131.

⁵⁴ *AF (Kiribati)* ([n 53](#)) paras. 58–9. This approach was upheld by the New Zealand High Court, Court of Appeal, and Supreme Court: *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173; *Teitiota v The Chief*

Executive of the Ministry of Business Innovation and Employment [2015] NZSC 107. Mr Teitiota filed a complaint with the UN Human Rights Committee in relation to the right to life: *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 Oct. 2019). For other relevant New Zealand cases see, for example, *AV (Nepal)* [2017] NZIPT 801125–26; *AW (Nepal)* [2017] NZIPT 503106–107; *AI (Tuvalu)* (2017) NZIPT 801093–094; *AJ (Tuvalu)* [2017] NZIPT 801120–123; *AF (Tuvalu)* [2015] NZIPT 800859; *AD (Tuvalu)* [2014] NZIPT 501370; *AC (Tuvalu)* [2014] NZIPT 800517–20; *Refugee Appeal No. 72719/2001*, RSAA (Tuvalu); *Refugee Appeal No. 72313/2000*, RSAA (Tuvalu); *Refugee Appeal No. 72314/2000*, RSAA (Tuvalu); *Refugee Appeal No. 72315/2000*, RSAA (Tuvalu); *Refugee Appeal No. 72316/2000*, RSAA (Tuvalu); *Refugee Appeal Nos. 72179–72181/2000*, RSAA (Tuvalu); *Refugee Appeal Nos. 72189–72195/2000*, RSAA (Tuvalu); *Refugee Appeal No. 72185/2000*, RSAA (Tuvalu); *Refugee Appeal No. 72186/2000*, RSAA (Tuvalu). For further discussion and analysis, see Scott ([n 51](#)) Ch. 3.

⁵⁵ Ferris, E., ‘Disasters and Displacement: What We Know, What We Don’t Know’ *Brookings Planetpolicy blog* (9 Jun. 2014) <http://www.brookings.edu/blogs/planetpolicy/posts/2014/06/09-climate-change-natural-disasters-ferris>.

⁵⁶ Cantor, D. J., ‘*Law, Policy, and Practice concerning the Humanitarian Protection of Aliens on a Temporary Basis in the context of Disasters*’ (Background Study for the Regional Workshop on Temporary Protection Status and/ or Humanitarian Visas in Situations of Disasters, San José, 10–11 Feb. 2015) 17. See also Protection Agenda ([n 21](#)) vol. 1, para. 55; *AC (Tuvalu)* ([n 54](#)) paras. 84–6, 97.

⁵⁷ Scott ([n 51](#)) 45.

⁵⁸ Scott, M., ‘Finding Agency in Adversity: Applying the Refugee Convention in the context of Disasters and Climate Change’ (2016) 35(4) *RSQ* 26, 28. See the UNDRR definition of ‘disaster’, which reflects this approach: ‘A serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts’: <https://www.unisdr.org/we/informterminology#letter-d>.

⁵⁹ Foster, M., *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 88 (fn omitted). Some domestic legislation expressly encompasses socio-economic forms of harm, such as Australia’s Migration Act 1958 (Cth), s. 5J(5), which extends to: ‘(d) significant economic hardship that threatens the person’s capacity to subsist; (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist; (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.’

⁶⁰ On which, see Ch. 3, s. 4.

⁶¹ McAdam ([n 26](#)) 45.

⁶² *Teitiota* 2014 ([n 54](#)) para. 40 (tacitly drawing on McAdam ([n 26](#)) 52).

⁶³ See Ch. 3. For a detailed analysis of the application of refugee law in the disaster/climate change context, see McAdam (n 26) Ch. 2.

⁶⁴ AF (Kiribati) (n 53) para. 56; Teitiota 2013 (n 54) para. 54; Teitiota 2014 (n 54) para. 19. For instance, it would be hard to show that affected individuals constituted a ‘particular social group’ since the law requires, inter alia, that the group share a fundamental, immutable characteristic other than the risk of persecution itself.

⁶⁵ *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 732; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 248 (Dawson J); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 499–500 (Lord Hope); *Minister for Immigration v Haji Ibrahim* (2000) 204 CLR 1, 48–9 (Gummow J). However, see Scott’s arguments: Scott (n 51) esp. Ch. 7.

⁶⁶ See New Zealand cases cited in n 54. Relevant Australian cases include: 1517812 (Refugee) [2017] AATA 1530 (Fiji); 1418483 (Refugee) [2016] AATA 3975 (Pakistan); 1406459 [2014] RRTA 738 (Philippines); 1004726 [2010] RRTA 845 (Tonga); 0907346 [2009] RRTA 1168 (Kiribati); N00/34089 [2000] RRTA 105 (Tuvalu); N95/09386 [1996] RRTA 319 (Tuvalu); N96/10806 [1996] RRTA 3195 (Tuvalu); N99/30231 [2000] RRTA 17 (Tuvalu); V94/02840 [1995] RRTA 2383 (Tuvalu). See also Scott (n 51) Ch. 3.

⁶⁷ Refugee Appeal No. 72189/2000 (n 54) para. 13.

⁶⁸ McAdam (n 53).

⁶⁹ UN High Commissioner for Human Rights, Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations: UN doc. A/HRC/37/34 (3 Jan. 2018) para. 13.

⁷⁰ AF (Kiribati) (n 53) paras. 56–70.

⁷¹ See s. 4 below.

⁷² UNHCR, ‘Summary of Deliberations on Climate Change and Displacement’ (UNHCR Expert Roundtable on Climate Change and Displacement, Bellagio, 22–25 Feb. 2011) (Apr. 2011) para. 9. For a very detailed overview of the approaches in the literature, see Weerasinghe 2020 (n 50); on the regional refugee instruments’ specific application in the context of disasters (including State practice), see 59–80.

⁷³ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art. 1(2). For discussion of the arguments for and against the application of the OAU Convention in disasters, see Wood (n 48) 24–5, referring inter alia to Rankin, M. B., ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal on Human Rights* 406; Kolmannskog, V., ‘“We Are in Between”: Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought’ (2014) 2 *International Journal of Social Science Studies* 83; Sharpe, M., ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2012) 58 *McGill Law Journal* 95; Sharpe, M., *The Regional Law of Refugee Protection in Africa* (2018) 49–52, who notes (at 51) that ‘Wood’s

view that “events seriously disturbing public order” may include environmental disasters is sound’. Even though the question will remain ‘somewhat unsettled’ until ‘there is a critical mass of state practice and/or jurisprudence on this issue’, construing the provision as affording protection to those fleeing environment events ‘is in line with [its] ordinary meaning.’

⁷⁴ Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984, conclusion III(3).

⁷⁵ Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean (Brasilia, 3 Dec. 2014) Preamble and Ch. 7. For references in other international (sub-)regional, and bilateral agreements, declarations, and policies, see Protection Agenda ([n 21](#)) vol. 2, 58–68.

⁷⁶ Council Directive (EC) 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art. 2(c). The drafting history reveals that Finland sought to have the Directive expressly recognize ‘persons who have had to flee as a result of natural disasters’, but this was not supported by other Member States, with Belgium and Spain noting that ‘such situations were not mentioned in any international legal instrument on refugees’: Council of the European Union, ‘Outcome of Proceedings of Working Party on Asylum’, doc. 6128/01 LIMITE ASILE 15 (16 Feb. 2011) 4. For general analysis, see Kolmannskog, V. & Myrstad, F., ‘Environmental Displacement in European Asylum Law’ (2009) 11 *EJML* 313, 316 ff.; UK Home Office, ‘UK Plans in Place to Protect Victims of Humanitarian Disasters’ Press release (20 Dec. 2004); Kälin ([n 41](#)); McAdam ([n 26](#)) 102–3; Cooper, M. D., *Migration and Disaster-Induced Displacement: European Policy, Practice and Perspective* Center for Global Development, Working Paper 308 (Oct. 2012) (for a detailed overview of laws in European Member States); Ragheboom, H., *The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective* (2017) 352–3; Hush, E., ‘Developing a European Model of International Protection for Environmentally-Displaced Persons: Lessons from Finland and Sweden’ *Columbia Journal of European Law, Preliminary Reference blog* (7 Sep. 2017): <http://cjel.law.columbia.edu/preliminary-reference/2017/developing-a-european-model-of-international-protection-for-environmentally-displaced-persons-lessons-from-finland-and-sweden/>. There is a proposal to repeal and replace the Temporary Protection Directive: see European Commission Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final 2020/0277 (COD) (see art. 14).

⁷⁷ Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

[2004] OJ L304/12, art. 15; Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 15. See Ch. 7 and s. 4; McAdam (n 26) Ch. 4; Kolmannskog and Myrstad (n 76).

⁷⁸ Wood (n 48) 23–1; Cantor (n 56) 17–18; Edwards, A., ‘Refugee Status Determination in Africa’ (2006) 14 *African Journal of International and Comparative Law* 204, 225–7; McAdam and others (n 25) paras. 85–91; Kälin & Schrepfer (n 26) 34.

⁷⁹ McAdam (n 26) 48; Wood (n 48) 25.

⁸⁰ Wood (n 48) 25 fn 149 noting an intervention made by representatives of the Government of Uganda during the Nansen Initiative Horn of Africa Regional Consultation.

⁸¹ UNHCR (n 51) para. 14. Two UNHCR-commissioned papers by Sanjula Weerasinghe are also helpful in teasing out the scope of refugee law in this context: *Weerasinghe 2018* and 2020 (n 50).

⁸² See further Wood (n 48) 25.

⁸³ Protection Agenda (n 21) vol. 1, para. 56, referring to Wood (n 48) 32–3.

⁸⁴ Cantor (n 56) 18.

⁸⁵ As Wood (n 48) 25 notes, South Africa regarded it as inappropriate ‘to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships’: ‘Draft Refugee White Paper’, Republic of South Africa, Government Gazette General Notice 1122 of 1998, 7; see also ‘Green Paper on International Migration in South Africa’, Republic of South Africa, Government Gazette No. 40088 (24 Jun. 2016) 20, para. (g), where this interpretation is arguably implicit. Cantor explains that in the Americas, virtually no State except Cuba accepts that a disaster in itself may be grounds for refugee protection under international or regional law; some States (Mexico, for example) expressly rule out such an interpretation: Cantor, D. J., ‘Environment, Mobility, and International Law: A New Approach in the Americas’ (2021) 21 *Chicago Journal of International Law* 263, 293.

⁸⁶ Cantor (n 56) 18 (fn omitted). For further analysis, see Cantor (n 85) 291–4.

⁸⁷ ‘Human Rights and Climate Change’: UN doc. A/HRC/26/L.33/Rev.1 (25 Jun. 2014) para. 1. Other resolutions on this subject include UN doc. A/HRC/RES/7/23 (28 Mar. 2008); UN doc. A/HRC/RES/10/04 (25 Mar. 2009); UN doc. A/HRC/RES/18/22 (17 Oct. 2011); UN doc. A/HRC/29/L.21 (30 Jun. 2015).

⁸⁸ *AF (Kiribati)* (n 53) para. 63, referring to *Öneryildiz v Turkey* (2005) 41 EHRR 20; *Budayeva v Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (20 Mar. 2008); *MSS v Belgium and Greece*, App. No. 30696/09 (21 Jan. 2011); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’: UN doc. E/C12/1999/5 (12 May 1999); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 14: The Right to the Highest Attainable Standard

of Health’: UN doc. E/C12/2000 (11 Aug. 2000). See further Kälin, W., ‘The Human Rights Dimension of Natural or Human-Made Disasters’ (2012) 55 *German Yearbook of International Law* 119, 137; Borges, I. M., *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions* (2019).

⁸⁹ In endorsing the Protection Agenda, the representative from Lesotho recognized the importance of international human rights law in this context, because it sets out minimum standards of treatment for the displaced, and noted that complementary protection mechanisms might provide additional bases on which protection could be granted. He called for the harmonization of ‘all the existing legal instruments or laws … to specifically provide for cross border climate change displacement’: Lesotho in Nansen Initiative ([n 47](#)) 139.

⁹⁰ See further below. This principle is contained in the law and/or practice of many States; see also *Januzi v Secretary of State for the Home Department* [2006] UKHL 5; *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706 (CA) (Canada); *Ranganathan v Minister of Citizenship and Immigration* [2001] 2 FC 164 (Canada); *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (Australia); *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 (Australia); *Refugee Appeal No. 71684/99* (29 Oct. 1999) (New Zealand); 8 CFR §208.13(b)(3)—reasonableness of internal relocation (asylum) (US); 8 CFR §208.16(b)(3) —reasonableness of internal relocation (withholding of removal) (US). See further s. 4.2.1.

⁹¹ See, for example, Mantouvalou, V., ‘Work and Private Life: *Sidabras and Dzautas v Lithuania*’ (2005) 30 *European Law Review* 573; Gearty, C. & Mantouvalou, V., *Debating Social Rights* (2010).

⁹² den Heijer suggests that the focus on art. 3 ECHR 50 as the core *non-refoulement* provision has become a ‘self-fulfilling prophecy’, in that it has hindered ‘the development of a more profound understanding of the scope of applicability of the ECHR’: den Heijer, M., ‘Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights’ (2008) 10 *EJML* 277, 278.

⁹³ See, for example, *Sufi and Elmi v United Kingdom*, App. Nos. 8319/07 and 11449/07 (28 Jun. 2011); *D v United Kingdom* (1997) 24 EHRR 423; *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477. On cumulative grounds in refugee law, see Dowd, R., ‘Dissecting Discrimination in Refugee Law: An Analysis of Its Meaning and Its Cumulative Effect’ (2011) 23 *IJRL* 28. Note also Scott ([n 51](#)) 109, who argues that, in the refugee context, the notion of ‘being persecuted’ should be understood ‘as a condition of existence, as distinct from an isolated act or accumulation of measures’.

⁹⁴ For instance, a German court noted that deteriorating humanitarian conditions in Afghanistan, which amounted to inhuman or degrading treatment, were based on a multitude of factors, including environmental conditions linked to climate and disasters: Verwaltungsgericht Baden-Wurttemberg, A 11 S 2042/20 (17 Dec. 2020) para. 30.

⁹⁵ See, for example, ‘Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and

Omissions of the United States' (7 Dec. 2005)

http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

⁹⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art. 6(2).

⁹⁷ Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood': UN doc. CRC/C/GC/7/Rev.1 (20 Sep. 2006). See also IASC Operational Guidelines ([n 38](#)).

⁹⁸ 'Report on the Situation of Human Rights in Ecuador' (1997) OEA/Ser.L/V/II.96, Doc. 10, Rev. 1, [Ch. 8](#); *Yanomami Case* (Case 7615 of 5 Mar. 1985) in Inter-American Commission on Human Rights, 'Annual Report (1984–85)' OEA/Ser.L/V/II.66, Doc. 10, Rev. 1.

⁹⁹ It would require an assessment of 'the status of the health or the type of ailment that the person suffers ... as well as the health care available in the country of origin and the physical and financial accessibility to this, among other aspects': Inter-American Court of Human Rights (IACtHR), *Advisory Opinion on Rights and Guarantees of Children in the context of Migration and/or in Need of International Protection* (2014) Series A, No. 21, para. 229, referring also to *Case of Vera and Others v Ecuador*, Judgment of 19 May 2011, Series C, No. 226, para. 43.

¹⁰⁰ See cases cited in Loucaides, L. G., 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights', in Loucaides, L. G., *The European Convention on Human Rights: Collected Essays* (2007), beginning with *Arrondelle v United Kingdom* (1980) 19 DR 186; see also *Lopez Burgos v Uruguay*, Comm. No. R.12/52 (29 Jul. 1981), UN doc. Supp. No. 40 A/36/40, 176; *Guerra v Italy* (1998) 26 EHRR 357; *Fadeyeva v Russia*, App. No. 55723/00 (9 Jun. 2005).

¹⁰¹ See *Öneryildiz v Turkey* ([n 88](#)) paras. 71–2.

¹⁰² *Budayeva v Russia* ([n 88](#)) para. 137; see also para. 158, and analysis in Burson, B. and others, 'The Duty to Move People Out of Harm's Way in the Context of Climate Change and Disasters' (2018) 37 RSQ 379, 385–7. See also Lauta, K. & Rytter, J., 'A Landslide on a Mudslide? Natural Hazards and the Right to Life under the European Convention on Human Rights' (2013) 7 *Journal of Human Rights and the Environment* 113; Kälin, W. & Haenni Dale, C., 'Disaster Risk Mitigation: Why Human Rights Matter' (2008) 31 FMR 38; Ragheboom ([n 76](#)).

¹⁰³ *Budayeva v Russia* ([n 88](#)) para. 135.

¹⁰⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series 69 (Protocol of San Salvador) art. 11; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) art. 24.

¹⁰⁵ *The Social and Economic Rights Action Centre and the Centre for Economic and Social*

Rights v Nigeria, Comm. No. 155/96 (27 Oct. 2001) para. 54
<http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (*Ogoniland Case*).

¹⁰⁶ *Teitiota v New Zealand* (n 54).

¹⁰⁷ *AF (Kiribati)* (n 53) para. 87, drawing on jurisprudence of the European Court of Human Rights and academic commentary.

¹⁰⁸ *AC (Tuvalu)* (n 54) para. 75.

¹⁰⁹ Ibid. However, in that case, the Tribunal permitted the family to remain on discretionary humanitarian grounds: see *AD (Tuvalu)* (n 54) and discussion in *McAdam* (n 53). For interpretation of humanitarian grounds (under the previous statute but in the same terms), see *Ye v Minister of Immigration* [2009] NZSC 76.

¹¹⁰ *Teitiota v New Zealand* (n 54) para. 9.11.

¹¹¹ Ibid.

¹¹² *Teitiota v New Zealand* (n 54) para. 9.12. See further *McAdam*, J., ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-Refoulement*’ (2020) 114 *AJIL* 708.

¹¹³ For a discussion of inhuman and degrading treatment more generally, see Ch. 7; in the context of Dublin transfers within the EU, see Ch. 8.

¹¹⁴ See, for example, *BG (Fiji)* [2012] NZIPT 800091, para. 148. It does not encompass the act of removal, in deliberate contrast to the approach taken by the European Court of Human Rights in cases such as *D v United Kingdom* (n 93) and *Sufi and Elmi* (n 93); see also *R v Secretary of State for the Home Department, ex parte Adam* [2005] UKHL 66, para. 7 (Lord Bingham). Australian law stipulates that ‘treatment’ must be ‘intentionally inflicted’: Migration Act 1958 (Cth) (Australia), s. 5(1), and the Full Federal Court has stated that such treatment does not encompass the act of removal: *GLD18 v Minister for Home Affairs* [2020] FCAFC 2, paras. 37–9 (although note the qualification in para. 41). It is arguable that New Zealand decision-makers have construed the potential scope of arts. 6 and 7 of the ICCPR 66—including in relation to the meaning of ‘treatment’—more narrowly than they might otherwise have done, since the NZ Immigration Act itself contains a residual humanitarian discretion to enable a person to remain if compelling or compassionate circumstances exist.

¹¹⁵ *AC (Tuvalu)* (n 54) para. 84. See discussion of the ILC’ draft articles (n 38) in *AC (Tuvalu)* (n 54) paras. 91–8.

¹¹⁶ *D v United Kingdom* (n 93); *N v United Kingdom* [2008] ECHR 453; *HLR v France* (1997) 26 EHRR 29, para. 42. See also the views of Committee against Torture, as in *AD v The Netherlands*, UN doc. CAT/C/23/D/96/1997 (12 Nov. 1999) para. 7.2. See discussion in the third edition of this work, 350–1. For a critique of the European Court of Human Rights’ approach, see Greenman, K., ‘A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law’ (2015) 27 *IJRL* 264. The developing jurisprudence on re-characterizing socio-economic violations as civil and political ones has been described as an ‘extension upon an extension’: *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para. 12, referring to *N v Secretary*

of State for the Home Department [2003] EWCA Civ 1369, paras. 37, 46, in Foster, M., ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ [2009] *New Zealand Law Review* 257, 266. On protection from poor conditions, see Ní Ghráinne, B., ‘Complementary Protection and Encampment’ (2021) 21 *Human Rights Law Review* 54.

¹¹⁷ *D v United Kingdom* (n 93) para. 40.

¹¹⁸ Ibid.

¹¹⁹ Ibid., para. 49.

¹²⁰ *N v United Kingdom* (n 116) para. 32.

¹²¹ Indeed, as the dissenting judges stated in *N v United Kingdom* (n 116) dissenting judgment, para. 20, ‘deportation of an “applicant on his or her death bed” would *in itself* be inconsistent with the absolute provision of Article 3 of the Convention’, irrespective of the conditions in the country of origin.

¹²² This is why the court ‘must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant’s personal situation in the expelling State’: *D v United Kingdom* (n 93) para. 49.

¹²³ Ibid., para. 53 (emphasis added). This seems to have been the approach of the Bordeaux Administrative Court of Appeal when it ruled in 2020 that a Bangladeshi man could not be deported because he would face ‘a worsening of his respiratory pathology due to air pollution’: Cour administrative d’appel de Bordeaux, n° 20BX02193, n° 20BX02195 (2ème chambre, 18 décembre 2020). By contrast, the case was heralded in the media as a landmark decision on environmental displacement: see, for example, Taylor, D., ‘Air pollution will lead to mass migration, say experts after landmark ruling’ *Guardian* (15 Jan. 2021) For similar approaches, see AC (*Taiwan*) [2017] NZIPT 503484; Verwaltungsgericht Baden-Württemberg (n 94).

¹²⁴ *D v United Kingdom* (n 93) para. 52.

¹²⁵ Ibid.

¹²⁶ Ibid., para. 53. See also *N v United Kingdom* (n 116); *Paposhvili v Belgium*, App. No. 41738/10 (13 Dec. 2016). The Court of Justice of the European Union (CJEU) has followed the approach of the European Court of Human Rights, only precluding removal ‘in very exceptional cases, where the humanitarian grounds against removal are compelling’: Case C-542/13 *M’Bodj v Etat belge* (18 Dec. 2014) para. 39; Case C-562/13 *Abdida* (18 Dec. 2014) para. 47, both citing *N v United Kingdom* (n 116) para. 42. Such cases are ‘characterised by the seriousness and irreparable nature of the harm that may be caused by the removal’, namely ‘a serious risk of grave and irreversible deterioration in [a person’s] state of health’: *Abdida*, para. 50. For further analysis, see Costello, C., ‘The Search for the Outer Edges of Non-Refoulement in Europe: Exceptionality and Flagrant Breaches’, in Burson, B. & Cantor, D. J., eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016) 194–7; Costello, C., *The Human Rights of Migrants and Refugees in European Law* (2016) 185–8.

¹²⁷ MSS (n 88) para. 367. Cf. *BG and Others v France*, App. No. 63141/13 (10 Sep. 2020) para. 88.

¹²⁸ MSS (n 88) para. 254. See also para. 253: ‘The Court reiterates that it has not excluded “the possibility that the responsibility of the State may be engaged [under Article. 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity” (see *Budina v. Russia*, App. No. 45603/05, ECHR, 18 June 2009).’

¹²⁹ *Sufi and Elmi* (n 93) para. 296.

¹³⁰ Ibid., para. 282.

¹³¹ Ibid., para. 281 referring to *N v United Kingdom* (n 116).

¹³² *Sufi and Elmi* (n 93) para. 283. This resonates with UK jurisprudence that suggests a greater willingness to find a violation of art. 3 where it can be attributed to the deliberate action or inaction of a State, rather than something more ‘natural’, such as an illness: see *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, para. 254, citing an earlier decision of the Asylum and Immigration Tribunal (AIT) in *HS (Returning Asylum Seekers) Zimbabwe CG* [2007] UKAIT 00094, cited in Foster (n 116) 300.

¹³³ *Sufi and Elmi* (n 93) para. 282.

¹³⁴ Costello (n 126) 193, citing *SHH v United Kingdom* (2013) 57 EHRR 18. See also Greenman (n 116). For analysis of the Dublin cases concerning transfers within the EU, see Ch. 8.

¹³⁵ *SHH* (n 134).

¹³⁶ Ibid., para. 90.

¹³⁷ Ibid., para. 91.

¹³⁸ Ibid.

¹³⁹ Ibid., para. 89. See also Case C-353/16 *MP v Secretary of State for the Home Department* (24 Apr. 2018).

¹⁴⁰ *SHH* (n 134) para. 92, in accordance with the principles set out in *N v United Kingdom* (n 116). A German court decision in late 2020 found that there were exceptional circumstances precluding the deportation of a man to Afghanistan because the humanitarian situation there had deteriorated significantly since the outbreak of Covid-19, and although he was healthy, his lack of family connections there would impact on his ability to survive: *Verwaltungsgericht Baden-Wurttemberg* (n 94) para. 26.

¹⁴¹ *Paposhvili* (n 126) para. 183 (emphasis added). Previously, the test required the person’s health to be so impaired that removal would lead to early death: *D v United Kingdom* (n 93); *N v United Kingdom* (n 116); *Yoh-Ekale Mwanje v Belgium* (2013) 56 EHRR 35.

¹⁴² *Paposhvili* (n 126) para. 205.

¹⁴³ Ibid., para. 188 (emphasis added).

¹⁴⁴ MP ([n 139](#)) paras. 40–1. See also *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, paras. 30–2, 34, departing from the prior position in *N v Secretary of State for the Home Department* [2005] UKHL 31.

¹⁴⁵ The applicant in *D v United Kingdom* presented this argument, but by characterizing the breach as the direct result of treatment by the UK, this point did not have to be finally decided: see *D v United Kingdom* ([n 93](#)) paras. 40–1. In *N v Secretary of State for the Home Department* ([n 116](#)), the English Court of Appeal suggested that ‘a claim to be protected from the harsh effects of a want of resources’ (para. 38) ‘is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State’ (para. 40). As the court itself acknowledged, this is not a clear *legal* test, but rather an elucidation of the factual circumstances that would amount to a breach of art. 3.

¹⁴⁶ *AC (Tuvalu)* ([n 54](#)) para. 70.

¹⁴⁷ See text to [n 115](#). In a series of cases in the UK, the courts stated that treatment is inhuman or degrading ‘if, *to a seriously detrimental extent*, it denies the most basic needs of any human being’. However, the State’s deliberate refusal to provide support was key. While the courts noted that there was no general public duty to house the homeless or provide for the destitute, it found that the State did have such an obligation if an asylum seeker ‘with no means and no alternative sources of support, unable to support himself, is, by the *deliberate action of the state*, denied shelter, food or the most basic necessities of life’: *Adam* ([n 114](#)) para. 7 (Lord Bingham) (emphasis added). Removal is not precluded simply because conditions of treatment in the receiving State are of a lower standard than those in the host State: *Salkic v Sweden*, App. No. 7702/04 (29 Jun. 2004); *Amegnigan v The Netherlands*, App No. 25629/04 (25 Nov. 2004); *Januzi* ([n 90](#)) para. 19 (Lord Bingham); see also para. 45 (Lord Hope).

¹⁴⁸ The ILC draft articles ([n 38](#)) provide that States must ‘reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters’ (draft art. 9); ‘ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control’ (draft art. 10); and ‘seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors’ where its national response capacity is manifestly exceeded (draft art. 11).

¹⁴⁹ *AC (Tuvalu)* ([n 54](#)) para. 75.

¹⁵⁰ Ibid.

¹⁵¹ *Budayeva v Russia* ([n 88](#)); *Öneryildiz v Turkey* ([n 84](#)). Certain decisions by the UK AIT appear to have applied a less restrictive threshold: see *McAdam* ([n 26](#)) 78–9.

¹⁵² *Teitiota v New Zealand* ([n 54](#)) para. 9.11.

¹⁵³ See Human Rights Committee, ‘General Comment No. 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7)’ (10 Mar. 1992) para. 2; ILC draft articles. ([n 38](#)) arts. 9–11. As Scott ([n 51](#)) 84 has explained, ‘[a] determination regarding whether the risk of death or serious harm would amount to arbitrary

deprivation of life or cruel, inhuman, or degrading treatment must necessarily consider the manner in which the authorities in the receiving state have addressed disaster risks, but must also take into account the nature of the risk and the ability of the state to address them.'

¹⁵⁴ *Teitiota v New Zealand* (n 54) para. 9.3, referring to Human Rights Committee, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life': UN doc. CCPR/C/GC/36 (30 Oct. 2018) para. 30; *BDK v Canada*, UN doc. CCPR/C/125/D/3041/2017 (19 Mar. 2019) para. 7.3; and *K v Denmark*, UN doc. CCPR/C/114/D/2393/2014 (16 Jul. 2015) para. 7.3. In commenting on the applicant's fear of violent land disputes, the Committee observed that 'a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation': para. 9.7 (fns omitted).

¹⁵⁵ See General Comment 20 (n 153) para. 4.

¹⁵⁶ Kälin, W. & Künzli, J., *The Law of International Human Rights Protection* (2nd edn., 2019) 533. Thank you to Walter Kälin for suggesting this framing.

¹⁵⁷ See further Ch. 7.

¹⁵⁸ *AC (Tuvalu)* (n 54) para. 119.

¹⁵⁹ *AD (Tuvalu)* (n 54) para. 23.

¹⁶⁰ Ibid., para. 25; see also para. 24.

¹⁶¹ Ibid., para. 26.

¹⁶² Scott (n 51) 85 (fns omitted).

¹⁶³ See Türk, V., 'Restructuring Refuge and Settlement: Responding to the Global Dynamics of Displacement' (2011) 28(2) *Refuge* 117.

¹⁶⁴ See discussion in Anderson, A. and others, 'A Well-Founded Fear of Being Persecuted ... But When?' (2020) 42 *SydLR* 155. Note, too, UNHCR, 'Guidelines on International Protection: Child Asylum Claims Under Article 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees': HCR/GIP/16/12 (22 Dec. 2009) para. 36 (emphasis added), which states that 'it is important to assess the consequences of such acts for each child concerned, *now and in the future*'. On the rights of children in the context of climate change, see *Sacchi v Argentina*, Communication to the Committee on the Rights of the Child (lodged 23 Sep. 2019) <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf>.

¹⁶⁵ See generally Schultz, J., *The Internal Protection Alternative in Refugee Law: Treaty Basis and Scope of Application under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol* (2019).

¹⁶⁶ *Januzi* (n 90) para. 19 (Lord Bingham), para. 45 (Lord Hope); UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of

Refugees': HCR/GIP/03/04 (23 Jul. 2003) para. 29. In *Salkic v Sweden* (n 147), the European Court of Human Rights reiterated that article 3 will not be breached simply because the level of healthcare (including mental healthcare) in the receiving State is not of an equivalent standard to that available in the host State. See also *Amegnigan* (n 147). In elaborating that standard, the UK AIT observed that such removal would be 'unduly harsh if an appellant is unable for all practical purposes to survive with sufficient dignity to reflect her humanity. That is no more than saying that if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high': *FB (Lone Women—PSG—Internal Relocation—AA (Uganda) Considered) Sierra Leone* [2008] UKAIT 00090, para. 39 (emphasis removed).

¹⁶⁷ UNHCR Guidelines on Internal Flight (n 166) para. 29 (emphasis added).

¹⁶⁸ Ibid., para. 30.

¹⁶⁹ For instance, whereas this was an early point of intervention by UNHCR, given its clear mandate on statelessness, it has since moved away from this approach. This has been informed by clearer empirical evidence about climate change impacts, mobility patterns, and so on, but also recognition of the complexity and challenges of applying the statelessness framework (and its limited implementation even for classic situations of statelessness).

¹⁷⁰ See McAdam (n 26) Ch. 5; Ch. 13 below.

¹⁷¹ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, art. 1.

¹⁷² Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175, art. 8; ICCPR 66, art. 24(3); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res. 217A (III) (UDHR 48), art. 15; 1954 Convention relating to the Status of Stateless Persons, art. 32.

¹⁷³ Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art. 1, which is now generally accepted as reflecting the position in customary international law.

¹⁷⁴ Crawford, J., *The Creation of States in International Law* (2nd edn., 2006) 700.

¹⁷⁵ Crawford says international law is 'based on this assumption': *ibid.*, 715, 701. He says 'there is a strong presumption against the extinction of States once firmly established': *ibid.*, 715, citing, among others, Marek, K., *Identity and Continuity of States in Public International Law* (1954) 548; Schachter, O., 'State Succession: The Once and Future Law' (1993) 33 *VirgJIL* 253, 258–60; Mushkat, R., 'Hong Kong and Succession of Treaties' (1997) 46 *ICLQ* 181, 183–7; Koskenniemi, M., 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the American Society of International Law* 22.

¹⁷⁶ Charter of the United Nations, 1 UNTS XVI (adopted 26 June 1945, entered into force 24 October 1945).

¹⁷⁷ Crawford (n 174) 715.

¹⁷⁸ Thürer, D., 'The "Failed State" and International Law' (1999) 81 *International Review of the Red Cross* 731. Crawford argues, however, that the notion of a 'failed State' involves some conceptual confusion, and that many cited cases of 'failed States' are in fact crises of

government or governance, rather than about the extinction of the State in question: Crawford (n 174) 721–2. If a ‘failed State’ describes ‘a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new’, the very notion of ‘reconstitution’ suggests that a reformulation of the State is possible, *qua* State, rather than as some other kind of entity: Zartman, I. W., ‘Introduction: Posing the Problem of State Collapse’, in Zartman, I. W., ed., *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (1995) 1, cited in Crawford (n 174) 720.

¹⁷⁹ Crawford (n 174) 89.

¹⁸⁰ Kälin (n 41) 102.

¹⁸¹ See Rayfuse, R., ‘W(h)ither Tuvalu? International Law and Disappearing States’ UNSW Faculty of Law Research Series Working Paper No. 9 (2009). See also Burkett, M., ‘The Nation *Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 *Climate Law* 345.

¹⁸² In small island States, climate change will exacerbate the already serious problem of water scarcity in small island States (for example, as a result of more frequent and severe droughts, and the salination of the fresh water lens through storm surges, king tides, and overtopping waves).

¹⁸³ For detailed analysis, see McAdam (n 26) Ch. 5; Grote Stoutenburg, J., *Disappearing Island States in International Law* (2015); Rayfuse, R., ‘International Law and Disappearing States: Maritime Zones and the Criteria for Statehood’ (2011) 41(6) *Environmental Policy and Law* 281; Grote Stoutenburg, J., ‘When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States’, in Gerrard, M. B. & Wannier, G. E., eds., *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013).

¹⁸⁴ On UNHCR’s protection role, see Ch. 13 and *passim*.

¹⁸⁵ Decision 1/CP.16, ‘The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention’: UN doc. FCCC/CP/2010/7/Add.1 (10–11 Dec. 2010) para. 14(f).

¹⁸⁶ For background on institutional developments in this area, see Hall, N., *Displacement, Development, and Climate Change: International Organizations Moving beyond Their Mandates* (2016); McAdam, J., ‘Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments 2010–2013’ (2014) 29(2) *Refuge* 11; McAdam, J., ‘From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement’ (2016) 39 *UNSW Law Journal* 1518; Entwistle, H., ‘*The World Turned Upside Down: A Review of Protection Risks and UNHCR’s Role in Natural Disasters*’ UNHCR Policy Development and Evaluation Service, PDES/2013/03 (Mar. 2013) Hall, N., ‘Moving beyond its Mandate? UNHCR and Climate Change Displacement’ (2013) 4 *Journal of International Organization Studies* 91; Hall, N., ‘A Catalyst for Cooperation: The Inter-Agency Standing Committee and the

Humanitarian Response to Climate Change' (2016) 22 *Global Governance* 369; Deschamp, B., Azorbo, M., & Lohse, S., 'Earth, Wind and Fire: A Review of UNHCR's Role in Recent Natural Disasters' UNHCR Policy Development and Evaluation Service, PDES/2010/06 (Jun. 2010). Betts, A., 'The Post-Nansen Agenda: Governing Human Mobility in the context of Natural Disasters and Climate Change' Refugee Studies Centre, University of Oxford, Occasional Policy Paper (Feb. 2015).

¹⁸⁷ McAdam, 'Creating New Norms' (n 186).

¹⁸⁸ UNHCR, Intergovernmental Event at the Ministerial Level of Member States of the United Nations on the Occasion of the 60th Anniversary of the 1951 Convention relating to the Status of Refugees and the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness (7–8 Dec. 2011), 'Background Note for the Roundtables': HCR/MINCOMMS/2011/08 (18 Nov. 2011) 4.

¹⁸⁹ UNHCR, *Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)* (2012) 101 (Norway), see also 77 (Germany), 95 (Mexico), 117 (Switzerland). Costa Rica pledged its support after the meeting.

¹⁹⁰ The Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Towards a Protection Agenda for People Displaced across Borders in the context of Disasters and the Effects of Climate Change' Information Note (Jan. 2015) 1.

¹⁹¹ The UN Secretary-General encouraged States to give 'favourable consideration' to incorporating its insights 'into national policies and practices'. See UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* (Report of the Secretary-General): UN doc. A/70/59 (21 Apr. 2016) para. 119.

¹⁹² Protection Agenda (n 21) vols. 1 & 2.

¹⁹³ On which, see McAdam, J., 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 *IJRL* 1 for a critique of various proposals.

¹⁹⁴ Protection Agenda (n 21) vol. 1, 10.

¹⁹⁵ ILC draft articles (n 38) arts. 4–6. On these principles, see further McAdam and others (n 25) paras. 116–23; McAdam (n 26) 256–66; ILA (n 42) 28.

¹⁹⁶ Sendai Framework for Disaster Risk Reduction 2015–2030: UN doc. A/RES/69/283 (23 Jun. 2015). For detailed analysis of each of these initiatives, see McAdam, 'Creating New Norms' (n 186).

¹⁹⁷ UNGA res. 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 Sep. 2015).

¹⁹⁸ United Nations Framework Convention on Climate Change (UNFCCC), Dec. 1/CP.21, Adoption of the Paris Agreement: UN doc. FCCC/CP/2015/10/Add.1 (29 Jan. 2016).

¹⁹⁹ UN Secretary-General, *One Humanity: Shared Responsibility* (Report of the Secretary-General for the World Humanitarian Summit): UN doc. A/70/709 (2 Feb. 2016) Annex, viii.

²⁰⁰ UNGA res. 71/1, 'New York Declaration for Refugees and Migrants' (3 Oct. 2016) paras. 1, 18, 43, 50.

²⁰¹ Global Compact on Refugees: UN doc. A/73/12 (Part II) (2 Aug. 2018); Global Compact for Migration ([n 20](#)).

²⁰² Adoption of the Paris Agreement ([n 198](#)) para. 49, see also para. 50. The Task Force was established under the auspices of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts.

²⁰³ New York Declaration ([n 200](#)) paras. 1, 18, 43, 50; Global Compact on Refugees ([n 201](#)) paras. 8, 12, 63; Global Compact for Migration ([n 20](#)) Objective 2, paras. 18(h)–(l) Objective 5, paras. 21(g)–(h).

²⁰⁴ Global Compact for Migration ([n 20](#)) Objective 2.

²⁰⁵ Ibid., Objective 2, paras. 18(h)–(l).

²⁰⁶ Ibid., Objective 21, para. 37; para. 11.

²⁰⁷ Ibid., Objective 5, para. 21(g).

²⁰⁸ Ibid., Objective 5, para. 21(h).

²⁰⁹ Global Compact on Refugees ([n 201](#)) para. 12.

²¹⁰ Additionally, para. 9 notes that the international community is called upon to support efforts to ‘reduce disaster risks’, and para. 79 emphasizes the importance of including refugees in disaster risk reduction strategies, since ‘[r]efugee settlements are often located in climate “hotspots” impacted by sudden and slow-onset natural hazards that create a risk of onward displacement. In these contexts, refugees may bring experience and knowledge of local conditions and land usage which can position them well to support disaster risk reduction efforts’: Türk & Garlick ([n 15](#)). See also paras. 52–3 on preparedness and forecasting.

²¹¹ Global Compact on Refugees ([n 201](#)) para. 63 (fn omitted).

²¹² For more detailed analysis of each component, see McAdam, J., ‘Building International Approaches to Climate Change, Disasters and Displacement’ (2016) 33 *Windsor Yearbook of Access to Justice* 1. For additional analysis, including of prospects for regional action, see PDD, ‘State-Led, Regional, Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement’, in Behrman, S. & Kent, A., eds., *Climate Refugees: Beyond the Legal Impasse* (2018).

²¹³ Protection Agenda ([n 21](#)) vol. 1, paras. 76–86, 117–18. The Sendai Framework on Disaster Risk Reduction ([n 196](#)) notes the importance of creating ‘public policies … aimed at addressing the issues of prevention … of human settlements in disaster risk zones’ (para. 27) and calls for the promotion of ‘transboundary cooperation … to build resilience and reduce disaster risk, including … displacement risk’ (para. 28). For the preventative role of a human rights-based approach, see OHCHR and PDD ([n 25](#)) para. 144: ‘While a human rights-based approach is not time-bound, the preventive role it plays to help avoid abuses shifts the focus to the risks slow onset events pose. As a result, more proactive measures are encouraged, to address and integrate rights into planning before harms occur. In some cases, these measures may prevent displacement by enabling people to stay in place, in others they may allow for migration as adaptation or human rights responsive planned relocation. This can have

positive implications for human rights.'

²¹⁴ Protection Agenda ([n 21](#)) vol. 1, paras. 99–105, 123–4.

²¹⁵ Ibid., paras. 46–7, 114–15. See also UNHCR, ‘*Guidelines on Temporary Protection and Stay Arrangements*’ (Feb. 2014). 233

²¹⁶ Ibid., paras. 87–93, 119–20. See further Bedford, R. & Bedford, C., ‘International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu’, in Burson, B., ed., *Climate Change and Migration: South Pacific Perspectives* (2010); Bedford, C. & Gibbs, G., *Labour Mobility in the Pacific Region* Report prepared for the Pacific Immigration Directors’ Conference (16 Oct. 2017); Shaw, L., Edwards, M., & Rimon, A., *Kiribati–Australia Nursing Initiative Independent Review: Review Report* (2014) <http://dfat.gov.au/about-us/publications/Documents/kiribati-australia-nursing-initiative-independent-report.pdf>; Hugo, G., ‘Migration and Development in Low-Income Countries: A Role for Destination Country Policy?’ (2012) 1 *Migration and Development* 24; Dun, O. & Klocker, N., ‘The Migration of Horticultural Knowledge: Pacific Island Seasonal Workers in Rural Australia—A Missed Opportunity?’ (2017) 48 *Australian Geographer* 27; Curtain, R. and others, *Pacific Possible: Labour Mobility: The Ten Billion Dollar Prize* (2016); World Bank, *Pacific Possible: Long-Term Economic Opportunities and Challenges for Pacific Island Countries: Discussion Draft* (2017).

²¹⁷ Protection Agenda ([n 21](#)) vol. 1, paras. 94–8, 121–2.

²¹⁸ Adger and others ([n 1](#)) 758.

²¹⁹ Cancún Adaptation Framework ([n 185](#)) para. 14(f); Global Compact for Migration ([n 20](#)) Objective 2, para. 18(h)–(l).

²²⁰ Rigaud ([n 12](#)) xxiv.

²²¹ ‘Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise: Commentary’, in Vidas, D., Freestone, D., & McAdam, J., eds., *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (2018) 61–2.

²²² See generally Burson and others ([n 102](#)); McAdam, J., ‘Displacing Evacuations: A Blind Spot in Disaster Displacement Research’ (2020) 39 *RSQ* 583.

²²³ Ferris, E., ‘Protection and Planned Relocations in the context of Climate Change’ UNHCR Legal and Protection Policy Research Series, PPLA/2012/04 (Aug. 2012); Thomas, A. R., ‘Post-Disaster Resettlement in the Philippines: A Risky Strategy’ (2015) 49 *FMR* 52; McAdam, J. & Ferris, E., ‘Planned Relocations in the context of Climate Change: Unpacking the Legal and Conceptual Issues’ (2015) 4 *Cambridge Journal of International and Comparative Law* 137; Piggott-McKellar, A. and others, ‘Moving People in a Changing Climate: Lessons from Two Case Studies in Fiji’ (2019) 8 *Social Sciences* 133; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, App. No. 276/2003, African Commission on Human and Peoples’ Rights. On respecting people’s choice *not* to move, see Farbotko, C., ‘Voluntary Immobility: Indigenous Voices in the Pacific’ (2018) 57 *FMR* 81.

²²⁴ McAdam, J., ‘Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the context of Climate Change’ (2014) 49 *The Journal of Pacific History* 301; McAdam, J., ‘“Under Two Jurisdictions”: Immigration, Citizenship and Self-Governance in Cross-Border Community Relocations’ (2016) 34 *Law and History Review* 281; McAdam, J., ‘Self-Determination and Self-Governance for Communities Relocated across International Borders: The Quest for Banaban Independence’ (2017) 24 *International Journal on Minority and Group Rights* 428; McAdam, J., ‘The High Price of Resettlement: When Nauru Almost Moved to Australia’ (2017) 48 *Australian Geographer* 7.

²²⁵ *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation* (Brookings, Georgetown University, & UNHCR, 7 Oct. 2015) A *Toolbox: Planning Relocations to Protect People from Disasters and Environmental Change* (Georgetown University, UNHCR, & IOM, 2017) <http://www.unhcr.org/596f1bb47.pdf>. Some commentators have critiqued this as a State-centric approach which largely overlooks the role of customary systems in shaping adaptation to climate change: Monson, R. & Fitzpatrick, D., ‘Negotiating Relocation in a Weak State: Land Tenure and Adaptation to Sea-Level Rise in Solomon Islands’, in Price, S. & Singer, J., eds., *Global Implications of Development, Disasters and Climate Change: Responses to Displacement from Asia Pacific* (2015); Fitzpatrick, D. & Compton, C., ‘Seeing Like a State: Land Law and Human Mobility after Natural Disasters’ (2018) 50 *New York University Journal of International Law and Politics* 719.

²²⁶ Republic of Fiji, *Planned Relocation Guidelines: A Framework to Undertake Climate Change Related Relocation* (2018); see also Government of Vanuatu (ⁿ 43); the Solomon Islands is in the process of developing such guidance. See also McNamara, K. E. & Jacot des Combes, H., ‘Planning for Community Relocations due to Climate Change in Fiji’ (2015) 6 *International Journal of Disaster Risk Science* 315.

²²⁷ Bronen, R., ‘Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine’ (2011) 35 *New York University Review of Law & Social Change* 357; Bronen, R., ‘Community Relocations: The Arctic and South Pacific’, in Martin, S. F., Weerasinghe, S., & Taylor, A., eds., *Humanitarian Crises and Migration: Causes, Consequences and Responses* (2014); Bronen, R. & Chapin, F. S., ‘Adaptive Governance and Institutional Strategies for Climate-Induced Community Relocations in Alaska’ (2013) 110 *PNAS* 9320.

²²⁸ Protection Agenda (ⁿ 21) vol. 1, para. 33.

²²⁹ Ibid., 6.

²³⁰ See examples of legislative and policy responses from Argentina, Canada, Cuba, Finland, Mexico, New Zealand, Peru, Sweden, and the US: ibid., vol. 2, 40–1, 44–7. For detailed analysis of legislation in the Americas, see Cantor (ⁿ 85) 298–310; see also Scott, M., ‘*Migration/Refugee Law (2019)*’ in (2019) 2 *Yearbook of International Disaster Law* 519, 527.

²³¹ Whereas the Swedish Aliens Act 2005:716, Ch. 4, s. 2 previously provided protection to

people fleeing environmental disasters, it (along with other aspects of asylum law) was suspended in July 2016 for a three-year period, which was subsequently extended (in June 2019) until July 2021: see Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige); Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige (Proposition 2018/19: 128. The Finnish Aliens Act also provided for protection on account of environmental catastrophes (s. 88, repealed in 2016), and for temporary protection in cases of mass displacement linked to an environmental disaster (s. 109). Although the literature states that the provisions have not been used successfully, a new project by Matthew Scott (personal correspondence in March 2020) suggests that they have certainly been invoked by applicants: see further <https://rwi.lu.se/climmobil-judicial-and-policy-responses/>. See also examples of laws in Guatemala and El Salvador: Cantor (n 85) 308. In February 2021, US President Biden ordered ‘a report on climate change and its impact on migration, including forced migration, internal displacement, and planned relocation’: Executive Order on Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration (4 Feb. 2021). Attempts to pass legislation on this topic in 2019 failed: A bill to establish a Global Climate Change Resilience Strategy, to authorize the admission of climate-displaced persons, and for other purposes (S. 2565, 116th Congress; introduced by Senator Edward Markey, 26 Sept. 2019); A bill to establish a Global Climate Change Resilience Strategy, to authorize the admission of climate-displaced persons, and for other purposes (H.R. 4732, 116th Congress; introduced by Ms Velazquez, 17 Oct. 2019).

²³² Cantor (n 85) 294. Interestingly, from 1952 until 1980, US law provided refugee protection to people displaced by a ‘natural calamity’: see Parker, J. L., ‘[Victims of Natural Disasters in US Refugee Law and Policy](#)’ (1982) 3 *Michigan Journal of International Law* 137, referring to INA s. 203(a)(7) and its predecessor, the Refugee Relief Act of 1953, s. 2(a). It is unclear if anyone received protection under the latter as no statistics were available from the Immigration and Nationality Service (138). No one was ever granted protection under the INA, in part because no President ever defined ‘catastrophic natural calamity’ nor declared an event to be one, which were requirements for the provision to operate (140). See also Cantor (n 85) 293 for details of contemporaneous provisions in Cuba and Trinidad and Tobago.

²³³ UNHCR Guidelines (n 215) para. 1. See also n 76.

²³⁴ *Protection for Persons Moving across Borders in the context of Disasters: A Guide to Effective Practices for RCM Member Countries* (2016); *South American Conference on Migration, Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin* (2018). According to Cantor (n 85) 318, they ‘have already begun to shape state practice in the Americas’.

²³⁵ See further Bradley, M. & McAdam, J., ‘Rethinking Durable Solutions to Displacement in the context of Climate Change’ (*The Brookings Institution*, 2012). Planning and assistance must go beyond the initial emergency phase; evacuations may otherwise mark the start of

protracted displacement if no solutions are forthcoming: see, for example, IDMC 2017 (n 10) 42, referring to post-earthquake Nepal.

²³⁶ Protection Agenda (n 21) vol. 2, 52.

²³⁷ Cantor (n 85); McAdam, J. & Pryke, J., *Climate Change, Disasters and Mobility: A Roadmap for Australian Action* (Kaldor Centre for International Refugee Law, Policy Brief 10, Oct. 2020); Burson, B. & Bedford, R., *Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific* (Discussion Paper, The Nansen Initiative on Disaster-Induced Cross-Border Displacement, 9 Dec. 2013).

²³⁸ Cantor (n 85) 298. Cantor argues that Temporary Protected Status (TPS) in the United States (which enables nationals of a country that has experienced an environmental disaster, and which has been designated by the Secretary for Homeland Security, to remain temporarily in the US) ‘is essentially an immigration law provision for regularizing status in disaster contexts rather than a tool of international protection’ (297). See also Cantor, D. J., *Cross-Border Displacement, Climate Change and Disasters: Latin America and the Caribbean* (Platform on Disaster Displacement and UNHCR, 2018).

²³⁹ For examples, see Protection Agenda (n 21) vol. 2 42–3; Cantor (n 85) 298–310.

²⁴⁰ Ibid., 43–4; Wood, T., *The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A Study of Africa* (PDD, May 2018); Francis, A., *Free Movement Agreements and Climate-Induced Migration: A Caribbean Case Study* (Sabin Center for Climate Change Law, Columbia University, Sep. 2019); Burson and Bedford (n 237) Executive Summary. On 26 February 2020, member States of the Intergovernmental Authority on Development (a region which comprises Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, and Uganda) endorsed the Protocol on Free Movement of Persons in the IGAD Region, which contains express provisions for those displaced in the context of disasters and the adverse impacts of climate change: Communiqué of the Sectoral Ministerial Meeting on the Protocol on Free Movement of Persons in the IGAD Region (26 Feb. 2020).

²⁴¹ For further analysis, see McAdam (n 193).

Nationality, Statelessness, and Protection

1. The role of nationality in the relations between States

There are few more sensitive issues than citizenship and the idea of belonging, of membership in a community, and of having one's own country. So complex are these issues, that international law has so far failed to establish agreed criteria for identifying who belongs to which territorial entity, even as citizenship and nationality continue to be the basis on which certain rights are commonly attributed, such as entry, residence, and the right to vote in national elections.¹ In this chapter, 'citizenship' and 'nationality' are used more or less interchangeably. International law does not prescribe any particular usage, although as Weis remarked: 'Conceptually and linguistically, the terms ... emphasize two different aspects of the same notion ... "Nationality" stresses the international, "citizenship" the national, municipal aspect.'² Domestic law determines the *content* of nationality, and historically only those elements of nationality bearing on the relations between States were considered of relevance to international law. Questions of nationality, therefore, are *in principle* within the reserved domain of domestic jurisdiction, even if that leaves many questions open.

At one time, it was easier to envisage that the realm of the domestic might not be co-extensive with the realm of the international—that a State's nationals for the purposes of international law, might yet be divided 'back home' into those who did, and those who did not, enjoy the full benefits of civil status. In a post-modern age sensible of human rights, such distinctions, though not unknown, are difficult to justify.³ Even Weis considered that if the domestic conception of citizenship did not encompass a sense of protection by the State, including admission or readmission, then it failed as an instance of nationality in the sense of international law.⁴

Nevertheless, nationality has played a variety of important roles in the development of international law. For example, it has been accepted as the essential link which allows a State to take up the case of an individual whose interests were injured by the actions of another State—so-called diplomatic protection. In the absence of nationality, the individual may be seriously

prejudiced,⁵ as the *Al Rawi* case demonstrates—the United Kingdom Government argued that it had no right, let alone any responsibility, to intervene with the US Government regarding the fate of previously UK-resident non-citizens then being held in Guantanamo.⁶ Nationality in a formal sense may not be enough, however, and the International Court of Justice emphasized in the *Nottebohm Case* that for one State's nationality to be *opposable* to another State in the context of diplomatic protection, it must satisfy the requirements of international law and reflect, among others, an effective link—a social fact of attachment between State and individual.⁷

The factual criteria for nationality in the international legal sense must nevertheless be balanced against the socio-political perceptions of particular States at particular times. In the 1961 Convention on the Reduction of Statelessness, for example, the ‘duty of loyalty’ and the repudiation of allegiance are retained as possible exceptions to the general prohibition of deprivation of nationality resulting in statelessness.⁸ Discussions in the International Law Commission (ILC) in 1952 and 1953 are also a useful reminder of different approaches to the acquisition and loss of nationality, and of how these issues may transcend purely legal considerations.⁹ More recently, the Court of Justice of the European Union has stressed ‘the special relationship of solidarity and good faith between [the State] and its nationals and … the reciprocity of rights and duties, which form the bedrock of the bond of nationality’.¹⁰ With these premises in mind, in *Pham* (2018), Arden LJ endorsed the proposition that the State ‘should not have to provide protection to a person who has in the past so fundamentally repudiated the obligations which he owes as a citizen’.¹¹

It is nevertheless significant how frequently the freedom of States in nationality matters is described as being ‘in principle’ within the reserved domain of domestic jurisdiction,¹² and that their actions in this regard are entitled to recognition by other States only so far as they are consistent with international law.¹³ The State remains the designated authority to make provision with regard to nationality, but nationality itself is a reflection of *attribution* to a particular territorial entity, and also an incident of responsibility in the relations of States, for example, in State succession, the international movements of people, deprivation of citizenship, and protection.¹⁴

The link of nationality delineates certain of those responsibilities. The State of nationality, for example, is obliged to admit or re-admit its citizens who are not accepted elsewhere. As Judge Read emphasized in the *Nottebohm Case*, when a

non-citizen comes to the frontier, the State has an unfettered right to refuse admission. But if it permits the non-citizen to enter, this voluntary act brings into being a series of legal relationships with the State of which that individual is a national. This relative relationship of rights and duties is the source of the receiving State's obligation to accord reasonable treatment and of its right to terminate the matter by deporting the non-citizen to his or her State of nationality. It is the source likewise of the right of the State of nationality to exercise protection, and of that State's duty to admit its nationals expelled from other States.¹⁵

In such a world, the individual without a nationality, or in possession of two or more nationalities, might be seen as destabilizing the international order. The Preamble to the 1930 Hague Convention on Nationality, for example, noted that, 'it is in the general interest of the international community to secure that all its members should recognize that *every person should have a nationality* and should have *one nationality*'.¹⁶ The interest is clearly that of States, not of individuals, and it is precisely in State interests that some limitations began to emerge on the sovereign competence of the State to determine who should be recognized as its nationals. States resisted the imposition of nationality on their citizens by other States,¹⁷ just as they protested denationalization as a punishment or on political grounds, because the consequences affected their own interests. States also recognized, generally in their practice and by way of treaty, that where one of them took over or succeeded to the territory of another by way of succession, the population generally followed along and became citizens of the new sovereign, though commonly with a right of option.¹⁸

Today, one question is whether some of the reasoning developed for the reconciliation of inter-State differences (the *Nottebohm Case*) can be transposed into a human rights context. This might mean, for example, demonstrating that the social fact of attachment and the existence of genuine connections between individual and territory give rise to certain duties on the part of the State, such as treating its population or discrete sections of it as 'citizens'. Thus, in addition to its general responsibility as a sovereign exercising authority and control over territory and population, the State may be obliged to recognize or confer nationality on those connected to it as a matter of juridical fact.¹⁹

Where the rights of the individual are in issue, nationality—'the right to have rights'—usefully emphasizes the everyday importance of citizenship as the necessary condition for their exercise and enjoyment.²⁰ Human rights may not

begin with nationality, but for all their antecedent and inalienable quality, the lesson that Hannah Arendt drew from the refugee crises of the first half of the 20th century was that such rights were of little value if there was no organized community to protect them and no institution to guarantee them.²¹ Her scepticism was born of experience, even though the refugee in the early years of the League of Nations was a major shock to the system and its underlying assumptions.²² What was also unprecedented, as Arendt points out, was ‘not the loss of a home, but the impossibility of finding a new one’.²³ She painted a bleak picture, and even though much was done for some of the displaced, her judgement is a telling corrective on an always partial and less than comprehensive response. Since 1951, however, laws and institutions have been strengthened, capable of providing many of the guarantees that refugees and the stateless need, even if the regime falls short still of constituting that organized community which she considered essential to effective protection. ‘Status’ for refugees and the stateless is an incomplete substitute for nationality, even as it stands for that function of international law which is to protect those whose juridical personality and entitlements are now recognized, and for whom the international community of States has accepted responsibility.

In 1962, Weis had already noted how the development of international law relating to nationality was part of something else—the development of the place of the individual in international law and the transition from international law to human rights law.²⁴ Since then, reasoning from the facts of social attachment to legal implications has been strengthened by cognate principles, and has acquired a measure of authority in the judgments of regional and other human rights bodies limiting the circumstances in which the long-term resident can lawfully be expelled, or in protecting family life from the injurious impact of expulsion.

As Judge Martens said in the *Beldjoudi* case, ‘[m]ere nationality does not constitute an objective and reasonable justification for the existence of a difference as regards the admissibility of expelling someone from what ... may be called his “own country”.’²⁵ The State retains competence to determine membership as a matter of domestic jurisdiction, but its exercise is now circumscribed. In *Genovese v Malta*, the European Court of Human Rights saw nationality as an inherent part of social identity, and therefore of private life in the sense of article 8 of the European Convention on Human Rights.²⁶ In *Kurić v Slovenia* the following year, the Court ruled that Slovenia must compensate thousands of people who were ‘erased’ from the list of permanent residents after

the country's separation from Yugoslavia.²⁷ The Grand Chamber upheld a 2010 ruling that Slovenia had unlawfully deprived many former Yugoslav citizens of their legal status in the aftermath of succession. It took note of evidence from UNHCR, among others, that this disproportionately affected vulnerable groups, particularly minorities; it left many stateless and made it impossible to maintain meaningful family and community ties, in breach of article 8.²⁸

The Court of Justice of the European Union has also dealt with citizenship issues, including in 2010 in *Rottmann v Freistaat Bayern*,²⁹ while the Inter-American Court of Human Rights is developing a substantial body of jurisprudence.³⁰ In the *Case of the Yean and Bosico Children v The Dominican Republic*, the Court held that '[n]ationality is a juridical expression of a social fact that connects an individual to a State. Nationality is a fundamental human right enshrined in the American Convention ... and is non-derogable in accordance with Article 27'.³¹ More recently, the Court ruled that the Dominican Republic's attempt to deny citizenship to Dominicans of Haitian ancestry was contrary to articles 3, 18, 20, and 24 of the American Convention on Human Rights.³² The African Commission on Human and Peoples' Rights, in turn, has found that article 5 of the 1981 Charter, which deals with dignity and recognition as a person before the law, includes the right to nationality, even though nationality is not formally mentioned in the Charter. Moreover, State discretion in matters of nationality is limited by obligations to prevent statelessness and by the prohibition of discrimination.³³

1.1 A right to nationality in international law

Notwithstanding these developments, the right of the individual to a nationality remains contested, particularly at the point where international law might seem to attribute responsibility to a particular State.³⁴ For the existence of a 'right', traditionally construed, supposes that it must exist in relation to a correlative duty; it cannot be a right against the whole world, for then there would be no 'nationality'. But if the duty holder is a State, which one? The State in which one was born? The State of one's parents, or of each, or of both? The State of one's present residence?

The relevant international instruments are sometimes equivocal, although agreements on the avoidance of statelessness have clearly helped to steer responsibility in the direction of the State in which one is born.³⁵ The contextual background to the texts on nationality remains the premise that every State has

the right to determine who are its nationals, although this may not be immediately evident. For example, article 15(1) of the Universal Declaration of Human Rights states simply that ‘Everyone has the right to a nationality’.³⁶ The 1965 Convention on the Elimination of All Forms of Racial Discrimination speaks to the non-discriminatory enjoyment of the right to nationality,³⁷ while article 24 of the 1966 International Covenant on Civil and Political Rights provides for a similar non-discriminatory approach to ‘such measures of protection’ as are required for the child as a minor, including that, ‘Every child shall be registered immediately after birth and shall have a name’, and that ‘Every child has the right to acquire a nationality’.³⁸

Article 7 of the 1989 Convention on the Rights of the Child reflects that slight, perhaps subtle, change of language from a ‘right to nationality’, to a ‘right to acquire a nationality’, in particular, when the child would otherwise be stateless.³⁹ In broad terms, therefore, everyone has the right to a nationality, which is to be enjoyed free from racial discrimination, and of which no one should be deprived arbitrarily. The process of identifying *where* that right ‘resides’ begins with the child, in the obligation to register birth, thus evidencing a critical link, all things being equal, between the individual and the registering State.⁴⁰ The gap between registration and the obligation to grant nationality starts to narrow, for the Convention on the Rights of the Child (and the provisions of the 1961 Convention on the Reduction of Statelessness and other instruments) now also oblige the State to guard against and avoid statelessness.

In 2013, the UNHCR Executive Committee confirmed these developments, recognizing that the lack of registration and related documentation increases vulnerability to statelessness and associated protection risks; it urged States to ensure civil registration, and emphasized that every child ‘shall be registered immediately after birth without discrimination of any kind’.⁴¹ In like manner, the Human Rights Council has recognized the ‘authority’ of States to legislate on nationality, ‘in accordance with international law’,⁴² but also that those arbitrarily deprived of nationality, which disproportionately affects minorities, are protected by international human rights and refugee law, as well as by treaties dealing with statelessness.

In 2012, the Council unanimously adopted a resolution on the right to a nationality, reaffirmed the essential protection due to some five million children around the world who were without citizenship, and called upon States to ensure free birth registration.⁴³ Another resolution, adopted the same day, noted the

disproportionate impact of arbitrary deprivation of nationality on minorities,⁴⁴ and encouraged States to grant nationality to those who had permanent residence in their territory before it was affected by succession.⁴⁵ The Council has likewise consistently taken a stand against the arbitrary deprivation of nationality,⁴⁶ insisting that ‘the right to a nationality of every human person is a fundamental human right’, and that children are particularly vulnerable.⁴⁷ In this regard, the Council has been equally steadfast on birth registration and the right of everyone to recognition everywhere as a person before the law.⁴⁸

At its 32nd session in 2016, the Council noted the persistence of discrimination against women and children as a significant cause of statelessness, with far-reaching consequences for entire families.⁴⁹ It emphasized that the determination by a State of who are its nationals must be consistent with its international obligations, including non-discrimination, urging States to reform legislation that discriminated against women, and to grant ‘equal rights to men and women to confer nationality on their children and spouses and regarding the acquisition, change or retention of their nationality’.⁵⁰

Even if there is no right under regional or universal human rights instruments to acquire or retain a particular nationality, the arbitrary denial of citizenship can clearly have a prejudicial impact on other protected rights and interests. In *Kurić*, for example, the European Court of Human Rights considered that the enactment of independence legislation having the object, among others, of establishing a ‘corpus’ of citizens was a legitimate aim within the meaning of article 8(2) ECHR.⁵⁰ However, a fair balance was still required between the individual’s rights and the community’s interests, and here the State had failed to take steps to ensure the ‘positive obligations inherent in effective “respect” of private or family life or both, in particular in the case of long-term migrants such as the applicants’. In order to avoid disproportionate effects, it ought specifically to have provided for regularization of residence status for those who failed to obtain citizenship, or who chose not to apply.⁵¹ In other factual circumstances, the duty to avoid statelessness may entail the obligation to go further and to grant citizenship.

In 2019, the Human Rights Committee came close to recognizing an obligation to grant citizenship, finding that the Netherlands had violated a child’s rights, contrary to article 24(3) ICCPR⁶⁶, read together with articles 2(2) and (3).⁵² The mother, who had been trafficked in 2004, had been born in China but was not registered, and her son, who was born in 2010 in the Netherlands, was

registered as ‘nationality unknown’. All efforts to have the entry changed to ‘stateless’ had been rejected, essentially on the ground that there was no conclusive proof of his lack of nationality.⁵³ The Committee did not argue that States were obliged to confer nationality under article 24(3); instead, it considered the peripheral applicability of non-discrimination in relation to the modes of acquisition of citizenship. In its view, a strict and conclusive standard of proof was not needed to determine statelessness; the fact that the Chinese authorities had repeatedly declined to confirm the child’s nationality was enough, while the Dutch authorities had failed to make their own inquiries and the Council of State had acknowledged that the child was unable to exercise his rights as a minor to acquire citizenship.

1.2 Deprivation of citizenship

Notwithstanding developments in the law relating to statelessness and in the field of human rights generally,⁵⁴ States continue to claim competence to deprive individuals of their citizenship, at least so far as the act in question operates within the territory of the State.⁵⁵ In this sense, and bearing in mind the evolving boundaries of human rights law, deprivation of citizenship *may* be permissible, resulting in the loss of social and political rights and in the treatment of the individual concerned as any other non-citizen, liable in principle to conditions on residence and, in theory, to expulsion. The right not to be arbitrarily deprived of one’s nationality may be of limited assistance, for example, if deprivation is prescribed according to law, shown to be reasonably necessary in a democratic society, proportionate, and consistent with the State’s other obligations under international law.⁵⁶ Many justiciable issues remain open and liable to legal challenge, however, including whether the criminal law or administrative measures would constitute a more proportionate response.

International law is by no means so accommodating with regard to deprivation of citizenship resulting in statelessness, particularly when it has an impact on the rights and interests of other States, when it otherwise touches on international obligations, or ‘because it disregards the doctrine of effective link and represents an attempt to avoid the responsibilities of territorial sovereignty and statehood’.⁵⁷ In relation to deportation, for example, the correct position in international law was set out in the British House of Commons in 1959, in discussion of the case of the convicted ‘atom spy’, Klaus Fuchs. Replying to questions relating to his status and removal, the Home Secretary confirmed that, ‘In law, Fuchs could be

deported but no other country can be required to accept a stateless deportee. Therefore, the power of deportation is not effectively available in this case.⁵⁸

Article 8 of the draft articles on expulsion adopted by the ILC on second reading in 2014 provides that, ‘A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.’⁵⁹ In its Commentary, the ILC notes that, while this article does not seek to limit the ‘normal operation of legislation relating to the grant or loss of nationality’, ‘deprivation of nationality, insofar as it has no other justification than the State’s desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.’⁶⁰ Already in 1979, Weis had pointed out the potential illegality to which deprivation of citizenship may give rise, particularly where ‘it affects the right of other States to demand from the State of nationality the readmission of its nationals ... *[I]ts extraterritorial effect would be denied as regards the duty of admission*’.⁶¹ He distinguished between denationalization before leaving and denationalization after leaving the State of nationality, but was of the view that in both cases, the duty to permit residence or to readmit the former national persists.⁶²

These propositions are unexceptional as a matter of international law.⁶³ If a State allows a non-citizen to enter, then it brings into being a series of legal relationships with the State of which he or she is a national, which status will be commonly evidenced by production of a passport that in turn guarantees ‘returnability’. Any State that admitted a non-citizen on the basis of his or her national passport would be fully entitled to ignore any purported deprivation of citizenship and, absent any refugee or other relevant protection elements, to return that person to the issuing State as a matter of right. This has long been part of the doctrine, and is not seriously contested in practice, no matter the rhetoric.

Article 1 of the 1930 Special Protocol concerning Statelessness sets out a limited obligation to readmit former nationals who became stateless after entering a foreign State,⁶⁴ but it does not exhaust the general law. At the time, the British delegate expressly contended that, ‘because a kind of contract or obligation results from the granting of a passport to an individual by a State so that when that individual enters a foreign State with that passport, the State whose territory he enters is entitled to assume that the other State whose nationality he possesses will receive him back in certain circumstances’.⁶⁵ Weis also noted that denationalization for the purpose of refusing readmission would

directly infringe the sovereign rights of the State seeking to exercise its right to expel non-citizens.⁶⁶ More recently, Meloni has argued that ‘returnability’ is part of the customary international law of passports, and that this explains why in municipal law, the possession of a passport is required as a condition of admission for the non-citizen.⁶⁷ Here, United Kingdom law and practice provides a useful and typical illustration;⁶⁸ evidence of ‘sufficient returnability’ is a principal factor in determining the period of visa validity and the grant or refusal of leave to enter.⁶⁹

1.2.1 Deprivation of citizenship and the 1961 Convention on the Reduction of Statelessness

At the First Plenary Meeting of the UN Conference on the Elimination or Reduction of Future Statelessness on 24 March 1959, the Acting President, speaking as the representative of the UN Secretary-General, said:

A person without a nationality was deprived not only of the rights of citizenship within any State, but also, in international relations, of the diplomatic protection which a State extended to its nationals. From the point of view of international law itself, statelessness was an anomaly, as had been recognized by the International Law Commission ... Both from the humanitarian and from the juridical points of view there were, therefore, strong reasons for eliminating statelessness or reducing it as much as possible.⁷⁰

The UN Conference on the Elimination or Reduction of Future Statelessness first met in 1959 but adjourned without adopting a convention, mainly because of the difficulty in formulating provisions relating to deprivation of nationality. The United Kingdom had already set out its position to the Committee of the Whole in 1959: ‘To deprive persons of their nationality so as to render them stateless should certainly be an exceptional step and the freedom of States to deprive persons of their nationality should be severely circumscribed by means of appropriate clauses in the convention’.⁷¹ Later, the UK added that it, ‘would have preferred to exclude altogether the possibility of deprivation of nationality in the case of natural-born nationals’,⁷² but that it would be willing to consider that a Contracting party might make a reservation with regard to deprivation of citizenship in relation to any *existing* provision of its law. Fewer instances of statelessness would result, however, if the convention were to include a short list of permissible grounds.⁷³

Article 8 in its final form in the 1961 Convention owed much to the UK's initiatives, with a compromise text which 'admitted no grounds for deprivation other than those already specified in the current law of the Contracting States'.⁷⁴ The UK noted that the working group on article 8 had not been happy with maintaining a distinction between natural-born and naturalized citizens, and did not consider that extended grounds for deprivation were required in the case of the latter.⁷⁵ Article 8 would therefore 'freeze' the grounds of deprivation at the date on which a State became party to the Convention,⁷⁶ and it now lays down the general principle that a State shall not deprive a person of his or her nationality if such deprivation would result in statelessness.⁷⁷ However, that duty remains qualified, and deprivation of nationality resulting in statelessness is still permitted in the case of naturalized individuals long resident outside the State; in certain cases of disloyalty, *if* the Contracting State so declares at the time of ratification; and where nationality has been obtained by misrepresentation or fraud. In the last-mentioned case, however, there may be other consequential limitations. Contrary to what might be assumed to follow from the principle that 'fraud vitiates everything', the UK Supreme Court and the Secretary of State accepted in one recent judgment that some categories of fraud may not in fact be so serious, account being taken of context and consequences, as to justify nullification of citizenship grants, as opposed to being the basis for (appealable) grounds for subsequent deprivation.⁷⁸ Moreover, in a case of potential deprivation by reason of fraud or misrepresentation, the possibility of statelessness,⁷⁹ even though not prohibited as such, should be taken into account when exercising discretion.⁸⁰ This may be particularly relevant if the individual affected would then be unable to reacquire a previous nationality: 'In such a case depriving the person of citizenship will not simply return him to the *status quo ante* but will place him in a worse position than if he had not been granted citizenship in the first place ... [T]he decision-maker ... will have to consider whether deprivation of nationality is justified having regard to that consequence'.⁸¹

The burden and standard of proof may also vary according to the ground of deprivation. For example, in *Secretary of State for the Home Department v Al-Jedda*, under the legislation then in force, the Secretary of State had to show that statelessness would not result from deprivation, and therefore to identify what other nationality the individual concerned had on the relevant date;⁸² by contrast, in a deprivation for fraud case, the burden is on the person concerned to show

that he or she would be left stateless. As with applications under the 1954 Convention and in proving the negative that is statelessness, however, it is not necessary to adduce evidence relating to every country in the world:

A court or tribunal can take notice of the fact that nationality is normally based on descent from nationals of a state, birth within the state's territory or naturalisation as a citizen – which in turn usually requires prolonged residence in the territory of the state or other substantial residential and/or social ties. Thus, it is only where the person concerned has a connection with a state of one of these kinds that evidence will be needed to show that he or she is not considered as a national under that state's law.⁸³

Finally, article 9 prohibits, without exception, the deprivation of nationality on racial, ethnic, religious, or political grounds.⁸⁴

1.2.2 Aspects of subsequent practice

The United Kingdom's generally positive and proactive stance in relation to the avoidance and elimination of statelessness is somewhat belied by later developments and by a rather simplistic approach to the challenges raised by terrorist activity and the engagement of citizens in foreign conflicts.⁸⁵ Section 40(3) of the British Nationality Act 1981 largely reproduced the grounds for deprivation of citizenship included in the 1948 Act,⁸⁶ and therefore present in the minds of the British delegation at the 1959 and 1961 Conferences.⁸⁷ In 2002, however, the government introduced a radical change, affecting both natural-born and naturalized citizens. The Secretary of State was empowered to deprive someone of citizenship if satisfied that he or she had done anything 'seriously prejudicial to the vital interests' of the United Kingdom, thus adopting the language of article 8(3)(ii) of the 1961 Convention and article 7(1)(d) of the 1997 European Convention on Nationality.⁸⁸ The new provisions were 'balanced' by specific incorporation of the basic principle laid down in article 8(1) of the 1961 Convention, that no one should be deprived of their nationality if that would result in statelessness. However, the deprivation provisions were amended again in 2006, substituting 'conducive to the public good' language for that of serious prejudice to vital interests, avowedly because the latter was considered too high a threshold.⁸⁹

The question, whether the effect of executive deprivation was such as to render the individual stateless, arose in lengthy litigation culminating in the judgment of the UK Supreme Court in *Secretary of State for the Home*

Department v Al-Jedda.⁹⁰ The respondent was an Iraqi refugee who had been granted asylum in the UK in 1992 and British nationality in 2000, thereby automatically losing his Iraqi citizenship by operation of law. In 2004, he was arrested by the US military in Iraq, transferred to the custody of British occupation forces and detained on suspicion of membership of a terrorist group.⁹¹ Shortly before his release without charge in December 2007, the Secretary of State made an order purporting to deprive him of his British citizenship under section 40(2); the government argued that this did not render him stateless, as he could have applied for his Iraqi citizenship to be restored. The Supreme Court disagreed, and made it clear that ‘stateless’ means just that—not being regarded as a citizen by any State under operation of its law,⁹² the question being simply ‘whether the person holds another nationality at the date of the order’.⁹³

Following its defeat in the Supreme Court, the government moved to amend the law once again, choosing this time to maintain focus on naturalized citizens and to revert in part to the language of the 1961 Convention. Section 40(4A) now permits the Secretary of State to make a deprivation order if satisfied that it is ‘conducive to the public good because the person ... has conducted him or herself in a manner which is seriously prejudicial to the vital interests’ of the United Kingdom, and if the Secretary of State, ‘has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory’.⁹⁴

The potential scope of ‘conducive to the public good’ was considered further in *Pham v Secretary of State for the Home Department*, which came back to the Court of Appeal after the Supreme Court had referred the case for reconsideration in 2015.⁹⁵ The Supreme Court had found that the Secretary of State’s decision to deprive the appellant, a Vietnamese national by birth, of his British citizenship did not have the effect of rendering him stateless as a matter of law, although he was effectively, de facto, stateless as the Vietnamese government refused to allow him to return.⁹⁶ The question then for the Court of Appeal was whether, by reason of the appellant’s involvement in terrorism-related activities, deprivation of citizenship was justified as being conducive to the public good. The appellant argued that he no longer posed a current risk to the UK (he had been convicted after extradition to the US and was serving a sentence of 40 years’ imprisonment), and that the proportionality test weighed in his favour. The Court nevertheless placed greater weight on the obligations

which attach to nationality, finding that ‘conducive to the public good’ could be satisfied in many ways, and that the State, ‘should not have to provide protection to a person who has in the past so fundamentally repudiated the obligations which he owes as a citizen. The precise grounds are a matter for the Secretary of State. There is nothing to make it a precondition that there should be a risk of current harm’.⁹⁷

The importance of effective review or appeal proceedings is evident from the judgment of the UK Supreme Court in a case involving the deprivation of citizenship of Shamima Begum in 2021.⁹⁸ Ms Begum, who was a British citizen born in the United Kingdom in 1999, travelled to Syria in 2015 and aligned herself with the Islamic State of Iraq and the Levant (ISIL). She was married and had three children, all of whom had died, and she ended up in a camp for internally displaced persons run by the Syrian Democratic Forces. The UK Security Services were of the view that anyone who had travelled to Syria and aligned themselves with ISIL posed a threat to national security, notwithstanding that Ms Begum had been radicalised as a minor and might therefore be considered a victim.⁹⁹ Ms Begum sought to challenge the deprivation on appeal and also to review the decision to refuse her leave to enter the UK to prosecute her case. The Secretary of State’s decision to refuse leave to enter was based in part on national security grounds and following the approach canvassed by Lord Hoffmann in *Rehman*,¹⁰⁰ the Court accepted the rejection of a standard of proof approach in such cases, in favour of an assessment of ‘future risk’. This implied certain limitations in the appeal process, which included allowing ‘a considerable margin to the primary decision-maker’.¹⁰¹ The appeals process must nevertheless enable the procedural requirements of ECHR 50 to be satisfied, although they will vary depending on context. In immigration matters, the appellant must be able, among other issues, to challenge legality, compatibility with absolute rights, and proportionality. In the case of deprivation of citizenship, however, a more limited approach had been adopted, focusing on whether deprivation or denial is arbitrary, not proportionate.¹⁰²

The discretion to deprive or to refuse entry on ‘conducive to the public good’ grounds was for the Secretary of State, and not for the Special Immigration Appeals Commission (SIAC). SIAC is limited to determining, among others, whether the Secretary of State has acted in a way in which no reasonable decision-maker could have done, although in reviewing a human rights challenge, it must decide ‘objectively on the basis of its own assessment’.¹⁰³

Given the appeal process, it was argued that if a person could not have a fair and effective appeal, for example, because refused leave to enter the UK to take part, then the deprivation decision would not be consistent with natural justice. The Court rejected this argument: ‘The fact that the appeal process is a safeguard against unfairness does not mean that a decision which cannot be the subject of an effective appeal is unfair.’¹⁰⁴ Nor did it follow that an appeal should be allowed merely because the appellant is unable to present her case effectively.¹⁰⁵ The right to fair hearing does not trump the requirements of national security, and the only appropriate response was to stay the appeal, ‘until Ms Begum is in a position to play an effective part in it without the safety of the public being compromised’.¹⁰⁶

1.2.3 Deprivation of citizenship and its implications in international law

Citizenship deprivation, particularly when linked to constructive expulsion or refusal of readmission, will have an impact on the individual’s protected rights, whether or not nationality is expressly recognized in applicable regional regimes,¹⁰⁷ and whether or not the individual targeted is physically present in the State itself.¹⁰⁸ It will also likely violate the rights of States which, having admitted a foreign national on the strength of his or her passport, now find themselves responsible for the issuing State’s outcasts.¹⁰⁹ In addition, States resorting to such measures may disable themselves from fulfilling, effectively and in good faith, obligations owed *inter se* and *erga omnes*, to prevent and punish serious crimes of international concern,¹¹⁰ such as torture, hostage-taking, terrorist bombing, or terrorist financing. Typically, the applicable treaties require States parties, when receiving relevant information, to take ‘such measures as may be necessary under ... domestic law to investigate the facts’.¹¹¹ If the circumstances so warrant, States are also required to take ‘appropriate measures’ to ensure the presence of the offender or alleged offender for the purpose of prosecution or extradition.¹¹² Thereafter, if the alleged offender is in its territory, the State may be obliged, if it does not extradite that person, ‘without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution’.¹¹³

Article 5 of the 1984 United Nations Convention against Torture requires jurisdiction to be established, among other cases, when the alleged offender is a national, and article 6 obliges the State party, ‘Upon being satisfied, after

examination of information available to it, that the circumstances so warrant' to take the alleged offender into custody or to take 'other legal measures to ensure his presence', and immediately to make a preliminary inquiry into the facts. Article 7(1) provides:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*,¹¹⁴ the International Court of Justice referred expressly to, 'the common interest in compliance' with the CAT 84, which entitles each State party to make a claim concerning alleged breaches by another State party,¹¹⁵ and emphasized the 'preventive and deterrent character' of the obligation to criminalize and establish jurisdiction.¹¹⁶ The State's obligations, 'taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven'.¹¹⁷ Moreover, while extradition is an option, 'prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State'.¹¹⁸ The Court held Senegal responsible for having failed to comply with its obligations under the Convention against Torture; depending on the particular circumstances, deprivation of citizenship may raise similar issues of State responsibility, particularly when purportedly applied to those outside State territory.

2. Statelessness in international law and practice

The French word for stateless—*apatriote*—first appeared in 1918 in the writings of the lawyer Charles Claro, and it rapidly took over from the German word *Heimatlos* which, describing someone without a home of homeland, had been current in the legal literature up until then.¹¹⁹ Although something of the sort can be traced back further, even to Roman times—*peregrini sine civitate*—statelessness appears really to have come into its own during the inter-war period, that is from 1920–40, both as a consequence of the break-up of the old empires, Russian, Ottoman, Austro-Hungarian, and as a result of State policies of 'denationalization'.¹²⁰ In a certain sense also, the phenomenon flowed from the

logic of the Westphalian system and the sovereignty of States, particularly when translated through the positivism of the 19th century. Inherent in that ‘sovereignty’ was the implied right of the State to determine membership—who should be citizens, and how citizenship could be acquired; and inversely, who, not being a citizen, should be allowed to enter the State and to remain and on what conditions.

In the era of the nation-State, nationality became ‘an essential attribute of a person’s material and moral well-being’. ¹²¹ However, the nationality laws of States differ, and an individual may possess more than one nationality as easily as none at all. States, in turn, may opt either for the principle of birth within territorial jurisdiction as the necessary and sufficient condition for national status (*jus soli*), or require an element of filiation, or descent from a citizen (*jus sanguinis*). ¹²² In addition, even acquired citizenship can be lost, for example, because of overseas residence; as a consequence of territorial transfers between States; because of punishment for political or criminal reasons; for women in particular, because of marriage to a foreign national; or leaving the legal aside, because of the effects of migration or coerced or involuntary displacements.

Variations and the inherent incompatibility of many permutations frequently entail no entitlement to citizenship under municipal law, no matter what factors otherwise link the individual and the State. The terminology used to describe these different situations is often confusing, moving from *de jure* statelessness to *de facto* statelessness, that is, from those who *as a matter of law* do not possess a nationality, and those who *as a matter of fact* do not benefit from the nationality that they do possess as a matter of law. The disadvantages, though, are commonly the same: ¹²³ restrictions on freedom of movement; persistent uncertainty in dealings with State authority and securing recognition and protection as a person before the law; transmission of statelessness from generation to generation; lack of identity or travel documents; liability to indefinite detention pending removal which, by definition, cannot occur; and the absence of a sense of belonging—the stateless, in fact, are often less protected than refugees, and it is that lack of protection which was the spur to international action in the League of Nations.

2.1 The League of Nations

From one perspective, the first refugee regime in the early years of the League was premised on the assumption that everyone was entitled to national protection

somewhere, behind which lay the further assumption that everyone and everywhere was subject to some State's jurisdiction and thus also to its protection. In a largely immobile world, that protection was principally what the sovereign provided 'internally', to those who owed allegiance by reason of fealty or residence. Protection might be denied, for example, to the 'alien enemy', defined not by nationality but more pragmatically, by place of business,¹²⁴ or by reason of misconduct, as with 'the traitor, the felon, the outlaw, and the excommunicated'.¹²⁵ Nevertheless, there were exceptions, and while those without protection might not sue, if sued themselves, some jurisdictions accepted that they could appear and be heard in their defence: 'To deny ... that right would be to deny ... justice and would be quite contrary to the basic principles of the King's Courts in the administration of justice.'¹²⁶ Even a resident enemy alien might sue, if present 'by the King's licence, and under his protection', for that is, 'consequent to his being in protection'.¹²⁷ Or, as the court put it in *Sylvester's Case* (1702), 'though he be but a poor refugee, and under the Queen's protection, so he may sue even though born under the liegeance of the French King, then in war with the Queen'.¹²⁸

When the League came to identify or describe those whom it should assist, it limited its approach, first, to specific groups, and secondly, by reference to the fact of being without protection.¹²⁹ The 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany applied to any person previously settled in that country, who did not possess any other nationality, and 'in respect of whom it is established that *in law or in fact* he or she does not enjoy the protection of the Government of the Reich'.¹³⁰ Many Russians were stateless as a matter of law, whereas German and Austrian refugees often retained their nationality, 'without however enjoying the right of protection'; they were effectively and in fact stateless.¹³¹

The varieties of disadvantage would certainly have been known to members of the Institut de Droit International when they met in Brussels in 1936 and unanimously adopted resolutions drafted by the Second Committee on the legal status of stateless persons and refugees.¹³² The rapporteur, Arnold Raestad, had prepared a preliminary report two years earlier and identified three issues in particular which called for examination: the treatment of the stateless; the rules governing and facilitating movement between States; and the question of protection, either by a State or by an international organization.¹³³ Refugees faced similar problems,¹³⁴ and might or might not be stateless; the question was

whether a general approach was possible, that would assure protection and assistance, for example, by an international organization or High Commissioner's Office,¹³⁵ and bring about a more equitable sharing of responsibilities.¹³⁶ Huber noted also the importance of emphasizing that it was unacceptable for a State to impose its own citizens on other States, by depriving them of nationality, protection, and the right of return.¹³⁷

The Committee proposed to define a stateless person (*apatriote*) as, ‘tout individu qui n'est pas considéré par aucun Etat comme possédant sa nationalité’;¹³⁸ and a refugee as, ‘[t]out individu qui, en raison d'événements politiques survenus sur le territoire de l'Etat dont il était ressortissant, a quitté volontairement ou non ce territoire, ou en demeure éloigné, qui n'a pas acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre Etat.’¹³⁹ This approach drew on State practice up to that point, particularly as evidenced by the 1928 agreement,¹⁴⁰ while debate in the Institut emphasized the centrality of compulsion in the refugee's condition and the value of basing the definition on objective criteria.¹⁴¹ In relation to article 2(1) of the statelessness definition, however, Ripert astutely remarked, ‘Comment imposer à l'apatriote la charge de prouver qu'il n'a pas de nationalité? L'apatriotie, prise en elle-même, est un fait purement négatif et qui n'est pas, comme tel, susceptible de preuve.’¹⁴²

With regard to the treatment of the stateless and of refugees, the Institut proposed standards which have been largely carried over to the 1951 Refugee Convention and the 1954 Stateless Persons Convention.¹⁴³ Among others, these included rights, such as access to the courts, administrative assistance, personal law, passport and identity documents valid for travel and return, and non-expulsion of the resident stateless unless another State accepted to admit them.¹⁴⁴ Ahead of its time, however, was the proposal that the State of habitual residence or domicile should be able to exercise diplomatic protection;¹⁴⁵ this was later taken up by John Dugard, the ILC's Special Rapporteur on diplomatic protection, and included in the draft articles adopted in 2006.¹⁴⁶

By 1936, it was clear that despite the many *ad hoc* and piecemeal developments, there were still ‘thousands of refugees from different countries’ who did not come within the scope of existing arrangements.¹⁴⁷ The Norwegian Government proposed the establishment of a central organization, ‘under or within the League, whose duty it would be to carry out, for all refugees to whom the League has decided or may decide to accord assistance and protection’ the

functions then being exercised by the Nansen Office for those refugees within its competence.¹⁴⁸ However, the idea of a ‘general approach’ gained little traction at the time,¹⁴⁹ and although the Committee on International Assistance to Refugees expressed the hope that ‘a unified juridical regime applicable to all exiles will be evolved’, it doubted whether action could be ‘moulded into any universal form’, or that there was value in making any general recommendations on questions of assimilation and naturalization.¹⁵⁰ Further progress in that direction would have to wait for the United Nations, but even then there would be exceptions, and the protection of the stateless and the refugee would initially take different paths.

2.2 The United Nations

At its first session in 1946, the UN General Assembly referred the refugee question to the Economic and Social Council (ECOSOC), ‘for thorough examination in all its aspects’,¹⁵¹ and ECOSOC initially maintained the language of the inter-war years, speaking to the need to adopt interim measures ‘to afford protection to stateless persons’. Its priorities were the post-war situation and the establishment of the International Refugee Organization,¹⁵² but a new conception of the refugee, distinct from that of the stateless person, was beginning to emerge in the politics of the day.

At the first session of the Commission on Human Rights in July 1947, the Drafting Committee on the International Bill of Human Rights considered article 32, the precursor to article 15 UDHR 48, submitted by René Cassin. This provided not only for a right to a nationality, but also that, ‘It is the duty of the United Nations and Member States to prevent statelessness as being inconsistent with human rights and the interests of the human community’.¹⁵³ At its second session in December, the Commission put on record its wish that the UN should give early consideration to the legal status of ‘persons who do not enjoy the protection of any State’.¹⁵⁴ The following year, ECOSOC asked the Secretary-General to prepare a study on the protection of ‘stateless persons’ and, taking account of relevant national legislation, conventions and agreements, to recommend whether a new convention was called for.¹⁵⁵

2.2.1 The 1949 UN Study of Statelessness

In its introduction, the *Study* expressly observed that, ‘There are two categories of stateless persons: *de jure* and *de facto*’:¹⁵⁶

Stateless persons de jure are persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one.

Stateless persons de facto are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.

Although in law the status of stateless person *de facto* differs appreciably from that of stateless persons *de jure*, in practice it is similar.¹⁵⁷

Although ECOSOC had made no express mention of ‘refugees’, this did not mean they were to be excluded:

[a] considerable majority of stateless persons are at present refugees. These refugees are ‘*de jure*’ stateless if they have been deprived of their nationality by their country of origin. They are ‘*de facto*’ stateless persons if, without having been deprived of their nationality, they no longer enjoy the protection and assistance of their national authorities.¹⁵⁸

The *Study* went on to include among the causes of statelessness, ‘racial, religious or political persecution’ and ‘mass emigration of nationals caused by changes in political or social systems’, thereby eliding the factual causes of refugee displacement with the situation of those without or deprived of their nationality. For those without a nationality, what was needed, first, was to improve their status and protection, and secondly, to eliminate statelessness. Protection was best achieved by providing identity documents, consular services, and legal status, while ‘technical’ statelessness could be eliminated by appropriate agreement on, among others, harmonization of nationality legislation; restrictions on deprivation of nationality as a penalty; better regulation of territorial settlements; and reduction of existing numbers through the facilitation of naturalization.¹⁵⁹

When the *Ad hoc* Committee on Statelessness and Related Problems came to consider the scope of the proposed convention,¹⁶⁰ the United Kingdom suggested that it include all cases, namely, refugees and stateless persons *de facto* and *de jure*. Even if the situation of refugees—the *de facto* stateless—were more urgent, the difference was ‘quantitative rather than qualitative’.¹⁶¹ The proposed convention should apply accordingly, and the expression ‘unprotected persons’

should cover,

- (a) persons who are not nationals of any State; and
- (b) persons who, being outside the territory of the State of which they are nationals, do not enjoy the protection of the State either because that State refuses them protection or because for good reasons (such as, for example, serious apprehension based on reasonable grounds, of political, racial or religious persecution in the event of their going to that State) they do not desire the protection of that State.¹⁶²

Against this position, however, the French representative had already isolated two distinct issues in an approach that quickly became the majority view: the status of refugees, on the one hand, and the problems related to the legal status of stateless persons, on the other. A draft convention on the first was urgently required, but the elimination of statelessness was basically different: ‘rather a continuing concern of the world community than an acute situation which required immediate remedial measures.’ Among the two categories of stateless persons, those who were also refugees were in need, hence the special urgency of their plight; but the same could not be said for non-refugee stateless persons. The United States representative agreed and pressed for separate treatment; the draft convention should be limited and ‘should not be based upon a confusion between the humanitarian problem of the refugees and the primarily legal problem of stateless persons’.¹⁶³

In the event, the *Ad hoc* Committee decided to focus upon the refugee, and it simply proposed an additional protocol on stateless persons, under which States might agree to apply the refugee convention, *mutatis mutandis*, to stateless persons to whom it did not otherwise apply.¹⁶⁴ ECOSOC saw that the ILC was to take up the question of nationality, and urged it to draft the instrument or instruments necessary for the elimination of statelessness.¹⁶⁵

Criticism of the *de jure/de facto* approach was fairly widespread at the time, both in the *Ad hoc* Committee¹⁶⁶ and in the ILC when it came to consider nationality and statelessness in 1952.¹⁶⁷ Nevertheless, the language haunts analysis and discourse to this day, and slippage frequently occurs when describing those who *as a matter of law* do not possess a nationality, and those who *as a matter of fact* do not benefit from the nationality that they do possess as a matter of law. Clear thinking is not helped by the fact that both the 1954 Convention and the 1961 Convention include the language in their Final Acts, if

not in the body of the treaty.

2.3 The 1954 Convention relating to the Status of Stateless Persons

The July 1951 Conference of Plenipotentiaries,¹⁶⁸ having adopted the Refugee Convention, decided to take no decision on the proposed draft protocol on stateless persons, referring it back for more detailed study.¹⁶⁹ In February 1952, the General Assembly deferred the draft protocol for lack of time,¹⁷⁰ but later requested the Secretary-General to seek the views of governments as to which provisions of the Refugee Convention they would be prepared to apply to stateless persons.¹⁷¹ A further United Nations Conference then convened in New York¹⁷² and adopted the 1954 Convention relating to the Status of Stateless Persons, an independent convention being preferred to the draft protocol initially proposed by the *Ad hoc* Committee in 1950.¹⁷³ In many respects, the content of the 1954 Convention parallels that of the Refugee Convention with regard to standards of treatment. Certain refugee-specific protections are excluded, however, such as non-penalization for illegal entry and *non-refoulement*,¹⁷⁴ while article 1 defines a stateless person as, ‘a person who is not considered a national by any State under the operation of its law’.¹⁷⁵

UNHCR participated in a non-voting capacity in the New York Conference, where one further notable omission from the new treaty regime was that of a supervisory body with functions similar to those under article 35 of the 1951 Refugee Convention. Paul Weis was the UNHCR Legal Adviser at the time and, writing in 1961 on the occasion of the entry into force of the 1954 Convention, he thought, perhaps surprisingly, that this was because, notwithstanding some prevalent sense of stateless persons as ‘not protected’, there was then simply no equivalent agency already in existence.¹⁷⁶ He regretted this, along with the fact that the 1954 Convention did not include de facto stateless persons—the gap may have been narrowed, but unprotected persons remained outside the scope of the Convention and of any competent agency.¹⁷⁷ The 1954 Conference was in fact wary of extending the scope of application of the Convention beyond those who might formally be characterized as not possessing a nationality according to law, unsatisfactory though article 1 is. It preferred to leave the ‘other unprotected’ outside, and merely recommended that, ‘[e]ach Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless

persons.¹⁷⁸ This was one, perhaps unintended, effect of the bifurcation of the unprotected which had occurred in the *Ad hoc* Committee, when political ‘urgency’ was attached to the refugee.¹⁷⁹

3. Eliminating and preventing statelessness

Notwithstanding the basic premises of reserved domain and domestic jurisdiction, many aspects of nationality were of great interest to States in the period of the League of Nations.¹⁸⁰ Dual nationality was a source of friction, particularly in matters of military service; multiple nationality merely repeated the problems; the nationality of married women raised issues affecting not only them, but also the nationality status of children; while statelessness was simply anomalous.

It was accepted as a general principle that it was for each State to determine who were its nationals, but the League was able to promote the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,¹⁸¹ which includes various provisions intended to reduce statelessness, for example, in the context of expatriation, nationality of married women, nationality of children, and adoption.¹⁸² Furthermore, the 1930 Protocol relating to a Certain Case of Statelessness provided for the acquisition of the nationality of a Contracting State by a person born in its territory of a mother possessing the nationality of that State and of a father without nationality, or of unknown nationality.¹⁸³ Finally, a Special Protocol of the same year, which eventually came into force in 2004 and currently has 11 States parties,¹⁸⁴ sought to provide for the readmission in certain circumstances of a person who, after entering a foreign country, lost his or her nationality without acquiring another.

While ratification of these treaties may not have been widespread, the preparatory work engaged in by the League, by academic institutions, such as the Harvard Research in International Law, and by non-governmental organizations, such as the Institut de Droit International, generated discussion and, in retrospect, a measure of emerging consensus around certain core principles. Significantly, each of the instruments adopted in 1930 expressly recognized that its provisions were without prejudice to the rules of customary international law. The elimination of statelessness remained a goal to be pursued through further international cooperation and the coordination and harmonization of national laws, and this was taken up by the United Nations, together with measures to

improve the status of those without nationality.

3.1 The International Law Commission

3.1.1 The elimination and reduction of statelessness

In July 1951, responding to the ‘technical aspects’ of statelessness, the International Law Commission appointed Manley O. Hudson, a United States lawyer and former judge of the Permanent Court of International Justice, as Special Rapporteur for the study of nationality.¹⁸⁵ At the Commission’s first substantive meeting the following year, Hudson submitted papers dealing with nationality in general, with the nationality of married persons, and with statelessness.¹⁸⁶ The first paper, intended to be partly historical and partly analytical, noted the common linkage between nationality and allegiance to a State, and also that the uniformity of nationality laws seemed ‘to indicate a consensus of opinion of States that conferment of nationality at birth has to be based on either, on *jus soli* or on *jus sanguinis*, or on a combination of these principles’.¹⁸⁷ Whether the revealed usage went to the point of obligation was an open question, however, while in the matter of naturalization—the conferment of nationality after birth—no rules of international law could be deduced, other than that there should be a personal or territorial link between the State and the individual concerned.¹⁸⁸

Hudson observed that statelessness could arise at birth, because of the inconsistent operation of the principles of *jus soli* and *jus sanguinis*; and later, because of conflicting national laws, voluntary acts of the individual, unilateral acts by the State, and territorial changes. Statelessness was ‘undesirable’ from the perspective of orderly international relations, for every individual should be ‘attributed to some State’; and it was also undesirable for the individual, because of its ‘precariousness’. Reducing or eliminating statelessness therefore meant focusing on causes, which seemed to suggest that the answer lay in the adoption of two rules: (1) If no other nationality is acquired at birth, the individual should acquire the nationality of the State in whose territory he or she is born; and (2) loss of nationality after birth should be conditional on the acquisition of another nationality. However, the Special Rapporteur did not consider that States were prepared to accept these principles at the time.¹⁸⁹

Discussions during the first meetings of the Commission confirmed how divisive were the issues. Some ILC members stressed the sovereignty and

internal jurisdiction dimensions to nationality, and considered that the State could not be denied the right to deprive of their nationality anyone who had put themselves outside their national community. Other members stressed that, while deprivation should not be imposed as a penalty, nationality was nevertheless a privilege not to be accorded unless there were a real link between individual and State. In the eyes of some, the ‘mere fact of birth’ or ‘mere habitual residence’ in a country before the age of 18 was not sufficient evidence of such a link. Others agreed, noting also that approaches to the acquisition of nationality transcended purely legal principles, while one member suggested that neither the ‘accident’ of birth, nor the ‘accident’ of parental citizenship was intrinsically stronger than the other, and that even nationality acquired by fraud should not be punished by deprivation.¹⁹⁰

Hudson had to resign for health reasons and the Commission unanimously elected Roberto Córdova of Mexico as Special Rapporteur to succeed him.¹⁹¹ In 1953, the Commission reviewed two draft conventions, one on the *elimination*, and one on the *reduction* of future statelessness.¹⁹² The old ‘divides’ re-emerged—sovereignty, *jus soli*, *jus sanguinis*, the relationship between international and national law, deprivation of nationality, the settlement of disputes, including the individual’s rights in the matter, if any, and the role of the United Nations. The drafts were nevertheless amended and adopted on first reading, and sent to governments for comment.¹⁹³

At its sixth session in 1954, the Commission reviewed the observations of governments, many of which simply reiterated their view that the proposed texts were incompatible with existing legislation.¹⁹⁴ It redrafted some of the articles, adopted final drafts of two conventions, and submitted them to the General Assembly,¹⁹⁵ while indicating that this body should consider which of the two drafts it preferred—that on *elimination*, which imposed stricter obligations, or that with the more modest aim of simply *reducing* statelessness.¹⁹⁶

The United Nations Conference on the Elimination or Reduction of Statelessness¹⁹⁷ met first in Geneva from 24 March to 18 April 1959, and again in New York from 15 to 28 August 1961. The Conference decided to use the draft convention on the *reduction* of statelessness as the basis for discussion, and focused on provisions aimed at reducing statelessness at birth. Once again, fundamental differences were revealed between States which favoured the principle of *jus soli*, and those which opted for *jus sanguinis*. Whereas endorsement and acceptance of the former would have stopped many instances

of original statelessness at source, consensus was missing and the final compromise combined elements of both principles. Equally divisive was the issue of deprivation of nationality, a facility defended by many States as essential to their vital interests;¹⁹⁸ as noted already, this lack of agreement necessitated the second session, at which the final text of the Convention on the Reduction of Statelessness was duly adopted.¹⁹⁹

At one time, the ILC had favoured the idea of both a protecting agency for stateless persons, and a tribunal to decide upon their claims. Neither suggestion found much favour with States, which opted instead for the establishment of a body within the framework of the United Nations, ‘to which a person claiming the benefit of (the) Convention may apply for the examination of (the) claim and for assistance in presenting it to the appropriate authority’.²⁰⁰ On the eve of the entry into force of the 1961 Convention in December 1975, the General Assembly requested UNHCR to undertake the functions foreseen in article 11 on a provisional basis,²⁰¹ and two years later, it asked UNHCR to continue to perform these functions, which were carried out, ‘without any financial implications for the United Nations’.²⁰²

3.1.2 The 1961 Convention on the Reduction of Statelessness

Article 1 of the 1961 Convention provides that, ‘A Contracting State *shall* grant its nationality to a person born in its territory who would *otherwise* be stateless’ (emphasis added). Certain reservations nevertheless remain in favour of the territorial State, which *may* require that applications be lodged by a certain age; that the person concerned shall have been habitually resident there for such period as it determines, within limits; and that he or she shall not have committed a serious criminal offence. Nevertheless, as Weis remarks, there are still significant elements in the 1961 Convention.²⁰³

First, it imposes *positive* obligations on States to grant nationality in certain circumstances, in contrast with the essentially negative obligations contained in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.²⁰⁴ Secondly, it also attempts to settle a variety of incidental problems, such as the nationality of foundlings (article 2),²⁰⁵ and the nationality of those born on board ships or aircraft (article 3). Article 4 also provides that a State *shall* grant nationality to a person not born in its territory if one parent had the nationality of that State and the person would otherwise be stateless, again subject to certain limitations at the discretion of the State similar to those in

article 1. In addition, loss of nationality on the occasion of change of civil status or voluntary act of the individual (such as renunciation) is to be conditional on the acquisition of another nationality (articles 5–7).

Articles 8 and 9 have been mentioned already in the context of deprivation, while in the case of transfer of territory, article 10 obliges Contracting States to include provisions which will ensure that no person becomes stateless as a result. In the absence of such provisions, nationality is to be conferred on those who, as a result of the transfer or acquisition of territory, ‘would otherwise become stateless’.

Finally, the UN Conference came back to the *law/fact* distinction, resolving ‘that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure*, to enable them to acquire an effective nationality’. ²⁰⁶ Neither this recommendation nor that attached to the 1954 Convention is particularly helpful from a practical perspective, although they may encourage States to do a little more than what they have agreed. The reference to ‘effective nationality’, however, recalls the thrust of the UK’s proposal in 1950, namely, the emphasis on the lack of protection. ²⁰⁷

4. Protecting the stateless

Notwithstanding the General Assembly’s allocation to UNHCR of certain functions under the 1961 Convention, it was some time before the stateless and statelessness were recognized formally as coming within UNHCR’s mandate. ²⁰⁸ Not surprisingly, the human rights dimension played a role here; in its 1987 ‘Note on Refugee Children’, ²⁰⁹ for example, UNHCR called attention to the risk of statelessness arising from the non-registration of births, and the Executive Committee expressed its concern in that year’s general conclusion. ²¹⁰ The following year, UNHCR again stressed its concern with the question of statelessness, while recognizing the complex issues involved, its own limited role and capacity, but also the breadth of its humanitarian mandate. ²¹¹ The General Assembly then expressly noted, ‘the close connection between the problem of refugees and stateless persons’, and invited States actively to explore and promote measures favourable to stateless persons in accordance with international law. ²¹²

In 1992, recognizing the absence of an international body with a general mandate for stateless persons, the Executive Committee called on UNHCR to

continue to act on their behalf.²¹⁴ In 1995, UNHCR reported at length on what it was doing,²¹⁵ following up on the Executive Committee's call the previous year to strengthen its efforts.²¹⁶ The Executive Committee then adopted a conclusion on the prevention and reduction of statelessness and the protection of stateless persons, encouraging UNHCR to continue its activities, 'as part of its statutory function of providing international protection'.²¹⁷ This was endorsed by the General Assembly, particularly from a 'preventive' perspective, but also with formal recognition of stateless persons as part of UNHCR's 'statutory function of providing international protection', in addition to the specific role entrusted to it in relation to the 1961 Convention.²¹⁸

With its general mandate confirmed across the broad field of protection and the reduction and elimination of statelessness,²¹⁹ UNHCR created a Statelessness Unit in 2005,²²⁰ and has since engaged with States on the framing or amendment of nationality legislation, initiated the ambitious #IBelong campaign with the goal of eradicating statelessness by 2024,²²¹ actively and successfully promoted increased participation by States in the basic treaties,²²² issued guidelines for States and recommended the adoption of procedures for the identification of stateless persons so that they can receive protection and be treated consistently with international law.²²³

Notwithstanding the importance of the principles set out in the 1954 Convention and the 1961 Convention, what finally counts is State practice. A recent significant jump in the number of States parties can be attributed to the efforts of UNHCR,²²⁴ while developing practice has helped to consolidate the basic principles, even if the incidence of statelessness has continued. For example, in 2000, the UN General Assembly adopted the Declaration of Articles on Nationality of Natural Persons in relation to the Succession of States, which is the end-product of work begun in the International Law Commission in 1993.²²⁵ This invites governments to take the ILC's work into account and, among other measures, to take 'all appropriate steps' to prevent people becoming stateless as a consequence of a change of sovereign responsibility. It proposes a presumption that those habitually resident on the territory in question acquire the nationality of the successor State, but also makes provision for the exercise of choice and respect for the will of the persons concerned.

At the regional level, the Council of Europe adopted the 1997 European Convention on Nationality, which establishes principles and rules relating to the nationality of natural persons and seeks to regulate military obligations.²²⁶ The

European Convention reaffirms the principle of non-discrimination, that everyone has a right to a nationality, that statelessness is to be avoided, that no one is to be arbitrarily deprived of their nationality, and that marriage or one spouse's change of nationality is not to affect the nationality of the other. In 2006, the Council of Europe adopted the European Convention on the Avoidance of Statelessness in relation to State Succession, which entered into force on 1 May 2009,²²⁷ and draws largely on the ILC Articles adopted by the General Assembly in 2000. It also employs the definition of statelessness in the 1954 Convention, stresses the fundamental right to a nationality, requires States to take all appropriate measures to avoid statelessness arising in the context of succession, and stresses the importance of cooperation between States, and by States with the Council of Europe and the UNHCR. The European Court of Human Rights has identified these regional conventions as 'relevant' instruments, even where not ratified by the States party to proceedings, and has found that under customary international law there is 'a positive obligation to avoid statelessness and to ameliorate the condition of those who were left stateless, especially in cases of State succession'.²²⁸

4.1 Protecting stateless *refugees* through the determination of status

As noted above, the stateless refugee is specifically mentioned in article 1A(2) of the 1951 Convention as someone who, by reason of well-founded fear of persecution, may be unable or unwilling to return to their country of former habitual residence.²²⁹ The deprivation of nationality may also be a juridically relevant factor, serving to confirm the rupture between citizen and State in a formal sense. Whether or not one accepts the deprivation as persecution in itself, it may nonetheless constitute good evidence to support a well-founded fear (with the consequential denial of the right to re-enter one's own country as a continuing act in that regard), and stand as an indicator of what might follow any forced return.

4.2 Protecting *the stateless* through the determination of status

As the title implies, the 1954 Convention is concerned with the *status* of stateless persons, improving the situation of those who are recognized as stateless, and ensuring that, like refugees, they benefit from those rights and freedoms which will enable them to make a life for themselves and their children in the State that

has recognized them. Both the 1954 Convention and the Refugee Convention have clear limitations: neither guarantees a right of entry nor a right to naturalization, and some who would otherwise have a claim to protection may be excluded.²³⁰ Still, in a 2017 decision, the Swiss Federal Administrative Court held that, even for recognized refugees with asylum, recognition as a stateless person was an interest worthy of protection ('ein schutzwürdiges Interesse').²³¹ After five years of lawful residence in Switzerland, they were entitled to settlement, while recognized refugees with asylum had no such corresponding claim. Stateless persons were also not 'excluded' from recognition of status under article 1(2)(ii) of the 1954 Convention, on the ground that they enjoyed all the rights and obligations attached to possession of the nationality of the country; significant differences remained and, in particular, they remained liable to expulsion and extradition, from which Swiss citizens were protected.

As with the 1951 Refugee Convention, many of the rights are qualified by reference to the degree of 'attachment' between individual and State, varying from simple presence, through lawful stay, to habitual residence.²³² Protection under the 1954 Convention is formally limited to those who are stateless as a matter of law, leaving those stateless de facto and not enjoying the benefits of a nevertheless 'existing' nationality outside, unless they are able to meet the requirements of the refugee definition.²³³ One unspoken premise of the 1954 Convention is that the stateless who might benefit are likely also to be displaced and caught up in a country's immigration laws; resolving the situation of resident populations facing the discriminatory denial of citizenship is left to other measures. Like the Refugee Convention, however, the 1954 Convention makes no mention of residence; UNHCR suggests that this would fulfil its object and purpose, and the Belgian Constitutional Court has held that the absence of any legislative provision granting residence and social support ('droit à l'intégration sociale') to stateless persons recognized in Belgium comparable to that enjoyed by refugees is a form of impermissible discrimination.²³⁴

Neither the 1951 Convention nor the 1954 Convention says anything about procedures for identifying refugees or stateless persons, although in each case, such a procedure is more or less essential if the treaty in question is to be fully and effectively implemented.²³⁵ For the State also, the statelessness of any particular individual is juridically relevant to the exercise of a variety of public powers, particularly in the immigration context,²³⁶ and although few specific statelessness procedures exist at present, practice and jurisprudence are

beginning to emerge.²³⁷ Ideally, such procedures will conform with due process requirements, but at the practical level, the definition of a stateless person and the object and purpose of the 1954 Convention may demand a different approach.²³⁸

In 2014, UNHCR published its *Handbook on Protection of Stateless Persons*.²³⁹ Like its refugee status predecessor, it is intended as a ‘resource’ for statelessness determination, and deals with the burden and standard of proof, the relevant date for the assessment of status, the responsibilities of claimant and decision-maker, and the overall approach to the evidence. UNHCR emphasizes that, ‘An individual is a stateless person from the moment that the conditions in Article 1(1) ... are met. Thus, any finding by any State or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature’.²⁴⁰ The recommended approach parallels that for refugee status determination procedures, but with due allowance for the interpretation of terms and the particular challenges raised by evidence and proof. For example, UNHCR stresses that the phrase, ‘not considered as a national’, should be approached as a mixed question of fact and law, in which practice can play a critically important role.²⁴¹

UNHCR notes that nationality may be acquired or lost, either automatically or non-automatically,²⁴² and emphasizes that ‘nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise’.²⁴³ Nevertheless, decision-makers may need to factor in a temporal dimension, for example, to take account of ongoing processes relevant to the acquisition or loss of citizenship.²⁴⁴ There are obvious difficulties in ‘proving a negative’ as against the world at large, but it is generally agreed that only putative States with which the individual has a ‘relevant link’ need be considered, such as birth, descent, marriage, adoption or habitual residence.²⁴⁵ UNHCR also urges States to recognize the shared nature of the burden of proof,²⁴⁶ not to raise the evidential threshold too high, but ‘to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law’;²⁴⁷ limited practice so far suggests that consensus on the appropriate standard of proof and the role and responsibilities of the deciding State is yet to emerge.²⁴⁸ In 2014, the Italian Supreme Court of Cassation, proceeding on the basis of equality of treatment between stateless persons and foreigners generally and taking account also of the protection due

under the 1954 Convention, ruled that the burden of proof for a stateless claimant should be ‘attenuated’, and that the judge should investigate the matter and request additional information or documentation as necessary.²⁴⁹

In *AS (Guinea)* in 2018, the Court of Appeal in the UK received some seven submissions focusing on the inherent difficulties in proving a negative, and referred extensively to the *UNHCR Handbook on Stateless Persons*, particularly with regard to the burden and standard of proof and assessment of the evidence.²⁵⁰ UNHCR, intervening, noted that deciding statelessness is a shared responsibility and, given the inherent difficulties and the serious consequences flowing from wrongly rejecting a claim, urged the adoption of the same standard as applied in refugee cases, namely, to recognize status if ‘it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law’.²⁵¹

The court accepted UNHCR’s role with regard to stateless persons and the 1954 Convention, agreed that its views should be considered and accorded ‘weight’, but emphasized that they remained ‘advisory’.²⁵² In its opinion, statelessness determination and refugee status determination were very different and, in general, the applicant for recognition of statelessness would face no risk of harm in approaching the authorities of a putative State of nationality, whether with or without the assistance of the Secretary of State. By contrast, it would be very hard for an asylum seeker ‘to establish anything more than a reasonable degree of likelihood that he or she will be persecuted if returned ... and the consequences of an error may be very severe indeed’.²⁵³ After reviewing earlier authority, the court concluded that a statelessness applicant ought to take ‘all reasonable practical steps’ to collect all the necessary evidence bearing on his or her nationality and, given the general absence of risk, apply also for the nationality of the State or States with which they had the closest connection.²⁵⁴ If that came to nought, with or without the assistance of the Secretary of State, then there was no reason why the issue of statelessness should not be decided on a balance of probabilities—was it more likely than not that the individual was stateless?²⁵⁵ In rejecting UNHCR’s submission, the court attached particular weight to the fact that of the 89 States then party to the 1954 Convention, fewer than 25 had adopted statelessness procedures, and of them, only six had adopted the lower than balance of probabilities standard. Although it was appropriate to take the practice of other States into account, it was not persuasive in the present case.²⁵⁶

UNHCR recognizes that, in practice, account may be taken of protection that is or may be available in another State, not as a reason to deny status as a stateless person, but in order to decide whether ‘transitional’ arrangements are appropriate; in principle, however, the decision ought only to be delayed if there is a realistic prospect of the claimant acquiring a nationality or the protection that goes with return to and permanent residence in his or her country of former habitual residence.²⁵⁷

The United Kingdom established its own procedure for the determination of statelessness in 2013, and made minor modifications to the immigration rules and decision-making advice in 2019.²⁵⁸ The rules expressly adopt the 1954 Convention definition and incorporate the ‘exclusion provisions’,²⁵⁹ but for the purposes of leave to remain in the UK, require both that the claimant be recognized as a stateless person *and* not be admissible to their country of former habitual residence or any other country.²⁶⁰ These criteria are additional to the Convention’s focus on not being a national of any country, but in other respects the UK’s October 2019 guidance on statelessness and applications for leave to remain closely follows UNHCR’s recommendations.²⁶¹ The UK also accepts that, where an individual is otherwise not returnable to any other country, it may be necessary to take a decision *outside* the rules; that is, to factor non-returnability into the exercise of discretion to protect and so, if properly exercised, to avoid the indefinite detention of those for whom no other responsible State can be identified. In this regard, in 2014 the Brussels Court of Appeal recalled the Constitutional Court’s views on the largely comparable situation of recognized stateless persons and recognized refugees; given that the fundamental rights of an ‘irremovable stateless person’ are also infringed in a discriminatory way, a distinction between such a person and a recognized refugee is not reasonably justifiable.²⁶²

The stateless person who is simply unable to return to their country of former habitual residence is still in need of protection,²⁶³ irrespective of any well-founded fear of being persecuted and regardless of why she or he left. From one perspective, this inability to return necessarily reflects or is the consequence of an act of State; that, in turn, may be presumptive evidence of likely persecution or of a State’s rejection of responsibility vis-à-vis this particular stateless person. In either case, the lack of protection is evident from any angle.

¹ On nationality as the ‘right to have rights’, see further below.

² Weis, P., *Nationality and Statelessness in International Law* (1956, 4–5; 2nd edn., 1979, 4–5). See also, Weil, P., ‘From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalized world’ (2011) 9 *International Journal of Constitutional Law* 615; Shachar, A., *The Birthright Lottery: Citizenship and Global Inequality* (2009); Hansen, R., ‘The Poverty of Post-Nationalism: Citizenship, Immigration, and the New Europe’ (2008) 38 *Theory and Society* 1; Edwards A. & van Waas, L., eds., *Nationality and Statelessness under International Law* (2014).

³ For a recent example and an indication of the complexities deriving from the UK’s colonial legacy, see *Minister of Home Affairs v Barbosa* [2019] UKPC 41, upholding a distinction between those with ‘Bermudian status’, on the one hand, and those ‘deemed’ to belong to Bermuda, on the other. The Privy Council reviewed the antecedents and varieties of British citizenship, and concluded that the concept of belonging to an overseas territory did not derive from the common law, but from the local constitution or local legislation.

⁴ Weis (n 2) 2nd edn., 45–8, 59.

⁵ See, for example, *Dickson Car Wheel Company (USA) v United Mexican States*, IV *Reports of International Arbitral Awards* 669, 678 (Jul. 1931): ‘A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.’

⁶ *Al Rawi v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279. For the pleadings by UNHCR as intervenor and a note on subsequent developments, see (2008) 20 *IJRL* 675; <http://www.unhcr.org/refworld/docid/45c350974.html>.

⁷ *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep. 4.

⁸ See further s. 1.2.1, s. 1.2.3.

⁹ ILC *Yearbook* (1952) vol. I, Summary records, 4th Session, 100–42; ILC, *Yearbook* (1953) vol. I, Summary records, 5th Session, 170–97, 202–80.

¹⁰ Case C-135/08 *Rottmann v Freistaat Bayern* (CJEU Grand Chamber, 2 Mar. 2010) para. 51.

¹¹ *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, paras. 53, 57. See also, Inter-American Court of Human Rights, *Proposed amendments to the naturalization provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 Jan. 1984) paras. 35–6; *Case of Castillo Petrucci et al v Peru*, Judgment (30 May 1999) paras. 96–103.

¹² Brownlie, I., ‘The Relations of Nationality in Public International Law’ (1963) 39 *BYIL* 284; PCIJ, *Tunis and Morocco Nationality Decrees* (1923) Ser. B, No. 4, 24, 25, 26.

¹³ Notwithstanding nearly 70 years between them, the basic provisions of art. 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (179 LNTS 89 No. 4137) and art. 3 of the 1997 European Convention on Nationality (CETS No. 166) are practically identical, affirming that it is for each State to determine under its

own law who are its nationals, but also that any such law is to be recognized by other States only ‘in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality’.

¹⁴ Brownlie ([n 12](#)) 316–8, 327–8, 333, 339–40.

¹⁵ *Nottebohm Case* ([n 7](#)) 34–49, 46–8 (Judge Read); the reference to an ‘unfettered right’ requires qualification today, given developments in the international legal protection of refugees and human rights, including family life. On the general principles, see Jennings, R. Y. & Watts, A., eds., *Oppenheim’s International Law* (9th edn., 1991) 857–9, § 379: ‘Nationality is the principal link between individuals and international law. The right is that of protection over its nationals abroad ... The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states.’ See also Fischer Williams, J., ‘Denationalization’ (1927) 8 *BYIL* 45, 55–6.

¹⁶ 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Law: 179 LNTS 89, No. 4137 (emphasis added); Bauer, J., ‘Multiple Nationality and Refugees’ (2014) 47 *Vanderbilt Journal of Transnational Law* 905.

¹⁷ Peters, A., ‘Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction’ (2010) 53 *German Yearbook of International Law* 623.

¹⁸ Brownlie ([n 12](#)) 341–2.

¹⁹ From another perspective, as Hersch Lauterpacht remarked in 1942, ‘there is no room for statelessness in any orderly, progressive and logical scheme of international law ... If States claim the right to be the only link between the individual and international law, then they must not be permitted to render that link non-existent’: ‘Nationality in International Law’, Discussion of the Report of the Committee on the Status of Stateless Persons (7 Oct. 1942) (1942) 28 *Transactions of the Grotius Society* 151, 159.

²⁰ Kesby, A., *The Right to Have Rights: Citizenship, Humanity and International Law* (2012) Ch. 2, 39, 52; *Case of the Yean and Bosico Children*, Inter-American Court of Human Rights (8 Sep. 2005) Ser. C, No. 130. See also, Weil ([n 2](#)) 622.

²¹ Arendt, H., *The Origins of Totalitarianism* (with an Introduction by Samantha Power) (2004) 373, 375. *Origins* was first published in 1951. [Samantha Power, ‘Introduction’](#), refers to Arendt’s ‘prophetic skepticism’ about the enforceability of international human rights: *ibid.*, xix.

²² As the Czechoslovak Minister for Foreign Affairs, Dr Edvard Beneš, noted in his letter of 10 May 1921 to the Secretary-General of the League of Nations, ‘the Government of the Soviets has been established in a wholly irregular manner, and ... its methods of government, as well as its juridical procedure, are entirely opposed not only to the sentiments of a large number of Russian refugees, but also to those of the majority of the civilised world’: LoN doc. C.126.M.72.1921.VII (16 Jun. 1921) Annex 6.

²³ Arendt ([n 21](#)) 372; ‘the calamity of the righteous is ... that they no longer belong to any community whatsoever’: *ibid.*, 375.

²⁴ Weis, P., ‘Staatsangehörigkeit und Staatenlosigkeit im gegenwärtigen Völkerrecht’: Vortrag gehalten vor der Berliner Juristischen Gesellschaft (29. Juni 1962) Berlin: W. de Gruyter, Schriftenreihe 9 der juristischen Gesellschaft zu Berlin.

²⁵ *Beldjoudi v France*, App. No. 12083/86 (26 Mar. 1992) Judge Martens, concurring, para. 2. On the interpretation of ‘his own country’ in art. 12(4), 1966 International Covenant on Civil and Political Rights (ICCPR 66), see Human Rights Committee, General Comment No. 27 on freedom of movement (art. 12): UN doc. CCPR/C/21/Rev.1/Add.9 (1 Nov. 1999) para. 20; Foster, M. & Lambert, H., *International Refugee Law and the Protection of Stateless Persons* (2019) 167.

²⁶ *Genovese v Malta*, App. No. 53124/09, Fourth Section (11 Oct. 2011) paras. 30, 33.

²⁷ *Kurić v Slovenia*, App. No. 26828/06, Judgment (Merits and Just Satisfaction), Grand Chamber (26 Jun. 2012) paras. 259–70, 339–62.

²⁸ Ibid., paras. 334, 338, 339, 349, 358–62. See also, *Kurić v Slovenia*, Judgment (Just Satisfaction) Grand Chamber (12 Mar. 2014), regarding arts. 41, 46. On the right to citizenship in international human rights law and in European human rights law, see Judge Pinto de Albuquerque, diss. op., in *Ramadan v Malta*, App. No. 76136/12, Fourth Section (21 Jun. 2016) Final: (17 Oct. 2016) 27–37.

²⁹ *Rottmann v Freistaat Bayern* ([n 10](#)) (recognizing that it is not contrary to EU law for a Member State to withdraw nationality acquired through naturalization by deception, provided that the decision observes the principle of proportionality).

³⁰ See art. 20, 1969 American Convention on Human Rights: ‘(1) Every person has the right to a nationality. (2) Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. (3) No one shall be arbitrarily deprived of his nationality or the right to change it.’ See also, Inter-American Court of Human Rights, *Proposed amendments* ([n 11](#)) (paras. 31–8 on the right to nationality); *Case of Castillo Petrucci* ([n 11](#)).

³¹ *Case of the Yean and Bosico Children v The Dominican Republic* ([n 20](#)).

³² *Caso de Personas Dominicanas y Haitianas Expulsadas v República Dominicana*, Inter-American Court of Human Rights (28 Aug. 2014) para. 325. See also Belton, K. A., ‘Ending Statelessness Through Belonging: A Transformative Agenda?’ (2016) 30 *Ethics and International Affairs* 419; Belton, K. A., ‘Heeding the Clarion Call in the Americas: The Quest to End Statelessness’ (2017) 31 *Ethics and International Affairs* 17; Marsteintredet, L., ‘Mobilisation against International Human Rights: Re-Domesticating the Dominican Citizenship Regime’ (2014) 44 *Iberoamericana—Nordic Journal of Latin American and Caribbean Studies*, 73; Cerqueira, D., ‘The Solitude of the Dominican Republic’ (14 Nov. 2014): <https://www.americasquarterly.org/content/solitude-dominican-republic>.

³³ *The Nubian Community in Kenya v The Republic of Kenya*, African Commission on Human and Peoples’ Rights, Communication 317/06 (28 Feb. 2015): <http://caselaw.ihrda.org/doc/317.06/view/en/#facts>. See also, African Commission on Human and Peoples’ Rights, *The Right to Nationality in Africa* (2015). See, generally, Manby, B.,

Citizenship in Africa: The Law of Belonging (2018); Manby, B., *Struggles for Citizenship in Africa* (2009).

³⁴ See Chan, J. M. M., ‘The Right to a Nationality as a Human Right—The Current Trend towards Recognition’ (1991) 12 *HRLJ* 1; van Waas, L., ‘Article 15: The Right to a Nationality’, in Ferstman, C. and others, eds., *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance* (2018) 126–36; Edwards & van Waas (n 2); ‘Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Note by the Secretary-General’: UN doc. A/73/207 (20 Jul. 2018); Institute on Statelessness and Inclusion, ‘Citizenship and Statelessness: (in)equality and (non)discrimination’ (2018): <https://www.institutesi.org/>.

³⁵ Art. 14 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law (n 16) provides that a foundling is presumed to have been born on the territory of the State in which he or she is found. In 1963, Brownlie noted the extent of State practice, particularly legislation, as well as concordant drafts in Hudson’s and Córdova’s work in the ILC, and concluded that irrespective of its acceptance as customary international law, the rule as to foundlings has a ‘strong claim’ to recognition as a general principle of law, within the meaning of art. 38 of the ICJ Statute: Brownlie (n 12) 311.

³⁶ 1948 Universal Declaration on Human Rights; art. 15(2) adds: ‘No one shall arbitrarily deprived of his nationality nor denied the right to change his nationality.’

³⁷ Art. 5, 1965 Convention on the Elimination of All Forms of Racial Discrimination.

³⁸ Art. 24(2), (3), ICCPR 66; van Waas, L., ‘Stateless Children’, in Bhabha, J., Kanics, J., & Senovilla Hernández, D., eds., *Research Handbook on Child Migration* (2018) 213.

³⁹ Art. 7, 1989 Convention on the Rights of the Child (CRC 89) provides: ‘1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.’ See also art. 8, which encapsulates the right of the child, ‘to preserve his or her identity, including nationality’. In *Gelman v Uruguay* Ser. C, No. 221, Judgment (2011), the Inter-American Court of Human Rights found that a kidnapped Argentinian child who had been handed over to Uruguayan ‘parents’ had lost her identity, contrary to art. 8 CRC 89.

⁴⁰ Cf. Bisschop, W. R. and others, ‘Report of the Committee on Nationality and Registration’ (1918) 4 *Transactions of the Grotius Society* li–lvi.

⁴¹ Executive Committee Conclusion No. 111 (LXIV) on Civil Registration (2013) para. 13. The UN General Assembly endorsed this conclusion: UNGA res. 68/141, ‘Office of the United Nations High Commissioner for Refugees’ (18 Dec. 2013) paras. 3, 26. See also, UNHCR, ‘Note on Statelessness’: UN doc. A/AC.96/1123 (4 Jul. 2013).

⁴² See, for example, HRC res. 32/5, ‘Human rights and arbitrary deprivation of

nationality’ (30 Jun. 2016) Preamble. The HRC referred also to Goal 16, Target 9, of the 2030 Agenda for Sustainable Development (UNGA res. 70/1), which is to provide legal *identity* for all, including birth registration: *ibid.*, para. 25.

⁴³ HRC res. 20/4, ‘The right to a nationality: women and children’: UN doc. A/HRC/RES/20/4 (5 Jul. 2012) (adopted without a vote).

⁴⁴ See Fernand de Varennes, Special Rapporteur, ‘Statelessness: a minority issue’: UN doc. A/73/205 (20 Jul. 2018).

⁴⁵ HRC res. 20/5, ‘Human rights and arbitrary deprivation of nationality’: UN doc. A/HRC/RES/20/5 (5 Jul. 2012) (adopted without a vote).

⁴⁶ For which an effective remedy is required: *ibid.*, paras. 2, 12; see further s. 1.2.

⁴⁷ *Ibid.*, paras. 19–21. See also HRC res. 32/5, ‘Human rights and arbitrary deprivation of nationality’ (30 Jun. 2016); also HRC resolutions 26/14 (26 Jun. 2014); 20/4 (5 Jul. 2012); 20/5 (16 Jul. 2012); 13/2 (24 Mar. 2010) (para. 8: every child has the right to acquire a nationality); 10/13 (26 Mar. 2009) (para. 7: those deprived of nationality may be affected by ‘poverty, social exclusion and legal incapacity’); 7/10 (27 Mar. 2008).

⁴⁸ The Council recalled that, according to UNICEF, nearly one quarter of births of the global population of under 5s have never been registered; it identified these issues as ‘closely linked to the realization of all other human rights’ and consequently, that it is the obligation of States to register the all births without discrimination of any kind’: HRC res. 34/15, ‘Birth registration and the right of everyone to recognition everywhere as a person before the law’ (24 Mar. 2017) Preamble, paras. 1, 2. See also, HRC res. 28/1 (26 Mar. 2015); 22/7 (21 Mar. 2013); UNGA res. 71/177, ‘Rights of the child’ (19 Dec. 2016) paras. 11, 18, 78; UNGA res. 69/157, ‘Rights of the child’ (18 Dec. 2014); art. 7, 1989 Convention on the Rights of the Child; art. 6, 1948 Universal Declaration of Human Rights: ‘Everyone has the right to recognition as a person before the law.’

⁴⁹ HRC res. 32/7, ‘The right to a nationality: women’s equal nationality rights in law and in practice’ (30 Jun. 2016).

⁵⁰ *Ibid.*, para. 5. In June 2011, the UN Secretary-General issued a ‘guidance note’ on the UN and statelessness. Reissued in 2018, it calls attention to the institutional cross-cutting of statelessness as it impacts UN agencies, and sets out seven guiding principles and four ‘concrete interrelated approaches on how the UN system can improve its coordinated response to statelessness’: <https://www.refworld.org/docid/5c580e507.html>. See also, Human Rights Council, ‘Report of the Secretary-General: Human rights and arbitrary deprivation of nationality’: UN doc. A/HRC/25/28 (19 Dec. 2013); Lambert, H., ‘Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status’ (2015) 64 *ICLQ* 1.

⁵¹ *Kurić v Slovenia* ([n 27](#)) paras. 343, 353–4, 358–9.

⁵² *Zhao v The Netherlands*, UN doc. CCPR/C/130/D/2918/2016 (28 Dec. 2019).

⁵³ Registration as ‘stateless’ would have opened the way to protection and to the right to obtain Dutch nationality.

⁵⁴ See generally Gibney, M. J., ‘Should Citizenship Be Conditional? The Ethics of

Denationalization’ (2013) 75 *The Journal of Politics* 646; Gibney, M. J., ‘“A Very Transcendental Power”: Denaturalisation and the Liberalisation of Citizenship in the United Kingdom’ (2013) 61 *Political Studies* 637; Weil (n 2); Lambert (n 50).

⁵⁵ ‘In general, it matters not, as far as international law is concerned, that a state’s internal laws may distinguish between different kinds of nationals—for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens’: Jennings & Watts (n 15) vol. 1, 856–7; Crawford, J., *Brownlie’s Principles of Public International Law* (9th edn., 2019) 511.

⁵⁶ See Ch. 3, ss.5.1.2–5.1.3.

⁵⁷ Brownlie (n 12) 339–40.

⁵⁸ 606 HC Deb. (11 Jun. 1959) cols. 1175–6.

⁵⁹ International Law Commission, *Report of the 66th Session*: UN doc. A/69/10 (2014) Ch. IV, ‘Expulsion of aliens’, 13, 32–3. In 2017, the General Assembly ‘took note’ of the articles on expulsion of aliens and decided to include the topic in the agenda of its seventy-fifth session (2020), with a view to examining what further action to take: UNGA res. 72/117 (7 Dec. 2017). In 2020, the Sixth Committee considered the issue and differences were again apparent between those States which did and those which did not consider that the draft articles reflected customary international law. Some thought that no convention should be elaborated, while others thought that the draft constituted an important contribution which might serve as guidelines and form a basis for discussion. The Sixth Committee proposed a resolution, adopted by the General Assembly without a vote, deciding to include the topic on the agenda of its seventh-eighth session (2023): UNGA res. 75/137, ‘Expulsion of aliens’ (15 Dec. 2020).

⁶⁰ *Report of the 66th Session* (n 59) 32, 33. In its General Comment on art. 12 of the ICCPR 66, the Human Rights Committee referred to a person’s right to enter ‘his own country’ as being broader than the concept of ‘country of nationality’, and not limited to nationality in a formal sense. In its view, individuals deprived of their nationality in violation of international law continue to hold the right to enter and reside in that country, as his or her ‘own country’, and that might also include stateless persons arbitrarily deprived of the right to acquire nationality: General Comment No. 27 on freedom of movement (art. 12): UN doc. CCPR/C/21/Rev.1/Add.9 (1 Nov. 1999) para. 20.

⁶¹ Weis, P., *Nationality and Statelessness in International Law* (2nd edn., 1979) 125, 126 (emphasis supplied). Paul Weis was himself a naturalized British subject, legal adviser in the International Refugee Organization, and then in the Office of the United Nations High Commissioner for Refugees; in the last-mentioned capacity, he participated in the Conference which led to the adoption of the 1961 Convention. For many years following his retirement, he was the United Kingdom Representative in the Council of Europe *ad hoc* Committee on Refugees and Stateless Persons (CAHAR).

⁶² Weis (n 61) 55: ‘The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would

be deceived if by subsequent denationalisation this duty were to be extinguished.' See also at 57: 'In the case of denationalisation, the doctrine of the survival of the duty of readmission after the loss of nationality follows, in fact, from the principle of territorial supremacy: this supremacy might be infringed by such unilateral action in so far as that action would deprive other States of the possibility of enforcing their recognised right to expel aliens supposing that no third State, acting in pursuance of its legitimate discretion, was prepared to receive them.'

⁶³ *Nottebohm Case* ([n 7](#)) 34 ff (Judge Read: text to [n 15](#)).

⁶⁴ LoN doc. C.27.M.16.1931.V; 2252 UNTS 435 (in force 2004).

⁶⁵ Ibid. See also the British Government's position as expressed at the 1930 League of Nations Hague Conference on Nationality: Rosenne, S., ed., *League of Nations Conference for the Codification of International Law (1930)* (1975) Vol. 3, 'Acts of the Conference. I Plenary Meetings. II Minutes of the First Committee'; Minutes of the First Committee (Nationality), 2nd Mtg. (18 Mar. 1930) 22–3; 20th Mtg. (7 Apr. 1930) 243–4 (Rosenne, ed., 901–2, 1123–4).

⁶⁶ Weis ([n 61](#)) 58–9. See also Lauterpacht, H., *The Function of Law in the International Community* (1933; repr'd 2011) 308–9; Turack, D., *The Passport in International Law* (1972) 20: '[s]tates regard as one of its primary purposes that the issuing state will receive back the holder, if for any reason, he is compelled to leave the host state. The great majority of states do not seem to care about the nationality of the person seeking entry to its territory as long as he produces a valid legal passport so that he can be repatriated in case his presence should become undesirable in the country of sojourn.' Brownlie, I., *Principles of Public International Law* (7th edn., 2008) 386; Crawford ([n 55](#)) 511.

⁶⁷ Meloni, A., *Visa Policy within the European Union Structure* (2006) 25. The entry on passports in the *Max Planck Encyclopedia of Public International Law* is to similar effect: Hagedorn, C., 'Passports' (2008): <http://opil.ouplaw.com/home/EPIL>: '33. Every State has the right to expel aliens through deportation ... sending them back to their country of origin ... States are obliged to readmit their passport holders into their territory and are estopped from refusing to do so.' See also Hoffmann, R., 'Denaturalization and Forced Exile' (*ibid.*, 2013) para. 26.

⁶⁸ UK Visas and Immigration, Guidance ECBO7: returnability (26 Nov. 2013): <https://www.gov.uk/government/publications/returnability-ecb07/ecb07-returnability>.

⁶⁹ Immigration Rules part 1: leave to enter or stay in the UK (26 Feb. 2016, updated 7 Apr. 2021): <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk>; Immigration Rules part 9: grounds for refusal (26 Feb. 2016, updated 7 Apr. 2021): <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal>.

⁷⁰ UN doc. A/CONF.9/SR.1 (24 Apr. 1961) 2, Summary Record of the First Plenary Meeting (24 Mar. 1959—Acting President, Mr Liang). See also Council of Europe, 2006 Convention on the Avoidance of Statelessness in relation to State Succession (CETS No.

200) Explanatory Report (Introduction): ‘The avoidance of statelessness is one of the major preoccupations of the international community. In accordance with customary international law States have an obligation, when determining who are their nationals, to avoid cases of statelessness. The rules for the implementation of this obligation are contained in the 1961 United Nations Convention on the Reduction of Statelessness.’

⁷¹ UN doc. A/CONF.9/C.1/SR.11 (24 Apr. 1961) 7–8, Summary Record of the Eleventh Meeting (8 Apr. 1959—Mr Ross).

⁷² UN doc. A/CONF.9/C.1/SR.14 (24 Apr. 1961) 3, Summary Record of the Fourteenth Meeting (10 Apr. 1959—Mr Harvey).

⁷³ UN doc. A/CONF.9/C.1/SR.15 (24 Apr. 1961) 6, Summary Record of the Fifteenth Meeting (11 Apr. 1959—Mr Ross). When the Conference reconvened two years later, the United Kingdom proposed, ‘In the interests of limiting the permissible grounds to the greatest extent to which agreement is practicable’, that only one other ground be included, namely, ‘disloyalty or treachery in the case of a naturalised citizen’: ‘Note by the Secretary-General with Annex containing observations by governments on deprivation of nationality’: UN doc. A/CONF.9/10 (9 Jun. 1961) 19.

⁷⁴ UN doc. A/CONF.9/SR.16 (11 Oct. 1961) 2, 3–4, Summary Record of the Sixteenth Plenary Meeting (16 Aug. 1961—Mr Ross).

⁷⁵ UN doc. A/CONF.9/L.86 (23 Aug. 1961).

⁷⁶ UN doc. A/CONF.9/SR.20 (11 Oct. 1961) 2–3, Summary Record of the Twentieth Plenary Meeting (23 Aug. 1961—Mr Harvey); UN doc. A/CONF.9/SR.22 (11 Oct. 1961) 7.

⁷⁷ Art. 8: ‘1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless. 2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State: (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality; (b) where the nationality has been obtained by misrepresentation or fraud. 3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time: (a) that, inconsistently with his duty of loyalty to the Contracting State, the person: (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State; (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State. 4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.’

⁷⁸ *Hysaj and Others v Secretary of State for the Home Department* [2017] UKSC 82.

⁷⁹ See the art. 8(2)(b) exception to art. 8(10) of the 1961 Convention; arts. 7(1), (3), 1997 European Convention on Nationality; *Rottmann v Freistaat Bayern* ([n 10](#)) para. 52.

⁸⁰ *KV v Secretary of State for the Home Department* [2018] EWCA Civ 2483, para. 16.

⁸¹ Ibid., paras. 19–20. See also *Ahmed and Others (deprivation of citizenship)* [2017] UKUT00118 (IAC), applying *Deliallisi (British Citizen: Deprivation of Appeal: Scope)* [2013] UKUT 00439 (IAC), holding that the reasonably foreseeable consequences of a deprivation of citizenship decision (under s. 40(5) of the 1981 Act) are a factor to be considered by the Tribunal.

⁸² *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62, paras. 30, 32 (under the 2014 legislation ([n 92](#)), the Secretary of State needs only to show that he or she has reasonable grounds to believe that statelessness will not result).

⁸³ *KV v Secretary of State for the Home Department* ([n 80](#)), para. 29. Before becoming a citizen, the appellant had been recognized as a refugee in the UK, and even ‘assuming that a travel document would be issued to him, [the] appellant cannot on the face of it reasonably be expected to return to Sri Lanka, let alone live there, in circumstances where he successfully claimed asylum on the ground that he had a well-founded fear of persecution if he were to return’: *ibid.*, para. 49.

⁸⁴ Cf. Institut de Droit International, art. 6, ‘Déclaration des droits internationaux de l’homme’ (1929) 35 *Annuaire*, vol. II, 300 (sex, race, religion, or language).

⁸⁵ Although earlier examples can be found, the reaction was heralded by changes in political discourse under former Prime Minister Tony Blair who, in 2002, sought to recharacterize citizenship as a privilege, rather than a right, let alone a constitutionally protected status; see Goodwin-Gill, G. S., ‘Statelessness is back (not that it ever went away)’ (Sep. 2019); <https://www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/>. Weil and Handler show clearly how, in the first half of the 20th century, the UK Home Office ‘internalized’ the principles of independent review, and note also that after ratifying the 1961 Convention, the UK changed the law of denationalization to accord with its treaty obligations: Weil P. & Handler, N., ‘Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain’s First Denationalization Regime’ (2018) 36 *Law and History Review* 295, 326.

⁸⁶ British Nationality Act 1948, ss. 20(3)(a), (b), 20(5).

⁸⁷ See Weil & Handler ([n 85](#)).

⁸⁸ HL Deb. (9 Oct. 2002) vol. 639, Lord Falconer at col. 537; Lord Filkin at cols. 534–6. The United Kingdom had ratified the 1961 Convention in 1966. At the time, the Government stated that it intended to ratify the European Convention.

⁸⁹ HL Deb. (14 Mar. 2006) vol. 679, Baroness Ashton of Upholland at col. 1190; British Nationality Act 1981, s. 40(2) substituted by ss. 56(1), 62, Immigration, Asylum and Nationality Act 2006. The Government also indicated that it no longer intended to ratify the European Convention, and it is reasonable to infer that it understood the revised 2006 legislation and specifically the deprivation grounds as inconsistent with art. 7; it was also

inconsistent with art. 8 of the 1961 Convention and with the UK's declaration on ratification.

⁹⁰ [2013] UKSC 62. Richard Hermer QC, Guy Goodwin-Gill, and Tom Hickman acted as counsel for the respondent, Mr Al-Jedda.

⁹¹ [2013] UKSC 62, paras. 4, 6 (Lord Wilson).

⁹² In this regard, see also *Pham v Secretary of State for the Home Department* [2015] UKSC 19, in which, taking account with some reservations of UNHCR's views, among others, Lord Carnwath (with Lord Neuberger, Lady Hale, and Lord Wilson agreeing), concluded that 'under the operation of its law' was 'not necessarily to be decided solely by reference to the text of the nationality legislation of the state in question, and that reference may also be made to the practice of the government, even if not subject to effective challenge in the courts': paras. 20–9, 38.

⁹³ [2013] UKSC 62, para. 32.

⁹⁴ Section 40(4A) inserted by ss. 66(1), 75(3), Immigration Act 2014. Section 40B, also inserted by ss. 66(3), 75(3), requires the Secretary of State to arrange for regular reviews of the s. 40(4A) deprivation power to be laid before Parliament. Appeals against deprivation of citizenship may be impeded by national security interests, the interests of the UK in its relationship with another country, and the public interest: s. 40A, substituted by ss. 4(1), (4), 162, Nationality, Immigration and Asylum Act 2002. See further s. 4, on the determination of statelessness/country of nationality.

⁹⁵ *Pham v Secretary of State for the Home Department* (EWCA) ([n 11](#)).

⁹⁶ *Pham v Secretary of State for the Home Department* (UKSC) ([n 92](#)).

⁹⁷ *Pham v Secretary of State for the Home Department* (EWCA) ([n 11](#)), paras. 49, 51, 52. 'Conduciveness to the public good' means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organized crime, war crimes, or unacceptable behaviours: 'United Kingdom Visas and Immigration Nationality Instructions': Vol. 1, Ch. 55, 'Deprivation and Nullity of British Citizenship', para. 55.4.4: <https://www.gov.uk/topic/immigration-operational-guidance/nationality-guidance>; cited in *Ahmed and Others (deprivation of citizenship)* [2017] UKUT00118 (IAC).

⁹⁸ *Begum v Special Immigration Appeals Commission* [2021] UKSC 7.

⁹⁹ *Ibid.*, paras. 16–19.

¹⁰⁰ *Secretary of State v Rehman* [2001] UKHL 47, [2003] 1 AC 153.

¹⁰¹ *Begum* ([n 98](#)) paras. 58, 61.

¹⁰² *Ibid.*, para. 64: 'In determining arbitrariness, the court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8.'

¹⁰³ *Ibid.*, paras. 69, 71.

¹⁰⁴ *Ibid.*, para. 88.

¹⁰⁵ *Ibid.*, para. 90

¹⁰⁶ Ibid., para. 135.

¹⁰⁷ The right to nationality is not expressly mentioned in the ECHR, but deprivation of citizenship can clearly have an impact on protected rights, such as the right to private and family life (art. 8). Art. 4(c), 1997 European Convention on Nationality (CETS No. 166), provides that ‘no one shall be arbitrarily deprived of his or her nationality’, but makes no provision for individual recourse. On arbitrary deprivation of nationality, see Eritrea–Ethiopia Claims Commission, Partial Award: Civilian Claims—Eritrea’s Claims 15, 16, 23 and 27–32 (2004) XXVI *Reports of International Arbitral Awards* 195–247, paras. 50, 60, 71; Lambert (ⁿ 50).

¹⁰⁸ Almost by definition, an act of deprivation only has meaning if directed at someone within or subject to the jurisdiction of the State, and a citizen is someone who manifestly meets this requirement. UK Government assertions to the contrary during the 2014 debate on deprivation were not supported by any reference to authority: ‘Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office’ (29 Jan. 2014) paras. 9–17. Leaving individuals ‘in orbit’—not allowed to remain in any other State but refused admission to their State of ‘former’ nationality—is certainly capable of raising Convention issues, as various admissibility decisions of the former European Commission on Human Rights showed, when dealing with applications by United Kingdom citizens from East Africa during the 1970s. See, for example, *Patel et al v United Kingdom*, App. Nos. 4403/70, 4486/70, 4501/70 and others, Decision of the Commission as to Admissibility (10 Oct. 1970): 13 *Yearbook* 928.

¹⁰⁹ See s. 1.2. In explaining its position, for example, a government minister expressly referred to ‘attempts to remove dangerous individuals from the UK’: HC Deb. (11 Feb. 2014) col. 258WH (James Brokenshire); also, HC Deb. (30 Jan. 2014) col. 1050 (Theresa May).

¹¹⁰ Cf. Preamble, 1998 Statute of the International Criminal Court (2187 UNTS 3): ‘[t]he most serious crimes of concern to the international community as a whole must not go unpunished and ... their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation ... [I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’

¹¹¹ Art. 9(1), 2000 Terrorism Financing Convention (2178 UNTS 197); art. 7(1), 1997 Terrorist Bombings Convention (2149 UNTS 256). Art. 6(1), 1979 Hostages Convention (1316 UNTS 205), provides that a State party in which an alleged offender is present, ‘shall immediately make a preliminary inquiry into the facts’.

¹¹² Art. 9(2), 2000 Terrorism Financing Convention; art. 7(2), 1997 Terrorist Bombings Convention; art. 6(1), 1979 Hostages Convention.

¹¹³ Art. 10, 2000 Terrorism Financing Convention; art. 8, 1997 Terrorist Bombings Convention; art. 8(1), 1979 Hostages Convention.

¹¹⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep. 422.

¹¹⁵ Ibid., para. 69 (specifically with reference to arts. 6(2) and 7(1) of the Convention).

¹¹⁶ Ibid., para. 75; also, paras. 86, 90, 94.

¹¹⁷ Ibid., para. 91.

¹¹⁸ Ibid., para. 95 (emphasis supplied). See also para. 120: ‘The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party.’ Clearly, each of the other conventions mentioned above has a similar purpose.

¹¹⁹ See comments by André Schneider, député, Projet de Protocole sur la prévention des cas d’apatriodie en relation avec la succession d’États, in ‘Les travaux de la délégation française à l’Assemblée parlementaire du Conseil de L’Europe’, 1ère partie de la session ordinaire de 2006: <https://www.senat.fr/rap/r05-235/r05-2354.html>. Also, Office français de protection des réfugiés et apatrides, ‘Histoire de l’apatriodie’: <http://archive.is/xbc8>.

¹²⁰ Fischer Williams (^{n 15}) 45, 55–7; Loewenfeld, E., ‘Status of Stateless Persons’ (1941) 27 *Transactions of the Grotius Society* 59, 66–7 (^{nn 25–6}) 81–5. Cf. Arendt H. (1951): ‘Denationalisation became a powerful weapon of totalitarian politics, and the constitutional inability of European nation-states to guarantee human rights to those who had lost nationally guaranteed rights made it possible for the persecuting governments to impose their standard of values even upon their opponents’: Arendt (^{n 21}) 343.

¹²¹ Independent Commission on International Humanitarian Issues, *Winning the Human Race?* (1988) 107–15.

¹²² Weil (^{n 2}) 616–8.

¹²³ Bloom, T., Tonkiss K., & Cole, P., eds., *Understanding Statelessness* (2017).

¹²⁴ *Porter v Freudenberg* [1915] 1 KB 857, 868–9, 873 (Lord Reading CJ).

¹²⁵ Ibid., 882–3.

¹²⁶ Ibid., 883.

¹²⁷ *Wells v Williams* (1697) 1 Ld Raymond 282, 91 Eng. Rep. 1086.

¹²⁸ *Sylvester’s Case*, Case 197, 7 Mod. 150.

¹²⁹ See, for example, 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated 4 July 1922 and 21 May 1924: 89 LNTS 47 (No. 2004); 1928 Arrangement concerning the Extension to other Categories of Refugees of certain Measures Taken in favour of Russian and Armenian Refugees (No. 2006) 64. The first arrangement for the benefit of Russian refugees made do without a definition or description: Arrangement of 5 July 1922 with respect to the Issue of Certificates of Identity to Russian Refugees: 13 LNTS 237 (No. 355).

¹³⁰ Art. 1, 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany: 1936–1937 LNTS 77 (No. 3952). The 1938 Convention concerning the Status of Refugees coming from Germany expressly added ‘stateless persons’ not covered by earlier arrangements, who had left Germany after being established there, and ‘who are proved not to enjoy, *in law or in fact*, the protection of the German Government’ (art. 1): 192 LNTS 60

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¹³¹ Loewenfeld ([n 120](#)) 82. Later, the *de jure/de facto* approach was itself bifurcated, with consequential distinctions not always helpful to the discourse or analysis; see s. 2.2.1.

¹³² *Annuaire de l'Institut de Droit International*, Session de Bruxelles (avril 1936) vol. 1, vol. 2. Were these, one wonders, the ‘few international jurists without political experience’, whom Hannah Arendt had in mind, as she looked back with sceptical hindsight in 1951? See Arendt ([n 21](#)) 371.

¹³³ *Annuaire de l'Institut de Droit International*, ([n 132](#)) vol. 1, 10.

¹³⁴ ‘Il s’agit d’expatriés qu’ont été mis dans cet état par des événements d’ordre politique’/‘It concerns expatriates who have been placed in this position by political events’: *ibid.*, 12, 34 (Author’s translation).

¹³⁵ *Annuaire de l'Institut de Droit International*, ([n 132](#)) vol. 1, 19–20, 95.

¹³⁶ *Ibid.*, 42–4.

¹³⁷ *Ibid.*, 49, 51.

¹³⁸ ‘Any person who is not considered by any State as possessing its nationality’ (Author’s translation).

¹³⁹ Art. 2, ‘Statut juridique des apatrides et des réfugiés’: *Annuaire de l'Institut de Droit International*, Session de Bruxelles (avril 1936) vol. 2, 172: ‘Anyone who, because of political developments in the territory of a State of which he or she was a national, has left that territory, voluntarily or not, or who remains outside of it and who has neither acquired a new nationality nor enjoys the diplomatic protection of any other State’ (Author’s translation). It was accepted also that the situations of the stateless and the refugee were not mutually exclusive.

¹⁴⁰ 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees: 89 LNTS 53, No. 2005; see also, 1928 Arrangement concerning the Extension to other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees: 89 LNTS 65, No. 2006.

¹⁴¹ *Annuaire de l'Institut de Droit International*, ([n 132](#)) vol. 2, 109.

¹⁴² *Ibid.*, 127 (‘How can one impose on the stateless person the burden of proving that they do not have a nationality? Statelessness is a purely negative fact and, as such, not susceptible of proof.’ (Author’s translation)).

¹⁴³ Arts. 3, 4, 5, ‘Statut juridique des apatrides et des réfugiés’: *ibid.*, vol. 2, 172; discussed at 146–52. Art. 8 reiterated an important point of principle, namely, that a State should not refuse admission to those who had lost the nationality of that State, without acquiring another: ‘Si un Etat a, par mesure d’autorité, retiré sa nationalité à un de ses sujets d’origine, et si celui-ci n’a pas acquis d’autre nationalité, ledit Etat devra néanmoins, à la demande de tout Etat sur le territoire duquel l’intéressé se trouve, et moyennant l’assentiment de ce dernier, le recevoir chez lui à moins qu’un autre Etat n’accepte de le recevoir. Les frais de rapatriement seront à la charge de l’Etat auquel incombe la précédente obligation.’ This was first proposed by the Institut in 1892; see art. 2, ‘Règles internationales sur l’admission et

l’expulsion des étrangers’, Session de Genève (1892). It was repeated in art. 6, ‘Résolutions relatives aux conflits des lois en matière de nationalité (naturalisation et expatriation)’, Session de Venise (1896).

¹⁴⁴ In June 2019, the First Section (Civil) of the Italian Court of Cassation held that a stateless person could not be expelled otherwise than in accordance with art. 31 of the 1954 Convention, and that this applied also to the de facto stateless and to those awaiting a decision on their application, if the information and documentation available to the authorities indicated that statelessness appeared to be an issue: Sez. Prima Civile, *Sentenza n. 16489 del 19/06/2019* (ECLI:IT:CASS:2019:16489CIV).

¹⁴⁵ Art. 7: *Annuaire de l’Institut* ([n 132](#)), vol. 2, discussed at 155–6.

¹⁴⁶ UNGA res. 62/67, ‘Diplomatic protection’ (6 Dec. 2007) Annex, art. 8, ‘Stateless persons and refugees’; *Report of the International Law Commission*, 58th Sess. (2006): UN doc. A/61/10, Ch. IV, ‘Diplomatic protection’, 47–51.

¹⁴⁷ ‘International Assistance to Refugees’, LoN doc. A.13.1935.XII (1935); 143 League of Nations OJ Spec. Supp. 65.

¹⁴⁸ ‘Memorandum by the Norwegian Government’, in ‘International Assistance to Refugees’ ([n 147](#)) 65–6.

¹⁴⁹ ‘Report of the Committee on International Assistance to Refugees’ (3 Jan. 1936): LoN doc. C.2.M.2. 1936. XII; Loewenfeld ([n 120](#)) 68.

¹⁵⁰ ‘Report of the Committee on International Assistance to Refugees’ ([n 149](#)) 9–11.

¹⁵¹ UNGA res. 8 (I) (12 Feb. 1946).

¹⁵² ECOSOC res. 18 (III) (3 Oct. 1946).

¹⁵³ UN doc. E/CN.4/21 (1 Jul. 1947) 21.

¹⁵⁴ Commission on Human Rights, ‘Report on the Second Session’, UN doc. E/600 (17 Dec. 1947); UN doc. E/CN.4/56, 15, ‘Draft Resolution on Stateless Persons’.

¹⁵⁵ ECOSOC res. 116D(VI) 1 (2 Mar. 1948).

¹⁵⁶ United Nations, *A Study of Statelessness* (1949); UN doc. E /1112; E/1112/Add.1.

¹⁵⁷ Ibid., 8–9.

¹⁵⁸ Ibid., 9.

¹⁵⁹ Ibid., 17–33.

¹⁶⁰ On the establishment and work of the Committee, see [Ch. 2](#); Goodwin-Gill, G. S., ‘Introduction to the 1951 Convention/1967 Protocol relating to the Status of Refugees’: <https://legal.un.org/avl/ha/prsr/prsr.html>.

¹⁶¹ *Ad hoc Committee on Statelessness and Related Problems*, UN doc. E/AC.32/SR.3 (26 Jan. 1950) para. 34; the UK representative, Sir Leslie Brass, remarked later that, ‘the status of both refugees and stateless persons was that of unprotected persons in need of international protection and the convention should therefore apply equally to both’: UN doc. E/AC.32/SR.4 (26 Jan. 1950) para. 8. Cf. the views of the Brazilian representative, Mr Guerreiro: UN doc. E/AC.32/SR.3 (26 Jan. 1950) para. 13.

¹⁶² UN doc. E/AC.32/L.2 (17 Jan. 1950). This was subsequently revised following the Committee's decision to confine the draft convention to refugees; see UN doc. E/AC.32/L.2/Rev/1 (19 Jan. 1950).

¹⁶³ *Ad hoc* Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.2 (26 Jan. 1950) paras. 6–8, 15, 18; UN doc. E/AC.32/SR.3 (26 Jan. 1950) paras. 22, 28. The British representative nevertheless emphasized the necessity to distinguish measures to eliminate statelessness and measures taken to protect existing stateless persons until such time as their position had been regularized: *ibid.*, para. 24.

¹⁶⁴ See *Report* of the *Ad hoc* Committee: UN doc. E/1618 (17 Feb. 1950) Annex III. Measures to eliminate statelessness received even less attention, being dealt with in a Danish proposal: *ibid.*, Annex V. See also, ECOSOC res. 319 (XI) 'Refugees and stateless persons' (11 and 16 Aug. 1950).

¹⁶⁵ ECOSOC also asked the Secretary-General to gather information from States, though it was to note in March 1951, that only a limited number of governments had responded: ECOSOC res. 319 (XI) 'Refugees and stateless persons' (11 and 16 Aug. 1950); ECOSOC res. 352 (XII) 'Refugees and stateless persons: report by the Secretary-General arising out of Council resolution 319 B (XI), section III, relating to the problem of statelessness' (13 Mar. 1951).

¹⁶⁶ See, for example, Mr Robinson (Israel), UN doc. E/AC.32/SR.4 (26 Jan. 1950) para. 4.

¹⁶⁷ Manley O. Hudson, Special Rapporteur, 'Nationality, including statelessness': UN doc. A/CN.4/50; International Law Commission, *Yearbook* (1952) vol. 2, 8, 17.

¹⁶⁸ UNGA res. 429(V) (14 Dec. 1950). The draft protocol on stateless persons appears in *Report* of the *Ad hoc* Committee on Refugees and Stateless Persons, Second Session: UN doc. E/1850, Annex II; the Committee had been renamed in the interim.

¹⁶⁹ 1951 Convention relating to the Status of Refugees, Final Act, Part III.

¹⁷⁰ UNGA resolutions 538 (VI) 'Assistance to and protection of refugees' (2 Feb. 1952); 539 (VI) 'Draft Protocol relating to the Status of Stateless Persons' (4 Feb. 1952).

¹⁷¹ UNGA res. 629 (VII) 'Draft protocol relating to the status of stateless persons' (6 Nov. 1952).

¹⁷² ECOSOC res. 526 A (XVII) (26 Apr. 1954).

¹⁷³ 1954 Convention relating to the Status of Stateless Persons, 360 UNTS 117 (entered into force 6 June 1960). As of 30 April 2021, 95 States were party to the 1954 Convention.

¹⁷⁴ Cf. the Final Act of the 1954 Convention (ⁿ 173), in which the 27 participating States expressed the view that the *non-refoulement* provision in art. 33 of the 1951 Refugee Convention was, 'an expression of the generally accepted principle' of non-return, so that an equivalent article for stateless persons was not needed.

¹⁷⁵ This definition was proposed by the UN Secretariat, drawing on the words of Manley O. Hudson, in his first report as the ILC's Special Rapporteur on 'Nationality, including Statelessness': UN doc. A/CN.4/50 (21 Feb. 1952) 17. Whether the Special Rapporteur was

intending to define stateless persons as such, as opposed to distinguishing those stateless *de jure* from those stateless *de facto*, is a moot point. The description has a yet older provenance in the work of the Institut de Droit International; see Goodwin-Gill, G. S., ‘International Refugee Law in the Early Years’ in Costello, C., Foster, M., & McAdam, J., *The Oxford Handbook of International Refugee Law* (2021).

¹⁷⁶ Weis, P., ‘The Convention relating to the Status of Stateless Persons’ (1961) 10 *ICLQ* 255, 260.

¹⁷⁷ *Ibid.*, 264.

¹⁷⁸ Recommendation III, adopted by 16-1-4: 1954 Convention relating to the Status of Stateless Persons, Final Act: 360 UNTS 117, 122. On renunciation, see Scott, P. F., ‘Renouncing British citizenship’ (2021) 35 *Journal of Immigration, Asylum and Nationality Law* 7.

¹⁷⁹ See text to (n 163).

¹⁸⁰ See generally, Conklin, W. E., *Statelessness: The Enigma of the International Community* (2014); Edwards & van Waas (n 2); Inter-Parliamentary Union & UNHCR, *Good practices in nationality laws for the prevention and reduction of statelessness*, Handbook for Parliamentarians No. 29 (2018); Inter-Parliamentary Union & UNHCR, *Nationality and Statelessness*, Handbook for Parliamentarians No. 22 (2nd edn., 2014); Organization for Security and Co-operation in Europe & UNHCR, ‘Handbook on Statelessness in the OSCE Area: International Standards and Good Practices’ (2017); Sawyer, C. & Blitz, B. K., eds., *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (2011); van Waas, L., *Nationality Matters: Statelessness under International Law* (2008); van Waas, L., ‘The UN Statelessness Conventions’, in Edwards & van Waas (n 2); Weis, P., ‘The United Nations Convention on the Reduction of Statelessness’ (1962) 11 *ICLQ* 1073; Weis, P., *Nationality and Statelessness in International Law* (1956; 2nd edn., 1979).

¹⁸¹ 179 LNTS 89.

¹⁸² Arts. 7, 8, 9, 13–16, and 17.

¹⁸³ 179 LNTS 115.

¹⁸⁴ LoN doc. C.27.M.16.1931.V; 2252 UNTS 435 (Australia, Belgium, Brazil, El Salvador, Fiji, India, Pakistan, South Africa, United Kingdom, and Zimbabwe); see text to (n 64).

¹⁸⁵ ILC Yearbook (1951) vol. I, 133rd mtg., 418 f, paras. 1–12; ILC Yearbook (1952) vol. II, 4, para. 5; Goodwin-Gill, G. S., ‘Introduction to the 1961 Convention on the Reduction of Statelessness’, UN Audio-Visual Library of International Law, Historic Archives (2011): <https://legal.un.org/avl/ha/crs/crs.html>.

¹⁸⁶ UN doc. A/CN.4/50; ILC Yearbook (1952) vol. II, 3.

¹⁸⁷ ILC Yearbook (1952) vol. II, 7.

¹⁸⁸ ILC Yearbook (1952) vol. II, 7–8.

¹⁸⁹ ILC Yearbook (1952) vol. II, 19–22. Considerations ‘of a political nature’ inclined the Special Rapporteur to refrain from making concrete proposals.

¹⁹⁰ ILC Yearbook (1952) vol. I, Summary records, 4th Sess., 100–42, 190–91, 244, 251–2; 244, para. 87.

¹⁹¹ Ibid., 251–2, para. 15.

¹⁹² See Córdova's first report: UN doc. A/CN.4/64; ILC Yearbook (1953) vol. II, 167–95.

¹⁹³ ILC Yearbook (1953) vol. I, 170–97, 202–80, 321–2, 325–34, 345, 377–83.

¹⁹⁴ The Commission did not consider this decisive: 'If Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation': UN doc. A/2693, para. 12; ILC Yearbook (1954) vol. II.

¹⁹⁵ ILC Yearbook (1954) vol. I, 3–52.

¹⁹⁶ UN doc. A/2693, para. 14; ILC Yearbook (1954) vol. II.

¹⁹⁷ UNGA res. 896 (IX) (4 Dec. 1954).

¹⁹⁸ UN doc. A/CONF.9/10 (9 Jun. 1961) Add. 1–3 (5 Jul. 1961) 'Note by the Secretary-General with Annex containing observations by Governments on deprivation of nationality'.

¹⁹⁹ 1961 Convention on the Reduction of Statelessness 989 UNTS 175 (adopted 30 August 1961, entered into force 13 December 1975).

²⁰⁰ Ibid., arts. 11, 20(2).

²⁰¹ UNGA res. 3274 (XXIX) 'Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply' (10 Dec. 1974) (48-11-66); UNGA res. 31/36 (30 Nov. 1976) (117-9-8).

²⁰² UNGA res. 31/36 (30 Nov. 1976).

²⁰³ Weis, P., 'The United Nations Convention on the Reduction of Statelessness' (1962) 11 *ICLQ* 1073.

²⁰⁴ 179 LNTS 89, No. 4137.

²⁰⁵ In this regard, it continued the principle of *jus soli* already established in arts. 14 and 15 of the 1930 Hague Convention ([n 193](#)).

²⁰⁶ See s. 1.2.1.

²⁰⁷ 1961 Convention on the Reduction of Statelessness, Final Act, Resolution 1.

²⁰⁸ UNHCR noted for the 1961 Conference on the Reduction of Statelessness that, 'there are many persons who, without being *de jure* stateless, do not possess an effective nationality. They are usually called *de facto* stateless persons', and this was an important problem still requiring 'full consideration': UN doc. A/CONF.9/11 (30 Jun. 1961) 3–4, cited in Batchelor, C., 'Stateless Persons: Some Gaps in International Protection' (1995) 7 *IJRL* 232.

²⁰⁹ See generally, Robinson, N., *Convention relating to the Status of Stateless Persons. Its History and Interpretation. A Commentary* (1955); Batchelor, 'Stateless Persons' ([n 208](#)); Batchelor, C., 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *IJRL* 156; Bianchini, K., *Protecting Stateless Persons: The Implementation of the Convention relating to the Status of Stateless Persons across EU States* (2018); Erauw, G., '[Compatibility](#)

of the 1954 Convention relating to the Status of Stateless Persons with Canada’s Legal Framework and its International Human Rights Obligations’ (2015); Foster & Lambert (n 25); Foster M. & Lambert, H., ‘Statelessness as a Human Rights Issue: A Concept whose Time has Come’ (2016) 28 *IJRL* 564; Fripp, E., *Nationality and Statelessness in the International Law of Refugee Status* (2016); Manly, M., ‘UNHCR’s Mandate and Activities’, in Edwards & van Waas (n 2); Massey, H., ‘UNHCR and *de facto* Statelessness’ (2010); Sawyer & Blitz (n 180); van Waas 2008 and 2014 (n 180); UNHCR, ‘International case law relating to statelessness’ (Sep. 2010, updated Mar. 2012); UNHCR, Handbook on the Protection of Stateless Persons (2014).

²¹⁰ UNHCR, ‘Note on Refugee Children’, EC/SCP/46 (31 Aug. 1987) para. 25.

²¹¹ Executive Committee, ‘Report of the 38th Session’: UN doc. A/AC.96/702 (12 Oct. 1987) para. 205(f), (g).

²¹² UNHCR, ‘Note on International Protection’: UN doc. A/AC.96/713 (15 Aug. 1988) paras. 59–69; see also ‘Report of the Working Group on Solutions and Protection’: EC/SCP/64 (12 Aug. 1991) para. 52; ‘Stateless Persons: A Discussion Note’: EC/SCP/1992/CRP.4 (1 Apr. 1992); ‘Report of the Standing Committee on International Protection’: EC/SCP/70 (7 Jul. 1992); ‘Note on International Protection’: UN doc. A/AC.96/830 (7 Sep. 1994) paras. 60, 66.

²¹³ UNGA res. 43/117, ‘Office of the United Nations High Commissioner for Refugees’ (8 Dec. 1988) para. 9.

²¹⁴ Executive Committee, ‘Report of the 43rd Session’: UN doc. A/AC.96/804 (15 Oct. 1992) para. 21(y).

²¹⁵ ‘Note on Current UNHCR Activities on Behalf of Stateless Persons’: EC/1995/SCP/CRP.6; ‘Report of the Sub-Committee on International Protection’: UN doc. A/AC.96/858 (17 Oct. 1995) paras. 21–7.

²¹⁶ Executive Committee, ‘Report of the 45th Session’: UN doc. A/AC.96/839 (11 Oct. 1994) para. 19(ee).

²¹⁷ Executive Committee, ‘Report of the 46th Session’: UN doc. A/AC.96/860 (23 Oct. 1995) para. 20.

²¹⁸ UNGA res. 50/152, ‘Office of the United Nations High Commissioner for Refugees’ (21 Dec. 1995) Preamble; operative paras. 14, 15, 16.

²¹⁹ Seet, M., ‘The Origins of UNHCR’s Global Mandate on Statelessness’ (2016) 28 *IJRL* 7; Darling, K., ‘Protection of Stateless Persons in International Asylum and Refugee Law’ (2009) 21 *IJRL* 742.

²²⁰ See also the comprehensive Executive Committee Conclusion No. 106 (LVII) on the Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons (2006) para. 18.

²²¹ UNHCR, *Global Plan to End Statelessness 2014-2024* (2014); also, <http://www.unhcr.org/ibelong/>.

²²² By 30 April 2021, the 1961 Convention had attracted 76 ratifications.

²²³ See further ([n 221](#)).

²²⁴ By 30 April 2021, 95 States had ratified the 1954 Convention (up from 36 in 1989), and 76 States had ratified the 1961 Convention (up from 15 in 1989).

²²⁵ UNGA res. 55/153 (12 Dec. 2000); International Law Commission, ‘Draft Articles on Nationality of Natural Persons in relation to the Succession of States’, *Yearbook of the International Law Commission* (1999) vol. II, Part Two, 23–47.

²²⁶ CETS No. 166. The treaty entered into force on 1 March 2000; by 30 April 2021, it had been ratified by 21 States (the latest being Luxembourg on 1 January 2018).

²²⁷ CETS No. 200. By 30 April 2021, it had been ratified by seven States (Austria, Hungary, Luxembourg, Moldova, Montenegro, the Netherlands, and Norway).

²²⁸ *Kurić v Slovenia* ([n 27](#)) para. 332; see also paras. 218–9, 353 (although there is no right under the European Convention to acquire or retain a particular nationality, an arbitrary denial of citizenship might give rise to an issue under art. 8 because of its impact on private life); *Hoti v Croatia*, App. No. 63311/14, First Section (26 Apr. 2018) paras. 117, 122, 126, 138: violation of art. 8 due to failure to regularize the status of a long-resident stateless person, whose parents had been refugees and who had no formal or links in fact with any other country; the court also noted that the Croatian authorities had provided no assistance to facilitate contact with another country and to resolve the situation. *Ramadan v Malta*, App. No. 76136/12, Fourth Section (21 Jun. 2016) Final: (17 Oct. 2016) paras. 41–3, 89 (revocation of citizenship not arbitrary, but see Judge Pinto de Albuquerque, diss. op., 26–44).

²²⁹ See Lambert, H., ‘Stateless Refugees’ in Costello, C., Foster, M., & McAdam, J., *The Oxford Handbook on International Refugee Law* (2021), and further, [Ch. 3](#), s. 5.1.2.

²³⁰ See art. 1F, 1951 Convention; art.1(2), 1954 Convention.

²³¹ *A, B, C v Staatssekretariat für Migration SEM*, Judgment F-6147/2015 (5 Jan. 2017).

²³² *UNHCR’s Handbook on the Protection of Stateless Persons* ([n 209](#)) refers to ‘rights on a gradual, conditional scale’: paras. 129–39. The common background and, in part, the shared negotiating history, may be reason enough for a complementary approach to the interpretation of terms, but see further below.

²³³ On the *de jure/de facto* issue, see s. 2.2.1, s. 3.1.2.

²³⁴ Cour constitutionnel, Arrêt no. 198/2009 (17 Dec. 2009) paras. B.7; the difference in treatment, ‘n’est pas raisonnablement justifiée’: 6-B.8: <https://www.const-court.be/public/f/2009/2009-198f.pdf>; see also Arrêt no. 1/2012, paras. B.9-B.10: <https://www.const-court.be/public/f/2012/2012-001f.pdf>.

²³⁵ See [Ch. 2](#).

²³⁶ A failure to integrate such juridical facts into domestic law and practice can lead to egregious violations of human rights, such as indefinite detention; see, for example, *Al Kateb v Godwin* [2004] HCA 37.

²³⁷ In its submissions in *AS (Guinea) v Secretary of State for the Home Department* [2018]

EWCA Civ 2234, UNHCR referred to fewer than 25 of the 89 States parties as having set up procedures. See, generally, Bianchini ([n 198](#)).

²³⁸ See, generally, [UNHCR, *Handbook on the Protection of Stateless Persons* \(n 209\)](#); Bianchini ([n 209](#)) 134–59, 160–76, 177–206; Bianchini, K., ‘Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom’ (2020) 32 *IJRL* 440; Foster & Lambert ([n 25](#)); [European Network on Statelessness](#), ‘Statelessness Determination and the Protection Status of Stateless Persons’ (2013); Gyulai, G., ‘The Determination of Statelessness and the Establishment of Statelessness-Specific Determination Regimes’, in Edwards & van Waas ([n 2](#)) 116.

²³⁹ [UNHCR *Handbook on the Protection of Stateless Persons* \(n 209\)](#). The *Handbook*, which replaced three sets of guidelines published in 2012, is divided into three substantive parts: Criteria for determining statelessness; Procedures for the determination of statelessness; and Status of stateless persons at the national level. UNHCR has since published ‘Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through arts. 1–4 of the 1961 Convention on the Reduction of Statelessness’, HCR/GS/12/04 (21 Dec. 2012); ‘Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness’, HCR/GS/12/05 (May 2020).

²⁴⁰ [UNHCR *Handbook on the Protection of Stateless Persons* \(n 209\)](#) para. 16; cf. [UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* \(1979; re-issued 2019\)](#) para. 29. As already noted, there are limitations implicit in the ‘declaratory’ approach.

²⁴¹ [UNHCR *Handbook on the Protection of Stateless Persons* \(n 239\)](#), paras. 23–4; *Pham v Secretary of State for the Home Department* (UKSC) ([n 92](#)) para. 38 (Lord Carnwath): this question is not necessarily to be decided solely by reference to the text of the nationality legislation of the State in question, and reference may also be made to the practice of the Government.

²⁴² [UNHCR *Handbook on the Protection of Stateless Persons* \(n 209\)](#) paras. 31–6.

²⁴³ *Ibid.*, para. 50. See also, *R (on the application of Semeda) v Secretary of State for the Home Department* [2015] UKUT 00658, Upper Tribunal (Immigration and Asylum Chamber) (17 Dec. 2015) paras. 13, 28–9: future forecasts are ‘alien to this exercise’, and the question is whether the government recognized the applicant as one of its nationals at the time when the decision is made.

²⁴⁴ [UNHCR *Handbook on the Protection of Stateless Persons* \(n 209\)](#) para. 51.

²⁴⁵ *Ibid.*, para. 92.

²⁴⁶ *Ibid.*, para. 89. See also, *KV v Secretary of State for the Home Department* ([n 80](#)) [UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* \(n 240\)](#) para. 196.

²⁴⁷ [UNHCR *Handbook on the Protection of Stateless Persons* \(n 209\)](#) para. 91.

²⁴⁸ See further below.

²⁴⁹ *Sentenza n.* 4262/2015, Italian Supreme Court (Corte Suprema di Cassazione) (4 Nov. 2014); for summary in English, see https://www.refworld.org/cases/ITA_CC,556da6cf4.html.

²⁵⁰ AS (*Guinea*) (n 237).

²⁵¹ Ibid., paras. 89–93. Cf. UNHCR’s seven submissions, summarized in the judgment (n 237) paras. 34–40.

²⁵² Ibid., paras. 43–44. See also *Pham v Secretary of State for the Home Department* (EWCA) (n 11).

²⁵³ AS (*Guinea*) (n 237) paras. 46–7.

²⁵⁴ Cf. *JM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 188, paras. 13–14.

²⁵⁵ Ibid., para. 57.

²⁵⁶ Ibid., para. 58.

²⁵⁷ UNHCR *Handbook on the Protection of Stateless Persons* (n 209) paras. 154–6. The protection through reacquisition of residence appears to be an import from the 1951 Refugees Convention; it does not appear in the 1954 Convention, which focuses on statelessness alone, but reflects the practical concern of States which will need to decide whether to allow a stateless person to remain.

²⁵⁸ Originally introduced in March 2013, see Statement of Changes to the Immigration Rules, HC1039 (14 Mar. 2013); see now Immigration Rules Part 14: Stateless persons: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons> (Rules 401–16) (updated 7 Apr. 2021). For other examples, see European Network on Statelessness, ‘Statelessness Index’: <https://index.statelessness.eu/>. See also, Harvey, A., ‘The UK’s New Statelessness Determination Procedure in Context’ (2013) 27 *Journal of Immigration and Nationality Law* 294; Splawn, C., ‘Representing stateless people in the UK: a practitioner’s view’ (25 Feb. 2021): <https://www.statelessness.eu/updates/>; Elliott, S., ‘Statelessness Determination in the UK: UNHCR audit reveals the need for fundamental changes in approaches taken to decision making’ (18 Feb. 2021): <https://www.statelessness.eu/updates/>.

²⁵⁹ There are some slight discrepancies in the language. Rule 402 uses the ‘serious reasons for considering’ criterion across the board, and substitutes ‘the country of their former habitual residence’ for the Convention’s reference to ‘the country in which they have taken residence’ in art. 1(2)(ii).

²⁶⁰ Rule 403(b), (c). See *JM (Zimbabwe) v Secretary of State for the Home Department* (n 254), paras. 10–11, 17. These requirements must also be satisfied where application is made for indefinite leave to remain: Rule 407(d). The Explanatory Memorandum accompanying the Statement of Changes (n 258) noted with regard to the ‘inadmissibility’ requirement that this would, ‘ensure that the policy captures those who are genuinely stateless and have nowhere else to go, whilst preventing abuse from applicants who have no status in the UK and are awaiting removal’: para. 7.41.

²⁶¹ Home Office, ‘Stateless leave guidance’, ver. 3.0 (30 Oct. 2019) 14: ‘Statelessness and

admissibility—Definition; 17: ‘Assessing evidence’; 20: ‘Decisions made by national authorities’.

²⁶² *X v Belgian State*, 2014/7124 (2012/AR/1655) Cour d’Appel de Bruxelles (17 Sep. 2014), citing Constitutional Court (para. B.7, Judgment of 17 Dec. 2009, and para. B.10, Judgment of 11 Jan. 2012).

²⁶³ For another perspective on inability to return, see Alexander, H. & Simon, J., ‘“Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change’ (2014) 26 *Florida Journal of International Law* 531.

Annex Basic Instruments

1. 1950 Statute of the Office of the United Nations High Commissioner for Refugees.
2. 1951 Convention relating to the Status of Refugees.
3. 1967 Protocol relating to the Status of Refugees.
4. 1954 Convention relating to the Status of Stateless Persons.
5. 1961 Convention on the Reduction of Statelessness.
6. 1969 Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa.
7. 1984 Cartagena Declaration on Refugees.
8. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

1. 1950 Statute of the Office of the United Nations High Commissioner for Refugees

General Assembly Resolution 428(V) of 14 December 1950

The General Assembly,

In view of its resolution 319 A (IV) of 3 December 1949,

1. Adopts the Annex to the present resolution, being the Statute of the Office of the United Nations High Commissioner for Refugees;
2. Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his office, especially by:
 - (a) Becoming parties to international conventions providing for the protection of refugees, and taking the necessary steps of implementation under such conventions;
 - (b) Entering into special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection;
 - (c) Admitting refugees to their territories, not excluding those in the most destitute categories;
 - (d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees;
 - (e) Promoting the assimilation of refugees, especially by facilitating their naturalization;
 - (f) Providing refugees with travel and other documents such as would normally be provided to other aliens by their national authorities, especially documents which would facilitate their resettlement;
 - (g) Permitting refugees to transfer their assets and especially those necessary for their resettlement;
 - (h) Providing the High Commissioner with information concerning the number and condition of refugees, and laws and regulations concerning them;
3. Requests the Secretary-General to transmit the present resolution, together with the Annex attached thereto, also to States non-members of the United Nations, with a view to obtaining their co-operation in its implementation.

Annex: Statute of the Office of the United Nations High Commissioner for Refugees

Chapter I—General Provisions

1. The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

In the exercise of his functions, more particularly when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons, the High Commissioner shall request the opinion of the advisory committee on refugees if it is created.

2. The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.
3. The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council.
4. The Economic and Social Council may decide, after hearing the views of the High Commissioner on the subject, to establish an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.
5. The General Assembly shall review, not later than at its eighth regular session, the arrangements for the Office of the High Commissioner with a view to determining whether the Office should be continued beyond 31 December 1953.

Chapter II—Functions of the High Commissioner

6. The competence of the High Commissioner shall extend to:
 - A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 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.

- (ii) 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 or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

Decisions as to eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of the present paragraph;

The competence of the High Commissioner shall cease to apply to any person defined in [section A](#) above if:

-) He has voluntarily re-availed himself of the protection of the country of his nationality; or
-) Having lost his nationality, he has voluntarily re-acquired it; or
-) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
-) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
-) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked; or
-) Being a person who has no nationality, he can no longer, because the circumstances in connection with which he has been recognized as a refugee

have ceased to exist and he is able to return to the country of his former habitual residence, claim grounds other than those of personal convenience for continuing to refuse to return to that country;

- B. Any other 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 nationality, or, if he has no nationality, to return to the country of his former habitual residence.
7. Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:
 - (a) Who is a national of more than one country unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national; or
 - (b) Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or
 - (c) Who continues to receive from other organs or agencies of the United Nations protection or assistance; or
 - (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.
8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
 - (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
 - (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
 - (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
 - (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
 - (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
 - (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
 - (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
 - (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.
9. The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.
10. The High Commissioner shall administer any funds, public or private, which he receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance. The High Commissioner may reject any offers which he does not consider appropriate or which cannot be utilized. The High Commissioner shall not appeal to Governments for funds or make a general appeal, without the prior approval of the General Assembly. The High Commissioner shall include in his annual report a statement of his activities in this field.
11. The High Commissioner shall be entitled to present his views before the General Assembly, the Economic and Social Council and their subsidiary bodies.

The High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly.

12. The High Commissioner may invite the co-operation of the various specialized agencies.

Chapter III—Organization and Finances

13. The High Commissioner shall be elected by the General Assembly on the nomination of the Secretary-General. The terms of appointment of the High Commissioner shall be proposed by the Secretary-General and approved by the General Assembly. The High Commissioner shall be elected for a term of three years, from 1 January 1951.
14. The High Commissioner shall appoint, for the same term, a Deputy High Commissioner of a nationality other than his own.
15. (a) Within the limits of the budgetary appropriations provided, the staff of the Office of the High Commissioner shall be appointed by the High Commissioner and shall be responsible to him in the exercise of their functions.
(b) Such staff shall be chosen from persons devoted to the purposes of the Office of the High Commissioner.
(c) Their conditions of employment shall be those provided under the staff regulations adopted by the General Assembly and the rules promulgated thereunder by the Secretary-General.
(d) Provision may also be made to permit the employment of personnel without compensation.
16. The High Commissioner shall consult the Government of the countries of residence of refugees as to the need for appointing representatives therein. In any country recognizing such need, there may be appointed a representative approved by the Government of that country. Subject to the foregoing, the same representative may serve in more than one country.
17. The High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest.
18. The Secretary-General shall provide the High Commissioner with all necessary facilities within budgetary limitations.

19. The Office of the High Commissioner shall be located in Geneva, Switzerland.
20. The Office of the High Commissioner shall be financed under the budget of the United Nations. Unless the General Assembly subsequently decides otherwise, no expenditure other than administrative expenditures relating to the functioning of the Office of the High Commissioner shall be borne on the budget of the United Nations and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions.
21. The administration of the Office of the High Commissioner shall be subject to the Financial Regulations of the United Nations and to the financial rules promulgated thereunder by the Secretary-General.
22. Transactions relating to the High Commissioner's funds shall be subject to audit by the United Nations Board of Auditors, provided that the Board may accept audited accounts from the agencies to which funds have been allocated. Administrative arrangements for the custody of such funds and their allocation shall be agreed between the High Commissioner and the Secretary-General in accordance with the Financial Regulations of the United Nations and rules promulgated thereunder by the Secretary-General.

2. 1951 Convention relating to the Status of Refugees

Entry into force: 22 April 1954

Text: 189 UNTS 150

FINAL ACT OF THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

I

The General Assembly of the United Nations, by Resolution 429 (V) of 14 December 1950, decided to convene in Geneva a Conference of Plenipotentiaries to complete the drafting of, and to sign, a Convention relating to the Status of Refugees and a Protocol relating to the Status of Stateless Persons.

The Conference met at the European Office of the United Nations in Geneva

from 2 to 25 July 1951.

The Governments of the following twenty-six States were represented by delegates who all submitted satisfactory credentials or other communications of appointment authorizing them to participate in the Conference:

Australia	Italy
Austria	Luxembourg
Belgium	Monaco
Brazil	Netherlands
Canada	Norway
Colombia	Sweden
Denmark	Switzerland (the Swiss delegation also represented Liechtenstein)
Egypt	Turkey
France	United Kingdom of Great Britain and Northern Ireland
Federal Republic of Germany	United States of America
Greece	Venezuela
Holy See	
Iraq	Yugoslavia
Israel	

The Governments of the following two States were represented by observers:

Cuba
Iran

Pursuant to the request of the General Assembly, the United Nations High Commissioner for Refugees participated, without the right to vote, in the deliberations of the Conference.

The International Labour Organization and the International Refugee Organization were represented at the Conference without the right to vote.

The Conference invited a representative of the Council of Europe to be represented at the Conference without the right to vote.

Representatives of ... Non-Governmental Organizations in Consultative relationship with the Economic and Social Council were also present as observers...

[List of Non-Governmental Organizations omitted]

Representatives of Non-Governmental Organizations which have been granted consultative status by the Economic and Social Council as well as those entered by the Secretary-General on the Register referred to in Resolution 288 B (X) of the Economic and Social Council, paragraph 17, had under the rules of procedure

adopted by the Conference the right to submit written or oral statements to the Conference.

The Conference elected Mr. Knud Larsen, of Denmark, as President, and Mr. A. Herment, of Belgium, and Mr. Talat Miras, of Turkey, as Vice-Presidents.

At its second meeting, the Conference, acting on a proposal of the representative of Egypt, unanimously decided to address an invitation to the Holy See to designate a plenipotentiary representative to participate in its work. A representative of the Holy See took his place at the Conference on 10 July 1951.

The Conference adopted as its agenda the Provisional Agenda drawn up by the Secretary-General (A/CONF.2/2/Rev.1). It also adopted the Provisional Rules of Procedure drawn up by the Secretary-General, with the addition of a provision which authorized a representative of the Council of Europe to be present at the Conference without the right to vote and to submit proposals (A/CONF.2/3/Rev.1).

In accordance with the Rules of Procedure of the Conference, the President and Vice-Presidents examined the credentials of representatives and on 17 July 1951 reported to the Conference the results of such examination, the Conference adopting the report.

The Conference used as the basis of its discussions the draft Convention relating to the Status of Refugees and the draft Protocol relating to the Status of Stateless Persons prepared by the ad hoc Committee on Refugees and Stateless Persons at its second session held in Geneva from 14 to 25 August 1950, with the exception of the preamble and article 1 (Definition of the term 'refugee') of the draft Convention. The text of the preamble before the Conference was that which was adopted by the Economic and Social Council on 11 August 1950 in Resolution 319 B II (XI). The text of article 1 before the Conference was that recommended by the General Assembly on 14 December 1950 and contained in the Annex to Resolution 429 (V). The latter was a modification of the text as it had been adopted by the Economic and Social Council in Resolution 319 B II (XI).¹

The Conference adopted the Convention relating to the Status of Refugees in two readings. Prior to its second reading it established a Style Committee composed of the President and the representatives of Belgium, France, Israel, Italy, the United Kingdom of Great Britain and Northern Ireland and the United States of America, together with the High Commissioner for Refugees, which elected as its Chairman Mr. G. Warren, of the United States of America. The

Style Committee re-drafted the text which had been adopted by the Conference on first reading, particularly from the point of view of language and of concordance between the English and French texts.

The Convention was adopted on 25 July by 24 votes to none with no abstentions and opened for signature at the European Office of the United Nations from 28 July to 31 August 1951. It will be re-opened for signature at the permanent headquarters of the United Nations in New York from 17 September 1951 to 31 December 1952.

The English and French texts of the Convention, which are equally authentic, are appended to this Final Act.

II

The Conference decided, by 17 votes to 3 with 3 abstentions, that the titles of the chapters and of the articles of the Convention are included for practical purposes and do not constitute an element of interpretation.

III

With respect to the draft Protocol relating to the Status of Stateless Persons, the Conference adopted the following resolution:

'The Conference,

'Having considered the draft Protocol relating to the Status of Stateless Persons,

'Considering that the subject still requires more detailed study,

'Decides not to take a decision on the subject at the present Conference and refers the draft Protocol back to the appropriate organs of the United Nations for further study.'

IV

The Conference adopted unanimously the following recommendations:

A

'The Conference,

'Considering that the issue and recognition of travel documents is necessary to

facilitate the movement of refugees, and in particular their resettlement,

‘Urges Governments which are parties to the Inter-Governmental Agreement on Refugee Travel Documents signed in London on 15 October 1946, or which recognize travel documents issued in accordance with the Agreement, to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in article 1 of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under article 28 of the said Convention.’

B

‘*The Conference*,

‘Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

‘Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family,

‘Recommends Governments to take the necessary measures for the protection of the refugee’s family especially with a view to:

- ‘(1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
- ‘(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.’

C

‘*The Conference*,

‘Considering that, in the moral, legal and material spheres, refugees need the help of suitable welfare services, especially that of appropriate non-governmental organizations,

‘Recommends Governments and inter-governmental bodies to facilitate, encourage and sustain the efforts of properly qualified organizations.’

D

'The Conference,

'Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position,

'Recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.'

E

'The Conference,

'Expresses the hope that 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 so 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.'

In Witness Whereof the President, Vice Presidents and the Executive Secretary of the Conference have signed this Final Act.

Done at Geneva this twenty-eighth day of July one thousand nine hundred and fifty-one in a single copy in the English and French languages, each text being equally authentic. Translations of this Final Act into Chinese, Russian and Spanish will be prepared by the Secretary-General of the United Nations, who will, on request, send copies thereof to each of the Governments invited to attend the Conference.

The President of the Conference: Knud Larsen

The Vice Presidents of the Conference: A. Herment. Talat Miras

The Executive Secretary of the Conference: John P. Humphrey

Convention Relating to the Status of Refugees

Preamble

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,

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,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

Chapter I—General Provisions

Article 1 Definition of the term ‘Refugee’

- A. For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who:

- (1) 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; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;
- (2) 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.

In the case of a 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.

- B. (1) For the purposes of this Convention, the words ‘events occurring before 1 January 1951’ in Article 1, [Section A](#), shall be understood to mean either
- ‘events occurring in Europe before 1 January 1951’; or
 - ‘events occurring in Europe or elsewhere before 1 January 1951’, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.
- (2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.
- C. This Convention shall cease to apply to any person falling under the terms of [Section A](#) if:

- (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) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under **Section A(1)** of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under **section A(1)** of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

- D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

- E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

- F. 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.

Article 2 General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3 Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4 Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5 Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6 The term ‘in the same circumstances’

For the purposes of this Convention, the term ‘in the same circumstances’ implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7 Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.
2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to [paragraphs 2 and 3](#), and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.
5. The provisions of [paragraphs 2 and 3](#) apply both to the rights and benefits referred to in [Articles 13, 18, 19, 21 and 22](#) of this Convention and to rights and benefits for which this Convention does not provide.

Article 8 Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this Article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9 Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10 Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.
2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11 Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II—Juridical Status

Article 12 Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13 Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other

contracts relating to movable and immovable property.

Article 14 Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15 Right of association

As regards non-political and non-profit making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16 Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III—Gainful Employment

Article 17 Wage-earning employment

1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:
 - (a) He has completed three years' residence in the country;
 - (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;
 - (c) He has one or more children possessing the nationality of the country of residence.
3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18 Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19 Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV—Welfare

Article 20 Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21 Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22 Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23 Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24 Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:
 - (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;
 - (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
 - (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.
2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.
3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the

process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V—Administrative measures

Article 25 Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.
2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.
3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.
4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
5. The provisions of this Article shall be without prejudice to [Articles 27](#) and [28](#).

Article 26 Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27 Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28 Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.
2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29 Fiscal charges

1. The Contracting States shall not impose upon refugee duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.
2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30 Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.
2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31 Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32 Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
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.

Article 34 Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI—Executory and transitory provisions

Article 35 Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.
2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:
 - (a) the condition of refugees,
 - (b) the implementation of this Convention, and
 - (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36 Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37 Relation to previous Conventions

Without prejudice to Article 28, paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII—Final clauses

Article 38 Settlement of disputes

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39 Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall hereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.
2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open from 28 July 1951 for accession by the States referred to in [paragraph 2](#) of this Article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40 Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the governments of such territories.

Article 41 Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those Articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States,
- (b) With respect to those Articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such Articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment.
- (c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42 Reservations

1. 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.
2. Any State making a reservation in accordance with [paragraph 1](#) of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43 Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44 Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.
3. Any State which has made a declaration or notification under [Article 40](#) may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45 Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46 Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in [Article 39](#):

- (a) of declarations and notifications in accordance with [Section B](#) of Article 1;
- (b) of signatures, ratifications and accessions in accordance with [Article 39](#);
- (c) of declarations and notifications in accordance with [Article 40](#);
- (d) of reservations and withdrawals in accordance with [Article 42](#);
- (e) of the date on which this Convention will come into force in accordance with [Article 43](#);
- (f) of denunciations and notifications in accordance with [Article 44](#);
- (g) of requests for revision in accordance with [Article 45](#).

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments,

DONE at GENEVA, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in [Article 39](#).

Schedule²

Paragraph 1

1. The travel document referred to in [Article 28](#) of this Convention shall be similar to the specimen annexed hereto.
2. The document shall be made out in at least two languages, one of which shall be English or French.

Paragraph 2

Subject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

Paragraph 3

The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.

Paragraph 4

Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.

Paragraph 5

The document shall have a validity of either one or two years, at the discretion of the issuing authority.

Paragraph 6

1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.
2. Diplomatic or consular authorities, specially authorized for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.
3. The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents or issuing new documents to refugees no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.

Paragraph 7

The Contracting States shall recognize the validity of the documents issued in accordance with the provisions of [Article 28](#) of this Convention.

Paragraph 8

The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him and if a visa is required, affix a visa on the document of which he is the holder.

Paragraph 9

1. The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination.
2. The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.

Paragraph 10

The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports.

Paragraph 11

When a refugee has lawfully taken up residence in the territory of another Contracting State, the responsibility for the issue of a new document, under the terms and conditions of [Article 28](#), shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply.

Paragraph 12

The authority issuing a new document shall withdraw the old document and shall return it to the country of issue, if it is stated in the document that it should be so returned; otherwise it shall withdraw and cancel the document.

Paragraph 13

1. Each Contracting State undertakes that the holder of a travel document issued by it in accordance with [Article 28](#) of this Convention shall be readmitted to its territory at any time during the period of its validity.
2. Subject to the provisions of the preceding sub-paragraph, a Contracting State may require the holder of the document to comply with such formalities as may be prescribed in regard to exit from or return to its territory.
3. The Contracting States reserve the right, in exceptional cases, or in cases where the refugee's stay is authorized for a specific period, when issuing the document, to limit the period during which the refugee may return to a period of not less than three months.

Paragraph 14

Subject only to the terms of [paragraph 13](#), the provisions of this Schedule in no

way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

3. 1967 Protocol relating to the Status of Refugees

Entry into force: 4 October 1967

Text: 606 UNTS 267

Preamble

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I General provision

1. The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
2. For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words '... a result of such events', in Article 1 A (2) were omitted.
3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with Article 1 B (1)(a) of the Convention, shall, unless extended under Article 1 B (2) thereof, apply also under the present Protocol.

Article II Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.
2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:
 - (a) The condition of refugees;
 - (b) The implementation of the present Protocol;
 - (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of the Convention to be applied in accordance with Article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States.
- (b) With respect to those articles of the Convention to be applied in accordance with Article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;
- (c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with Article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII Reservations and declarations

1. At the time of accession, any State may make reservations in respect of Article IV of the present Protocol and in respect of the application in accordance with Article I of the present Protocol of any provisions of the Convention other than those contained in Articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this Article shall not extend to refugees in respect of whom the Convention applies.
2. Reservations made by States Parties to the Convention in accordance with Article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.
3. Any State making a reservation in accordance with paragraph 1 of this Article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.
4. Declarations made under Article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of Article 40, paragraphs 2 and 3, and of Article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII Entry into force

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.
2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in [Article V](#) above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI Deposit in the archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in [Article V](#) above.

4. 1954 Convention relating to the Status of Stateless Persons

Entry in force: 6 June 1960

Text: 360 UNTS 117

Final Act of the United Nations Conference on the Status of Stateless Persons
Done at New York, on 28 September 1954

I

The Economic and Social Council, on 26 April 1954 at its seventeenth session, by resolution 526 A (XVII)¹ decided that a second conference of plenipotentiaries should be convened to revise in the light of the provisions of the Convention Relating to the Status of Refugees of 28 July 1951² and of the observations made by Governments the draft Protocol relating to the Status of Stateless Persons prepared by an Ad Hoc Committee of the Economic and Social

Council in 1950 and to open the instrument for signature.

The Conference met at the Headquarters of the United Nations in New York from 13 to 23 September 1954.

The Governments of the following twenty-seven States were represented by delegates all of whom submitted satisfactory credentials or other communications of appointment authorizing them to participate in the Conference :

Australia
Belgium
Brazil
Cambodia
Costa Rica
Denmark
Ecuador
El Salvador
France
Germany, Federal Republic
Guatemala
Holy See
Honduras
Iran
Israel
Liechtenstein
Monaco
Netherlands
Norway
Philippines
Sweden
Switzerland
Turkey
United Kingdom
Yemen
Yugoslavia

The Governments of the following five States were represented by observers:
Argentina, Egypt, Greece, Indonesia, Japan.

A representative of the United Nations High Commissioner for Refugees participated, without the right to vote, in the deliberations of the Conference.

The Conference decided to invite interested specialized agencies to participate in the proceedings without the right to vote. The International Labour Organisation was accordingly represented.

The Conference also decided to permit representatives of non-governmental organizations which have been granted consultative status by the Economic and Social Council as well as those entered by the Secretary-General on the Register to submit written or oral statements to the Conference.

Representatives of the following non-governmental organizations were present as observers :

Category A

International Confederation of Free Trade Unions

International Federation of Christian Trade Unions

Category B

Agudas Israel

Commission of the Churches on International Affairs

Consultative Council of Jewish Organizations

Friends' World Committee for Consultation

International Conference of Catholic Charities

International League for the Rights of Man

World Jewish Congress

World's Alliance of Young Men's Christian Associations

Organizations on the Register

Lutheran World Federation

The Conference elected Mr. Knud Larsen of Denmark as President and Mr. A. Herment of Belgium, and Mr. Jayme de Barros Gomes of Brazil as Vice-Presidents.

The Conference adopted as its agenda the Provisional Agenda drawn up by the Secretary-General (E/CONF.17/2). It also adopted the draft Rules of Procedure drawn up by the Secretary-General (E/CONF.17/2) excepting rule 5, which it decided to delete (E/CONF.17/2/Add.1). At its 12th meeting the Conference decided to amend rule 7 (E/CONF.17/2/Add.2).

The Conference appointed (i) a Drafting Committee on the Definition of the Term 'Stateless Person', which was composed of the President of the Conference

and the representatives of Australia, Belgium, Brazil, the Federal Republic of Germany, France, Israel and the United Kingdom of Great Britain and Northern Ireland ; (ii) an *Ad Hoc* Committee on the Question of the Travel Document for Stateless Persons composed of the President of the Conference and the representatives of Belgium, Brazil, France, the Federal Republic of Germany, the United Kingdom and Yugoslavia; and (iii) a Style Committee composed of the President of the Conference and the representatives of Belgium, France, Guatemala and the United Kingdom.

The Conference used as the basis of its discussions the Draft Protocol Relating to the Status of Stateless Persons prepared by the *Ad Hoc* Committee of the Economic and Social Council on Refugees and Stateless Persons at its second session held in Geneva in 1950 and the provisions of the Convention Relating to the Status of Refugees adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons held at Geneva from 2 to 25 July 1951. The main working document for the Conference was a memorandum by the Secretary-General, document E/CONF.17/3.

The Conference decided, by 12 votes to none with 3 abstentions, to prepare an independent convention dealing with the status of stateless persons rather than a protocol to the 1951 Convention Relating to the Status of Refugees.

The Convention was adopted on 23 September 1954 by 19 votes to none with 2 abstentions, and opened for signature at the Headquarters of the United Nations.

The English, French and Spanish texts of the Convention, which are equally authentic, are appended to this Final Act.

II

The Conference unanimously decided that the titles of the chapters and of the articles of the Convention are included for practical purposes and do not constitute an element of interpretation.

III

The Conference adopted the following recommendation by 16 votes to 1 with 4 abstentions:

‘*The Conference,*

'Recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons; and

'Recommends further that, in cases where the State in whose territory the person resides has decided to accord the treatment referred to above, other Contracting States also accord him the treatment provided for by the Convention.'

IV

The Conference unanimously adopted the following resolution:

'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.'

In Witness Whereof the President, the Vice-Presidents and the Executive Secretary of the Conference have signed this Final Act.

Done at New York this twenty-eighth day of September one thousand nine hundred and fifty-four in a single copy in the English, French and Spanish languages, each text being equally authentic. Translations of this Final Act into Chinese and Russian will be prepared by the Secretary-General of the United Nations, who will, on request, send copies thereof to each of the Governments invited to attend the Conference.

1954 Convention relating to the Status of Stateless Persons

Preamble

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General

Assembly of the United Nations have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,

Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,

Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement,

Have agreed as follows:

Chapter I General Provisions

Article 1 Definition of the term ‘stateless person’

1. For the purpose of this Convention, the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.
2. This Convention shall not apply:
 - (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
 - (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
 - (iii) To persons with respect to whom there are serious reasons for considering that:
 - (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
 - (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
 - (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2 General obligations

Every stateless person has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3 Non-discrimination

The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.

Article 4 Religion

The Contracting States shall accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to

freedom to practise their religion and freedom as regards the religious education of their children.

Article 5 Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to stateless persons apart from this Convention.

Article 6 The term ‘in the same circumstances’

For the purpose of this Convention, the term ‘in the same circumstances’ implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling.

Article 7 Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to stateless persons the same treatment as is accorded to aliens generally.
2. After a period of three years’ residence, all stateless persons shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to stateless persons the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to stateless persons, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to [paragraphs 2](#) and [3](#), and to extending exemption from reciprocity to stateless persons who do not fulfil the conditions provided for in paragraphs 2 and 3.
5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in [Articles 13, 18, 19, 21](#) and [22](#) of this Convention and to rights and benefits for which this Convention does not provide.

Article 8 Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals or former nationals of a foreign State, the Contracting States shall not apply such measures to a stateless person solely on account of his having previously possessed the nationality of the foreign State in question. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article shall, in appropriate cases, grant exemptions in favour of such stateless persons.

Article 9 Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10 Continuity of residence

1. Where a stateless person has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.
2. Where a stateless person has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11 Stateless seamen

In the case of stateless persons regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II Juridical Status

Article 12 Personal status

1. The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a stateless person and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become stateless.

Article 13 Movable and immovable property

The Contracting States shall accord to a stateless person treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14 Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a stateless person shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15 Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 16 Access to courts

1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.
2. A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III Gainful Employment

Article 17 Wage-earning employment

1. The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment.
2. The Contracting States shall give sympathetic consideration to assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals, and in particular of those stateless persons who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18 Self-employment

The Contracting States shall accord to a stateless person lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19 Liberal professions

Each Contracting State shall accord to stateless persons lawfully staying in their

territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Chapter IV Welfare

Article 20 Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, stateless persons shall be accorded the same treatment as nationals.

Article 21 Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22 Public education

1. The Contracting States shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23 Public relief

The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24 Labour legislation and social security

1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:
 - (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities; remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;
 - (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
 - (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.
2. The right to compensation for the death of a stateless person resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.
3. The Contracting States shall extend to stateless persons the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.
4. The Contracting States will give sympathetic consideration to extending

to stateless persons so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V

Administrative Measures

Article 25 Administrative assistance

1. When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities.
2. The authority or authorities mentioned in [paragraph 1](#) shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.
3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary.
4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
5. The provisions of this article shall be without prejudice to [Articles 27 and 28](#).

Article 26 Freedom of movement

Each Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27 Identity papers

The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.

Article 28 Travel documents

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

Article 29 Fiscal charges

1. The Contracting States shall not impose upon stateless persons duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations .
2. Nothing in the above paragraph shall prevent the application to stateless persons of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30 Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit stateless persons to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.
2. A Contracting State shall give sympathetic consideration to the application of stateless persons for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31 Expulsion

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 32 Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

Final Clauses

Article 33 Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 34 Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 35 Signature, ratification and accession

1. This Convention shall be open for signature at the Headquarters of the United Nations until 31 December 1955.
2. It shall be open for signature on behalf of:
 - (a) Any State Member of the United Nations;
 - (b) Any other State invited to attend the United Nations Conference on the Status of Stateless Persons; and
 - (c) Any State to which an invitation to sign or to accede may be addressed by the General Assembly of the United Nations.
3. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. It shall be open for accession by the States referred to in [paragraph 2](#) of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 36 Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 37 Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;
- (c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 38 Reservations

1. 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) and 33 to 42 inclusive.
2. Any State making a reservation in accordance with [paragraph 1](#) of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 39 Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 40 Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.
3. Any State which has made a declaration or notification under [Article 36](#) may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 41 Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 42 Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in [Article 35](#):

- (a) Of signatures, ratifications and accessions in accordance with [Article 35](#);
- (b) Of declarations and notifications in accordance with [Article 36](#);
- (c) Of reservations and withdrawals in accordance with [Article 38](#);
- (d) Of the date on which this Convention will come into force in accordance with [Article 39](#);
- (e) Of denunciations and notifications in accordance with [Article 40](#);
- (f) Of request for revision in accordance with [Article 41](#).

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at New York, this twenty-eighth day of September, one thousand nine hundred and fifty-four, in a single copy, of which the English, French and Spanish texts are equally authentic and which shall remain deposited in the

archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in Article 35.

[Schedule on travel documents omitted]

5. 1961 Convention on the Reduction of Statelessness

Entry into force: 13 December 1975

Text: 989 UNTS 175

Final Act of the United Nations Conference on the Elimination or Reduction of Future Statelessness

1. The General Assembly of the United Nations, by resolution 896 (IX) 1 of 4 December 1954, expressed its desire that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States had communicated to the Secretary-General their willingness to co-operate in such a conference. The Secretary-General was requested to fix the exact time and place for the conference when that condition had been met. The General Assembly noted that the International Law Commission had submitted to it drafts of a Convention on the Elimination of Future Statelessness and a Convention on the Reduction of Future Statelessness in the Report of the International Law Commission covering its sixth session in 1954. The General Assembly requested the Governments of States invited to participate in the conference to give early consideration to the merits of a multilateral convention on the elimination or reduction of future Statelessness.
2. Upon the fulfilment of the condition envisaged in the resolution of the General Assembly, the Secretary-General convened a United Nations Conference on the Elimination or Reduction of Future Statelessness at the European Office of the United Nations at Geneva on 24 March 1959. The Conference met at the European Office of the United Nations from 24 March to 18 April 1959.
3. At the time of its adjournment on 18 April 1959 the Conference adopted the following resolution:

‘The Conference,

‘Being unable to terminate the work entrusted to it within the time provided for its work,

‘Proposes to the competent organ of the United Nations to reconvene the Conference at the earliest possible time in order to continue and complete its work.’

4. In pursuance of this resolution, the Secretary-General of the United Nations, after ascertaining the views of the participating States, decided that the Conference should be reconvened at the United Nations Headquarters in New York on 15 August 1961. The Conference met at the United Nations Headquarters from 15 to 28 August 1961.
5. At the first part of the Conference the Governments of the following thirty-five States were represented: Argentina, Austria, Belgium, Brazil, Canada, Ceylon, Chile, China, Denmark, Dominican Republic, Federal Republic of Germany, France, Holy See, India, Indonesia, Iraq, Israel, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Norway, Pakistan, Panama, Peru, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States, Yugoslavia.
6. The Governments of the following States were represented by observers: Finland, Greece.
7. At the second part of the Conference the Governments of the following thirty States were represented: Argentina, Austria, Belgium, Brazil, Canada, Ceylon, China, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Holy See, Indonesia, Israel, Italy, Japan, Netherlands, Norway, Pakistan, Panama, Peru, Spain, Sweden, Switzerland, Turkey, United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States, Yugoslavia.
8. The Governments of the following States were represented by observers: Greece, Iraq.
9. At the first part of the Conference the following inter-governmental organizations were represented by observers:
 - Council of Europe
 - Intergovernmental Committee for European Migration
 - International Institute for the Unification of Private Law
 - League of Arab States

10. At the second part of the Conference the following inter-governmental organization was represented by an observer:
 - League of Arab States
11. At both parts of the Conference the Office of the United Nations High Commissioner for Refugees was represented by an observer.
12. At the first part of the Conference Mr. Knud Larsen (Denmark) was elected as President and Mr. Ichiro Kawasaki (Japan) and Mr. Humberto Calamari (Panama) as Vice-Presidents.
13. At the second part of the Conference none of these Officers of the Conference was present. The Conference accordingly elected Mr. Willem Riphagen (Netherlands) as President and Mr. Gilberto Amado (Brazil) and Mr. G. P. Malalasekera (Ceylon) as Vice-Presidents.
14. At the first part of the Conference the following Committees were set up:

Committee of the Whole

Chairman: The President of the first part of the Conference

Vice-Chairmen: The Vice-Presidents of the first part of the Conference

Drafting Committee

Members: Representatives of the following States: Argentina, Belgium, France, Israel, Panama, the United Kingdom of Great Britain and Northern Ireland

Chairman (First part of the Conference): Mr. Humberto Calamari (Panama)

(Second part of the Conference): Mr. Enrique Ros (Argentina)

15. At the second part of the Conference the Committee of the Whole did not meet.
16. At both parts of the Conference the President and Vice-Presidents, in accordance with rule 3 of the Rules of Procedure, examined the credentials of representatives and reported thereon to the Conference.
17. At the second part of the Conference a Working Group was set up, consisting of the President, who acted as Chairman, and representatives of Brazil, Canada, France, Israel, Norway, Switzerland, Turkey and the United Kingdom of Great Britain and Northern Ireland, and of representatives of other States who desired to participate. Mr. Peter Harvey (United Kingdom of Great Britain and Northern Ireland) acted as

Rapporteur of the Working Group.

18. At the first part of the Conference the Secretary-General of the United Nations was represented by Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs of the United Nations, who was also appointed Executive Secretary.
19. At the second part of the Conference the Secretary-General of the United Nations was represented by Mr. C. A. Stavropoulos, the Legal Counsel. Mr. Yuen-li Liang acted as Executive Secretary.
20. At the first part of the Conference it was decided that the Conference would take as the basis for its work the draft Convention on the Reduction of Future Statelessness, prepared by the International Law Commission. The first part of the Conference also had before it observations submitted by Governments on that draft Convention, a Memorandum with a Draft Convention on the Reduction of Statelessness submitted by Denmark, and preparatory documentation prepared by the Secretariat of the United Nations.
21. The second part of the Conference had before it, in addition to the documentation referred to above, observations submitted by Governments on deprivation of nationality, observations submitted by the Office of the United Nations High Commissioner for Refugees, and further documentation prepared by the Secretariat of the United Nations.
22. On the basis of the deliberations, as recorded in the records of the Committee of the Whole and of the plenary meetings, the Conference prepared a Convention on the Reduction of Statelessness. The Convention, which is subject to ratification, was adopted by the Conference on 28 August 1961, and opened for signature from 30 August 1961 until 31 May 1962 at the United Nations Headquarters in New York. This Convention was also opened for accession and will be deposited in the archives of the United Nations.
23. In addition the Conference adopted the four resolutions which are annexed to this Final Act.

In witness whereof the representatives have signed this Final Act.

Done at New York this thirtieth day of August, one thousand nine hundred and sixty-one, in a single copy of which the Chinese, English, French, Russian and Spanish texts are equally authentic and which shall be deposited in the archives of the United Nations, and certified copies of which shall be delivered by the

Secretary-General of the United Nations to all Members of the United Nations and all nonmember States invited to the Conference.

President of the Conference: Willem Riphagen

Executive Secretary of the Conference: Yuen-li Liang

Resolutions

I

The Conference

Recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.

II

The Conference

Resolves that for the purposes of paragraph 4 of article 7 of the Convention the term ‘naturalized person’ shall be interpreted as referring only to a person who has acquired nationality upon an application which the Contracting State concerned may in its discretion refuse.

III

The Conference

Recommends Contracting States making the retention of nationality by their nationals abroad subject to a declaration or registration to take all possible steps to ensure that such persons are informed in time of the formalities and time-limits to be observed if they are to retain their nationality.

IV

The Conference

Resolves that for the purposes of the Convention the term ‘convicted’ shall mean ‘convicted by a final judgement of a court of competent jurisdiction’.

The Contracting States,

Acting in pursuance of resolution 896 (IX), adopted by the General Assembly of the United Nations on 4 December 1954,

*Considering it desirable to reduce statelessness by international agreement,
Have agreed as follows:*

Article 1

1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:
 - (a) At birth, by operation of law, or
 - (b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected.

A Contracting State which provides for the grant of its nationality in accordance with subparagraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.
2. A Contracting State may make the grant of its nationality in accordance with subparagraph (b) of paragraph 1 of this article subject to one or more of the following conditions:
 - (a) That the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;
 - (b) That the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;
 - (c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;
 - (d) That the person concerned has always been stateless.
3. Notwithstanding the provisions of paragraphs 1 (b) and 2 of this article, a

child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.

4. A Contracting State shall grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born because he has passed the age for lodging his application or has not fulfilled the required residence conditions, if the nationality of one of his parents at the time of the person's birth was that of the Contracting State first above-mentioned. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State. If application for such nationality is required, the application shall be made to the appropriate authority by or on behalf of the applicant in the manner prescribed by the national law. Subject to the provisions of [paragraph 5](#) of this article, such application shall not be refused.
5. The Contracting State may make the grant of its nationality in accordance with the provisions of [paragraph 4](#) of this article subject to one or more of the following conditions:
 - (a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;
 - (b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;
 - (c) That the person concerned has always been stateless.

Article 2

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

Article 3

For the purpose of determining the obligations of Contracting States under this

Convention, birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered, as the case may be.

Article 4

1. A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State. Nationality granted in accordance with the provisions of this paragraph shall be granted:
 - (a) At birth, by operation of law, or
 - (b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of [paragraph 2](#) of this article, no such application may be rejected.
2. A Contracting State may make the grant of its nationality in accordance with the provisions of [paragraph 1](#) of this article subject to one or more of the following conditions:
 - (a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;
 - (b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;
 - (c) That the person concerned has not been convicted of an offence against national security;
 - (d) That the person concerned has always been stateless.

Article 5

1. If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.
2. If, under the law of a Contracting State, a child born out of wedlock loses the nationality of that State in consequence of a recognition of affiliation, he shall be given an opportunity to recover that nationality by written application to the appropriate authority, and the conditions governing such application shall not be more rigorous than those laid down in [paragraph 2](#) of Article 1 of this Convention.

Article 6

If the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.

Article 7

1. (a) If the law of a Contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality;
(b) The provisions of [subparagraph \(a\)](#) of this paragraph shall not apply where their application would be inconsistent with the principles stated in Articles 13 and 14 of the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations.
2. A national of a Contracting State who seeks naturalization in a foreign country shall not lose his nationality unless he acquires or has been accorded assurance of acquiring the nationality of that foreign country.
3. Subject to the provisions of [paragraphs 4](#) and [5](#) of this article, a national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground.
4. A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.
5. In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority.
6. Except in the circumstances mentioned in this article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.

Article 8

1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
 - (a) In the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;
 - (b) Where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
 - (a) That, inconsistently with his duty of loyalty to the Contracting State, the person:
 - (i) Has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
 - (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State;
 - (b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

Article 9

A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

Article 10

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

Article 11

The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.

Article 12

1. In relation to a Contracting State which does not, in accordance with the provisions of paragraph 1 of Article 1 or of Article 4 of this Convention, grant its nationality at birth by operation of law, the provisions of paragraph 1 of Article 1 or of Article 4, as the case may be, shall apply to persons born before as well as to persons born after the entry into force of this Convention.
2. The provisions of paragraph 4 of Article 1 of this Convention shall apply to persons born before as well as to persons born after its entry into force.
3. The provisions of Article 2 of this Convention shall apply only to foundlings found in the territory of a Contracting State after the entry into force of the Convention for that State.

Article 13

This Convention shall not be construed as affecting any provisions more conducive to the reduction of statelessness which may be contained in the law of any Contracting State now or hereafter in force, or may be contained in any other convention, treaty or agreement now or hereafter in force between two or more

Contracting States.

Article 14

Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute.

Article 15

1. This Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply *ipso facto* as a result of such signature, ratification or accession.
2. In any case in which, for the purpose of nationality, a non-metropolitan territory is not treated as one with the metropolitan territory, or in any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Contracting State or of the non-metropolitan territory for the application of the Convention to that territory, that Contracting State shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of signature of the Convention by that Contracting State, and when such consent has been obtained the Contracting State shall notify the Secretary General of the United Nations. This Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General.
3. After the expiry of the twelve-month period mentioned in paragraph 2 of this article, the Contracting States concerned shall inform the Secretary-General of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of this Convention may have been withheld.

Article 16

1. This Convention shall be open for signature at the Headquarters of the United Nations from 30 August 1961 to 31 May 1962.
2. This Convention shall be open for signature on behalf of:
 - (a) Any State Member of the United Nations;
 - (b) Any other State invited to attend the United Nations Conference on the Elimination or Reduction of Future Statelessness;
 - (c) Any State to which an invitation to sign or to accede may be addressed by the General Assembly of the United Nations.
3. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. This Convention shall be open for accession by the States referred to in [paragraph 2](#) of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 17

1. At the time of signature, ratification or accession any State may make a reservation in respect of [Articles 11, 14 or 15](#).
2. No other reservations to this Convention shall be admissible.

Article 18

1. This Convention shall enter into force two years after the date of the deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the sixth instrument of ratification or accession, it shall enter into force on the ninetieth day after the deposit by such State of its instrument of ratification or accession or on the date on which this Convention enters into force in accordance with the provisions of [paragraph 1](#) of this article, whichever is the later.

Article 19

1. Any Contracting State may denounce this Convention at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the Contracting State concerned one year after the date of its receipt by the Secretary-General.
2. In cases where, in accordance with the provisions of Article 15, this Convention has become applicable to a non-metropolitan territory of a Contracting State, that State may at any time thereafter, with the consent of the territory concerned, give notice to the Secretary-General of the United Nations denouncing this Convention separately in respect to that territory. The denunciation shall take effect one year after the date of the receipt of such notice by the Secretary-General, who shall notify all other Contracting States of such notice and the date of receipt thereof.

Article 20

1. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States referred to in Article 16 of the following particulars:
 - (a) Signatures, ratifications and accessions under Article 16;
 - (b) Reservations under Article 17;
 - (c) The date upon which this Convention enters into force in pursuance of Article 18;
 - (d) Denunciations under Article 19.
2. The Secretary-General of the United Nations shall, after the deposit of the sixth instrument of ratification or accession at the latest, bring to the attention of the General Assembly the question of the establishment, in accordance with Article 11, of such a body as therein mentioned.

Article 21

This Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

In witness whereof the undersigned Plenipotentiaries have signed this Convention.

Done at New York, this thirtieth day of August, one thousand nine hundred and sixty-one, in a single copy, of which the Chinese, English, French, Russian

and Spanish texts are equally authentic and which shall be deposited in the archives of the United Nations, and certified copies of which shall be delivered by the Secretary-General of the United Nations to all members of the United Nations and to the non-member States referred to in Article 16 of this Convention.

6. Organization of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa

Entry into force: 20 June 1974

Text: 1000 UNTS 46

Preamble

We, the Heads of State and Government assembled in the city of Addis Ababa, from 6-10 September 1969,

1. *Noting with concern* the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,
2. *Recognizing* the need for an essentially humanitarian approach towards solving the problems of refugees,
3. *Aware*, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,
4. *Anxious* 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,
5. *Determined* that the activities of such subversive elements should be discouraged, in accordance with the Declaration on the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965,
6. *Bearing in mind* that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
7. *Recalling* Resolution 2312 (XXII) of 14 December 1967 of the United

Nations General Assembly, relating to the Declaration on Territorial Asylum,

8. *Convinced* that all the problems of our continent must be solved in the spirit of the Charter of the Organization of African Unity and in the African context,
9. *Recognizing* that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,
10. *Recalling* Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa,
11. *Convinced* that the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between the Organization of African Unity and the Office of the United Nations High Commissioner for Refugees,

Have agreed as follows:

Article I

Definition of the term ‘Refugee’

1. For the purposes of this Convention, the term ‘refugee’ shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
2. The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing

public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term ‘a country of which he is a national’ 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 which he is a national 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.
4. This Convention shall cease to apply to any refugee if:
 - (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or,
 - (b) having lost his nationality, he has voluntarily reacquired it, or,
 - (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or,
 - (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or,
 - (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or,
 - (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or,
 - (g) he has seriously infringed the purposes and objectives of this Convention.
5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:

- (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 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 Organization of African Unity;
 - (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.
6. For the purposes of this Convention, the Contracting State of asylum shall determine whether an applicant is a refugee.

Article II

Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
2. 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.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, [paragraphs 1](#) and [2](#).
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

Article III

Prohibition of Subversive Activities

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

Article IV

Non-Discrimination

Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.

Article V

Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

Article IV

Travel Documents

1. Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory.
2. Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.
3. Travel documents issued to refugees under previous international agreements by States Parties thereto shall be recognized and treated by Member States in the same way as if they had been issued to refugees pursuant to this Article.

Article VII

Co-operation of the National Authorities with the Organization of African Unity

In order to enable the Administrative Secretary-General of the Organization of African Unity to make reports to the competent organs of the Organization of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees;
- (b) the implementation of this Convention, and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article VIII

Co-operation with the Office of the United Nations High Commissioner for Refugees

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.
2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

Article IX

Settlement of Disputes

Any dispute between States signatories to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity, at the request of any one of the Parties to the dispute.

Article X

Signature and Ratification

1. This Convention is open for signature and accession by all Member States of the Organization of African Unity and shall be ratified by signatory States in accordance with their respective constitutional processes. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization of African Unity.
2. The original instrument, done if possible in African languages, and in English and French, all texts being equally authentic, shall be deposited with the Administrative Secretary-General of the Organization of African Unity.
3. Any independent African State, Member of the Organization of African Unity, may at any time notify the Administrative Secretary-General of the Organization of African Unity of its accession to this Convention.

Article XI

Entry into force

This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.

Article XII

Amendment

This Convention may be amended or revised if any Member State makes a written request to the Administrative Secretary-General to that effect, provided however that the proposed amendment shall not be submitted to the Assembly of

Heads of State and Government for consideration until all Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of the Member States Parties to the present Convention.

Article XIII

Denunciation

1. Any Member State Party to this Convention may denounce its provisions by a written notification to the Administrative Secretary-General.
2. At the end of one year from the date of such notification, if not withdrawn, the Convention shall cease to apply with respect to the denouncing State.

Article XIV

Upon entry into force of this Convention, the Administrative Secretary-General of the OAU shall register it with the Secretary-General of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

Article XV

Notifications by the Administrative Secretary-General of the Organization of African Unity

The Administrative Secretary-General of the Organization of African Unity shall inform all Members of the Organization:

- (a) of signatures, ratifications and accessions in accordance with [Article X](#);
- (b) of entry into force, in accordance with [Article XI](#);
- (c) of requests for amendments submitted under the terms of [Article XII](#);
- (d) of denunciations, in accordance with [Article XIII](#).

...

5. 1984 Cartagena Declaration on Refugees

Adopted at a Colloquium entitled ‘Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y

Humanitarios' held at Cartagena, Colombia from 19-22 November 1984

Text: <http://www.unhcr.org/en-au/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>

Conclusions and Recommendations

I

Recalling the conclusions and recommendations adopted by the Colloquium held in Mexico in 1981 on Asylum and International Protection of Refugees in Latin America, which established important landmarks for the analysis and consideration of this matter;

Recognizing that the refugee situation in Central America has evolved in recent years to the point at which it deserves special attention;

Appreciating the generous efforts which have been made by countries receiving Central American refugees, notwithstanding the great difficulties they have had to face, particularly in the current economic crisis;

Emphasizing the admirable humanitarian and non-political task which UNHCR has been called upon to carry out in the Central American countries, Mexico and Panama in accordance with the provisions of the 1951 United Nations Convention and the 1967 Protocol, as well as those of resolution 428 (V) of the United Nations General Assembly, by which the mandate of the United Nations High Commissioner for Refugees is applicable to all States whether or not parties to the said Convention and/or Protocol;

Bearing in mind also the function performed by the Inter-American Commission on Human Rights with regard to the protection of the rights of refugees in the continent;

Strongly supporting the efforts of the Contadora Group to find an effective and lasting solution to the problem of Central American refugees, which constitute a significant step in the negotiation of effective agreements in favour of peace in the region;

Expressing its conviction that many of the legal and humanitarian problems relating to refugees which have arisen in the Central American region, Mexico and Panama can only be tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts;

II

Having acknowledged with appreciation the commitments with regard to refugees included in the Contadora Act on Peace and Co-operation in Central America, the bases of which the Colloquium fully shares and which are reproduced below:

- (a) ‘To carry out, if they have not yet done so, the constitutional procedures for accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.’
- (b) ‘To adopt the terminology established in the Convention and Protocol referred to in the foregoing paragraph with a view to distinguishing refugees from other categories of migrants.’
- (c) ‘To establish the internal machinery necessary for the implementation, upon accession, of the provisions of the Convention and Protocol referred to above.’
- (d) ‘To ensure the establishment of machinery for consultation between the Central American countries and representatives of the Government offices responsible for dealing with the problem of refugees in each State.’
- (e) ‘To support the work performed by the United Nations High Commissioner for Refugees (UNHCR) in Central America and to establish direct co-ordination machinery to facilitate the fulfilment of his mandate.’
- (f) ‘To ensure that any repatriation of refugees is voluntary, and is declared to be so on an individual basis, and is carried out with the co-operation of UNHCR.’
- (g) ‘To ensure the establishment of tripartite commissions, composed of representatives of the State of origin, of the receiving State and of UNHCR with a view to facilitating the repatriation of refugees.’
- (h) ‘To reinforce programmes for protection of and assistance to refugees, particularly in the areas of health, education, labour and safety.’
- (i) ‘To ensure that programmes and projects are set up with a view to ensuring the self-sufficiency of refugees.’
- (j) ‘To train the officials responsible in each State for protection of and assistance to refugees, with the co-operation of UNHCR and other international agencies.’
- (k) ‘To request immediate assistance from the international community for Central American refugees, to be provided either directly, through bilateral or multilateral agreements, or through UNHCR and other

organizations and agencies.'

- (l) 'To identify, with the co-operation of UNHCR, other countries which might receive Central American refugees. In no case shall a refugee be transferred to a third country against his will.'
- (m) 'To ensure that the Governments of the area make the necessary efforts to eradicate the causes of the refugee problem.'
- (n) 'To ensure that, once agreement has been reached on the bases for voluntary and individual repatriation, with full guarantees for the refugees, the receiving countries permit official delegations of the country of origin, accompanied by representatives of UNHCR and the receiving country, to visit the refugee camps.'
- (o) 'To ensure that the receiving countries facilitate, in co-ordination with UNHCR, the departure procedure for refugees in instances of voluntary and individual repatriation.'
- (p) 'To institute appropriate measures in the receiving countries to prevent the participation of refugees in activities directed against the country of origin, while at all times respecting the human rights of the refugees.'

III

The Colloquium adopted the following conclusions:

1. To promote within the countries of the region the adoption of national laws and regulations facilitating the application of the Convention and the Protocol and, if necessary, establishing internal procedures and mechanisms for the protection of refugees. In addition, to ensure that the national laws and regulations adopted reflect the principles and criteria of the Convention and the Protocol, thus fostering the necessary process of systematic harmonization of national legislation on refugees.
2. To ensure that ratification of or accession to the 1951 Convention and the 1967 Protocol by States which have not yet taken these steps is unaccompanied by reservations limiting the scope of those instruments, and to invite countries having formulated such reservations to consider withdrawing them as soon as possible.
3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate

and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article I, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the 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 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

4. To confirm the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee and to underline the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees.
5. To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.
6. To reiterate to countries of asylum that refugee camps and settlements located in frontier areas should be set up inland at a reasonable distance from the frontier with a view to improving the protection afforded to refugees, safeguarding their human rights and implementing projects aimed at their self-sufficiency and integration into the host society.
7. To express its concern at the problem raised by military attacks on refugee camps and settlements which have occurred in different parts of the world and to propose to the Governments of the Central American countries, Mexico and Panama that they lend their support to the measures on this matter which have been proposed by the High Commissioner to the UNHCR Executive Committee.
8. To ensure that the countries of the region establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights, taking into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx.

9. To express its concern at the situation of displaced persons within their own countries. In this connection, the Colloquium calls on national authorities and the competent international organizations to offer protection and assistance to those persons and to help relieve the hardship which many of them face.
10. To call on States parties to the 1969 American Convention on Human Rights to apply this instrument in dealing with asilados and refugees who are in their territories.
11. To make a study, in countries in the area which have a large number of refugees, of the possibilities of integrating them into the productive life of the country by allocating to the creation or generation of employment the resources made available by the international community through UNHCR, thus making it possible for refugees to enjoy their economic, social and cultural rights.
12. To reiterate the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin.
13. To acknowledge that reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.
14. To urge non-governmental, international and national organizations to continue their worthy task, co-ordinating their activities with UNHCR and the national authorities of the country of asylum, in accordance with the guidelines laid down by the authorities in question.
15. To promote greater use of the competent organizations of the inter-American system, in particular the Inter-American Commission on Human Rights, with a view to enhancing the international protection of asilados and refugees. Accordingly, for the performance of this task, the Colloquium considers that the close co-ordination and co-operation existing between the Commission and UNHCR should be strengthened.
16. To acknowledge the importance of the OAS/UNHCR Programme of Co-operation and the activities so far carried out and to propose that the next stage should focus on the problem raised by massive refugee flows in Central America, Mexico and Panama.
17. To ensure that in the countries of Central America and the Contadora

Group the international norms and national legislation relating to the protection of refugees, and of human rights in general, are disseminated at all possible levels. In particular, the Colloquium believes it especially important that such dissemination should be undertaken with the valuable co-operation of the appropriate universities and centres of higher education.

IV

The Cartagena Colloquium therefore

Recommends:

- That the commitments with regard to refugees included in the Contadora Act should constitute norms for the 10 States participating in the Colloquium and be unfailingly and scrupulously observed in determining the conduct to be adopted in regard to refugees in the Central American area.
- That the conclusions reached by the Colloquium (III) should receive adequate attention in the search for solutions to the grave problems raised by the present massive flows of refugees in Central America, Mexico and Panama.
- That a volume should be published containing the working document and the proposals and reports, as well as the conclusions and recommendations of the Colloquium and other pertinent documents, and that the Colombian Government, UNHCR and the competent bodies of OAS should be requested to take the necessary steps to secure the widest possible circulation of the volume in question.
- That the present document should be proclaimed the ‘Cartagena Declaration on Refugees’.
- That the United Nations High Commissioner for Refugees should be requested to transmit the contents of the present declaration officially to the heads of State of the Central American countries, of Belize and of the countries forming the Contadora Group.

Finally, the Colloquium expressed its deep appreciation to the Colombian authorities, and in particular to the President of the Republic, Mr. Belisario Betancur, the Minister for Foreign Affairs, Mr. Augusto Ramírez Ocampo, and

the United Nations High Commissioner for Refugees, Mr. Poul Hartling, who honoured the Colloquium with their presence, as well as to the University of Cartagena de Indias and the Regional Centre for Third World Studies for their initiative and for the realization of this important event. The Colloquium expressed its special recognition of the support and hospitality offered by the authorities of the Department of Bolivar and the City of Cartagena. It also thanked the people of Cartagena, rightly known as the ‘Heroic City’, for their warm welcome.

In conclusion, the Colloquium recorded its acknowledgement of the generous tradition of asylum and refuge practised by the Colombian people and authorities.

Cartagena de Indias, 22 November 1984

6. Directive 2011/95/EU of the European Arliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Official Journal of the European Union L. 337/9, 20.12.2011

(Internal footnotes, Annex I (Repealed Directive and Time limit for transposition into national law) and Annex II (Correlation Table) omitted)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular points (a) and (b) of Article 78(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) A number of substantive changes are to be made to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (3). In the interests of clarity, that Directive should be

recast.

- (2) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.
- (3) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.
- (4) The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.
- (5) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.
- (6) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.
- (7) The first phase in the creation of a Common European Asylum System has now been achieved. The European Council of 4 November 2004 adopted the Hague Programme, which sets the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, the Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and the Council, with a view to their adoption before the end of 2010.
- (8) In the European Pact on Immigration and Asylum, adopted on 15 and 16 October 2008, the European Council noted that considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes and called for new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague Programme, and thus to offer a higher degree of protection.

- (9) In the Stockholm Programme, the European Council reiterated its commitment to the objective of establishing a common area of protection and solidarity, based on a common asylum procedure and a uniform status, in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), for those granted international protection, by 2012 at the latest.
- (10) In the light of the results of the evaluations undertaken, it is appropriate, at this stage, to confirm the principles underlying Directive 2004/83/EC as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.
- (11) The resources of the European Refugee Fund and of the European Asylum Support Office should be mobilised to provide adequate support to Member States' efforts in implementing the standards set in the second phase of the Common European Asylum System, in particular to those Member States which are faced with specific and disproportionate pressure on their asylum systems, due in particular to their geographical or demographic situation.
- (12) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.
- (13) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks.
- (14) Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection.
- (15) Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on

compassionate or humanitarian grounds fall outside the scope of this Directive.

- (16) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.
- (17) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.
- (18) The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.
- (19) It is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child.
- (20) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty on European Union (TEU) and the TFEU.
- (21) The recognition of refugee status is a declaratory act.
- (22) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.
- (23) Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.
- (24) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.
- (25) In particular, it is necessary to introduce common concepts of protection

needs arising sur place, sources of harm and protection, internal protection and persecution, including the reasons for persecution.

- (26) Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.
- (27) Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.
- (28) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.
- (29) One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.
- (30) It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.
- (31) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations resolutions relating to measures combating terrorism, which declare that

‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.

- (32) As referred to in Article 14, ‘status’ can also include refugee status.
- (33) Standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.
- (34) It is necessary to introduce common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.
- (35) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.
- (36) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.
- (37) The notion of national security and public order also covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association.
- (38) When deciding on entitlements to the benefits included in this Directive, Member States should take due account of the best interests of the child, as well as of the particular circumstances of the dependency on the beneficiary of international protection of close relatives who are already present in the Member State and who are not family members of that beneficiary. In exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.
- (39) While responding to the call of the Stockholm Programme for the establishment of a uniform status for refugees or for persons eligible for subsidiary protection, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by

refugees under this Directive, and should be subject to the same conditions of eligibility.

- (40) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit.
- (41) In order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted. Such taking into account should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards.
- (42) In that context, efforts should be made in particular to address the problems which prevent beneficiaries of international protection from having effective access to employment-related educational opportunities and vocational training, *inter alia*, relating to financial constraints.
- (43) This Directive does not apply to financial benefits from the Member States which are granted to promote education.
- (44) Special measures need to be considered with a view to effectively addressing the practical difficulties encountered by beneficiaries of international protection concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualifications, in particular due to the lack of documentary evidence and their inability to meet the costs related to the recognition procedures.
- (45) Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law.
- (46) Access to healthcare, including both physical and mental healthcare, should be ensured to beneficiaries of international protection.

- (47) The specific needs and particularities of the situation of beneficiaries of refugee status and of subsidiary protection status should be taken into account, as far as possible, in the integration programmes provided to them including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to their protection status in the Member State concerned.
- (48) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.
- (49) Since the objectives of this Directive, namely to establish standards for the granting of international protection to third-country nationals and stateless persons by Member States, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (50) In accordance with Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (51) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (52) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2004/83/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.
- (53) This Directive should be without prejudice to the obligations of the

Member States relating to the time limit for transposition into national law of Directive 2004/83/EC set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

General Provisions

Article 1 Purpose

The purpose of this Directive is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted.

Article 2 Definitions

For the purposes of this Directive the following definitions shall apply:

- (a) ‘international protection’ means refugee status and subsidiary protection status as defined in points (e) and (g);
- (b) ‘beneficiary of international protection’ means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g);
- (c) ‘Geneva Convention’ means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;
- (d) ‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom [Article 12](#) does not apply;
- (e) ‘refugee status’ means the recognition by a Member State of a third-country national or a stateless person as a refugee;

- ‘person eligible for subsidiary protection’ means a third- country national
- (f) or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;
- (g) ‘subsidiary protection status’ means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection;
- (h) ‘application for international protection’ means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;
- (i) ‘applicant’ means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;
- (j) ‘family members’ means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection:

- the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
 - the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
 - the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;
- (k) ‘minor’ means a third-country national or stateless person below the age of 18 years;
- (l) ‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;
- (m) ‘residence permit’ means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State’s law, allowing a third-country national or stateless person to reside on its territory;
- (n) ‘country of origin’ means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3 More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

Chapter II

Assessment of Applications for International Protection

Article 4 Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.
2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
 - (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
 - (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
 - (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
 - (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;
 - (e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.
4. The fact that an applicant has already been subject to persecution or

serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:
 - (a) the applicant has made a genuine effort to substantiate his application;
 - (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
 - (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
 - (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
 - (e) the general credibility of the applicant has been established.

Article 5 International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.
3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

Article 6 Actors of persecution or serious harm

Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7 Actors of protection

1. Protection against persecution or serious harm can only be provided by:
 - (a) the State; or
 - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State; provided they are willing and able to offer protection in accordance with paragraph 2.
2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.
3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts.

Article 8 Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
 - (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
 - (b) has access to protection against persecution or serious harm as defined in Article 7; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.
2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.

Chapter III

Qualification for Being a Refugee

Article 9 Acts of persecution

1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
 - (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
2. Acts of persecution as qualified in [paragraph 1](#) can, inter alia, take the form of:
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in [Article 12\(2\)](#);
 - (f) acts of a gender-specific or child-specific nature.
3. In accordance with [point \(d\)](#) of Article 2, there must be a connection between the reasons mentioned in [Article 10](#) and the acts of persecution as qualified in [paragraph 1](#) of this Article or the absence of protection against such acts.

Article 10 Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

- (a) the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;
 - (b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
 - (c) the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
 - (d) a group shall be considered to form a particular social group where in particular:
 - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;
 - (e) the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.
2. When assessing if an applicant has a well-founded fear of being

persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11 Cessation

1. A third-country national or a stateless person shall cease to be a refugee if he or she:
 - (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or
 - (b) having lost his or her nationality, has voluntarily re-acquired it; or
 - (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
 - (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
 - (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality; or
 - (f) being a stateless person, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.
2. In considering **points (e)** and **(f)** of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.
3. **Points (e)** and **(f)** of paragraph 1 shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 12 Exclusion

1. A third-country national or a stateless person is excluded from being a refugee if:
 - (a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall ipso facto be entitled to the benefits of this Directive;
 - (b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.
2. A third-country national or a stateless person is excluded from being a refugee where 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 of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
 - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
3. **Paragraph 2** applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.

Chapter IV

Refugee Status

Article 13 Granting of refugee status

Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with [Chapters II and III](#).

Article 14 Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be a refugee in accordance with [Article 11](#).
2. Without prejudice to the duty of the refugee in accordance with [Article 4\(1\)](#) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with [paragraph 1](#) of this Article.
3. Member States shall revoke, end or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, it is established by the Member State concerned that:
 - (a) he or she should have been or is excluded from being a refugee in accordance with [Article 12](#);
 - (b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.
4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
 - (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
 - (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.
5. In situations described in [paragraph 4](#), Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.
6. Persons to whom [paragraphs 4](#) or [5](#) apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

Chapter V

Qualification for Subsidiary Protection

Article 15 Serious harm

Serious harm consists of:

- (a) the 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.

Article 16 Cessation

1. A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.
2. In applying [paragraph 1](#), Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.
3. [Paragraph 1](#) shall not apply to a beneficiary of subsidiary protection status who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.

Article 17 Exclusion

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where 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 crime;
 - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
 - (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
2. **Paragraph 1** applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.
3. Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of **paragraph 1** which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

Chapter VI

Subsidiary Protection Status

Article 18 Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with **Chapters II and V**.

Article 19 Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of Directive 2004/83/EC, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body if he or she has ceased to be eligible for subsidiary protection in accordance with [Article 16](#).
2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with [Article 17\(3\)](#).
3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person, if:
 - (a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with [Article 17\(1\)](#) and [\(2\)](#);
 - (b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of subsidiary protection status.
4. Without prejudice to the duty of the third-country national or stateless person in accordance with [Article 4\(1\)](#) to disclose all relevant facts and provide all relevant documentation at his or her disposal, the Member State which has granted the subsidiary protection status shall, on an individual basis, demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with [paragraphs 1, 2 and 3](#) of this Article.

Chapter VII

Content of International Protection

Article 20 General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.
2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.
3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
4. [Paragraph 3](#) shall apply only to persons found to have special needs after an individual evaluation of their situation.
5. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

Article 21 Protection from refoulement

1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in [paragraph 1](#), Member States may *refoule* a refugee, whether formally recognised or not, when:
 - (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
 - (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.
3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom [paragraph 2](#) applies.

Article 22 Information

Member States shall provide beneficiaries of international protection, as soon as possible after refugee status or subsidiary protection status has been granted, with access to information, in a language that they understand or are reasonably

supposed to understand, on the rights and obligations relating to that status.

Article 23 Maintaining family unity

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in [Articles 24](#) to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.
3. [Paragraphs 1](#) and [2](#) are not applicable where the family member is or would be excluded from international protection pursuant to [Chapters III](#) and [V](#).
4. Notwithstanding [paragraphs 1](#) and [2](#), Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

Article 24 Residence permits

1. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable, unless compelling reasons of national security or public order otherwise require, and without prejudice to [Article 21\(3\)](#).
Without prejudice to [Article 23\(1\)](#), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than 3 years and renewable.
2. As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of subsidiary protection status and their family members a renewable residence permit which must be valid for at least 1 year and, in case of renewal, for at least 2 years, unless compelling reasons of national security or public order otherwise require.

Article 25 Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.
2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.

Article 26 Access to employment

1. Member States shall authorise beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted.
2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment offices, are offered to beneficiaries of international protection, under equivalent conditions as nationals.
3. Member States shall endeavour to facilitate full access for beneficiaries of international protection to the activities referred to in [paragraph 2](#).
4. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27 Access to education

1. Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.
2. Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third- country nationals legally resident.

Article 28 Access to procedures for recognition of qualifications

1. Member States shall ensure equal treatment between beneficiaries of international protection and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.
2. Member States shall endeavour to facilitate full access for beneficiaries of international protection who cannot provide documentary evidence of their qualifications to appropriate schemes for the assessment, validation and accreditation of their prior learning. Any such measures shall comply with Articles 2(2) and 3(3) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

Article 29 Social welfare

1. Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State.
2. By way of derogation from the general rule laid down in [paragraph 1](#), Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same level and under the same eligibility conditions as nationals.

Article 30 Healthcare

1. Member States shall ensure that beneficiaries of international protection have access to healthcare under the same eligibility conditions as nationals of the Member State that has granted such protection.
2. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted protection, adequate healthcare, including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 31 Unaccompanied minors

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.
3. Member States shall ensure that unaccompanied minors are placed either:
 - (a) with adult relatives; or
 - (b) with a foster family; or
 - (c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.
5. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.
6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

Article 32 Access to accommodation

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.
2. While allowing for national practice of dispersal of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

Article 33 Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.

Article 34 Access to integration facilities

In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.

Article 35 Repatriation

Member States may provide assistance to beneficiaries of international protection who wish to be repatriated.

Chapter VIII

Administrative Cooperation

Article 36 Cooperation

Member States shall each appoint a national contact point and communicate its address to the Commission. The Commission shall communicate that information to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate

measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 37 Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

Chapter IX

Final Provisions

Article 38 Reports

1. By 21 June 2015, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. Those proposals for amendment shall be made by way of priority in [Articles 2](#) and [7](#). Member States shall send the Commission all the information that is appropriate for drawing up that report by 21 December 2014.
2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every 5 years.

Article 39 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with [Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34](#) and [35](#) by 21 December 2013. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law covered by this Directive.

Article 40 Repeal

Directive 2004/83/EC is repealed for the Member States bound by this Directive with effect from 21 December 2013, without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directive set out in Annex I, Part B.

For the Member States bound by this Directive, references to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 41 Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

[Articles 1, 2, 4, 7, 8, 9, 10, 11, 16, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34](#) and [35](#) shall apply from 22 December 2013.

Article 42 Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 13 December 2011.

- 1 The texts referred to in the paragraph above are contained in document A/CONF.2/1.
- 2 The Annex with details of the Specimen Travel Document is omitted.

Annex 2 States Parties to the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention; Delegations participating in the 1984 Cartagena Declaration; Members of the Executive Committee of the High Commissioner's Programme (at 31 January 2020); and Member States of the European Union (31 January 2020)

1. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

Date of entry into force: 22 April 1954 (Convention); 4 October 1967 (Protocol).
Total Number of States Parties to the 1951 Convention: 146

Total Number of States Parties to the 1967 Protocol: 147

States Parties to both the Convention and Protocol: 144

States Parties to one or both of these instruments: 149

States Parties to the 1951 Convention only [C]: Madagascar, St. Kitts and Nevis

States Parties to the 1967 Protocol only [P]: Cape Verde, USA and Venezuela

States Parties which maintain the geographical limitation [G]: Congo, Madagascar, Monaco, Turkey.

Afghanistan

Albania

Algeria

Angola

Antigua & Barbuda

Argentina

Armenia

Australia

Austria

Azerbaijan

Bahamas

Belarus

Belgium

Belize
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Bulgaria
Burkina Faso
Burundi
Cambodia
Cameroon
Canada
Cape Verde [P]
Central African Republic
Chad
Chile
China
Colombia
Congo [G]
Costa Rica
Côte d'Ivoire
Croatia
Cyprus
Czech Republic
Democratic Republic of the Congo
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Equatorial Guinea
Estonia
Eswatini
Ethiopia
Fiji

Finland
France
Gabon
Gambia
Georgia
Germany
Ghana
Greece
Guatemala
Guinea
Guinea-Bissau
Haiti
Holy See
Honduras
Hungary
Iceland
Iran, Islamic Republic of
Ireland
Israel
Italy
Jamaica
Japan
Kazakhstan
Kenya
Kyrgyzstan
Latvia
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar [C] [G]
Malawi
Mali
Malta
Mauritania
Mexico

Monaco [G]
Montenegro
Morocco
Mozambique
Namibia
Nauru
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
North Macedonia
Norway
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Republic of Korea
Republic of Moldova
Romania
Russian Federation
Rwanda
Samoa
Sao Tome and Principe
Senegal
Serbia
Seychelles
Sierra Leone
Slovakia
Slovenia
Solomon Islands
Somalia
South Africa
South Sudan

Spain
St. Kitts and Nevis **[C]**
St. Vincent and the Grenadines
Sudan
Suriname
Sweden
Switzerland
Tajikistan
Timor-Leste
Togo
Trinidad and Tobago
Tunisia
Turkey **[G]**
Turkmenistan
Tuvalu
Uganda
Ukraine
United Kingdom
United Republic of Tanzania
United States of America **[P]**
Uruguay
Venezuela **[P]**
Yemen
Zambia
Zimbabwe

2. States Parties to the 1969 OAU Convention

Date of entry into force: 20 June 1974

Number of States Parties: 46*

The Organisation of African Unity was established in 1963, and replaced in 2002 by the African Union

Algeria
Angola
Benin
Botswana

Burundi
Burkina Faso
Cameroon
Cape Verde
Central African Republic
Chad
Congo
Congo, Democratic
Republic of
Côte d'Ivoire
Comoros
Egypt
Equatorial Guinea
Eswatini
Ethiopia
Gabon
Gambia
Ghana
Guinea
Guinea Bissau
Kenya
Lesotho
Liberia
Libya
Malawi
Mali
Mauritania
Mozambique
Niger
Nigeria
Rwanda
Senegal
Seychelles
Sierra Leone
South Africa
South Sudan
Sudan

Tanzania, United
Republic of
Togo
Tunisia
Uganda
Zambia
Zimbabwe

* Morocco, formerly a party, withdrew from the OAU in 1984, following admission of the Sahrawi Arab Democratic Republic; it joined the African Union on 31 January 2017.

3. Government Delegations participating in the 1984 Cartagena Declaration

Adopted 22 November 1984

Number of Governments participating: 10

Belize
Colombia
Costa Rica
El Salvador
Guatemala
Honduras
Mexico
Nicaragua
Panama
Venezuela

4. States Members of the Executive Committee of the High Commissioner's Programme

Number of Member States: 106

Afghanistan
Algeria
Argentina
Armenia

Australia
Austria
Azerbaijan
Bangladesh
Belarus
Belgium
Benin
Brazil
Bulgaria
Burkina Faso
Cameroon
Canada
Chad
Chile
China
Colombia
Congo
Congo, Democratic
Republic of
Costa Rica
Côte d'Ivoire
Croatia
Cyprus
Czech Republic
Denmark
Djibouti
Ecuador
Egypt
Estonia
Ethiopia
Fiji
Finland
France
Georgia
Germany
Ghana
Greece

Guinea
Holy See
Hungary
Iceland
India
Iran, Islamic Republic of
Ireland
Israel
Italy
Japan
Jordan
Kenya
Korea, Republic of
Latvia
Lebanon
Lesotho
Lithuania
Luxembourg
Madagascar
Mali
Malta
Mexico
Moldova
Montenegro
Morocco
Mozambique
Namibia
Netherlands
New Zealand
Nicaragua
Nigeria
North Macedonia
Norway
Pakistan
Paraguay
Peru
Philippines

Poland
Portugal
Romania
Russian Federation
Rwanda
Senegal
Serbia
Slovakia
Slovenia
Somalia
South Africa
Spain
Sudan
Sweden
Switzerland
Tanzania, United Republic of
Thailand
Togo
Tunisia
Turkey
Turkmenistan
Uganda
United Kingdom
United States of America
Uruguay
Venezuela
Yemen
Zambia
Zimbabwe

5. Member States of the European Union

Number of Member States: 27

Austria
Belgium
Bulgaria
Croatia
Republic of Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Ireland
Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden

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