

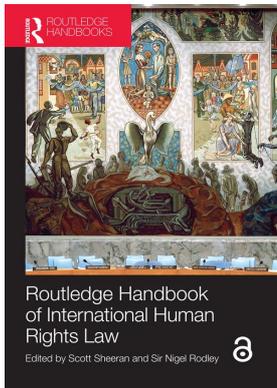
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International refugee and human rights law: partners in ensuring international protection and asylum

*Cornelis (Kees) Wouters**

1 Introduction

International refugee law finds its roots in the atrocities of war and conflict,¹ in the recognition of human dignity,² and in the equality and inalienability of rights of all human beings.³ International refugee law and international human rights are closely linked and are necessary partners in ensuring a strong framework of international protection, i.e. protection afforded in the absence of protection from one's own country. In human rights law, a wealth of standards and instruments has been developed accompanied by a variety of entities monitoring and/or supervising their interpretation and application at the national, regional and global level.⁴ In the field of international refugee law, few explicit norms have emerged and instruments have developed with only one actor – the UN High Commissioner for Refugees (UNHCR) – being tasked in its Statute to supervise the application of international conventions.⁵

* The views expressed are the personal views of the author and may not necessarily be shared by the United Nations or by UNHCR. The author is grateful to Najla Akef for her assistance in writing this chapter and to Blanche Tax for her advice and feedback.

1 GA Res. 319 A (IV) (3 December 1949).

2 Charter of the United Nations (1948) 1 UNTS XVI, preamble, recital 2.

3 Universal Declaration of Human Rights, GA Res. 217 A (III) (10 December 1948) preamble, recital 1.

4 J. Fitzpatrick, 'Human Rights and Forced Displacement: Converging Standards', in A. Bayefsky and J. Fitzpatrick (eds), *Human Rights and Forced Displacement* (Martinus Nijhoff Publishers, 2000) 3.

5 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 8(a), available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html>. UNHCR's Statute does not specify which conventions, but it includes the following conventions: the 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, available at: <http://www.refworld.org/docid/3be01b964.html>; the 1967 Protocol Relating to the status of Refugees, 606 UNTS 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>; and the 1969 OAU Convention governing specific aspects of refugee problems in Africa, 1001 UNTS 45, available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html>.

Since the end of the 1980s, there has been growing awareness that there are no impenetrable boundaries between human rights law, international humanitarian law, international criminal law and refugee law.⁶ International human rights and refugee law have become complementary and mutually reinforcing legal regimes. There is no hierarchical relationship between these strands of international law; they are interconnected.⁷ The interconnection between international human rights and refugee law is most visible in two areas: first, in the reasons why people seek protection, and second, in the enjoyment of such protection. Human rights violations in the context of armed conflict and other situations of violence or in the context of oppressive regimes are a major cause of people seeking refuge and protection in another country, and define the notion of persecution or other forms of harm. The failure or inability of a person's country of nationality or habitual residence to fulfil its responsibility to ensure the human rights of its inhabitants is a matter of international concern and responsibility. At the core of this responsibility lies the principle of non-refoulement, i.e. in general terms the prohibition of return, which was traditionally only part of international refugee law, but has been extensively developed under international human rights law. Second, international human rights and refugee law jointly provide a framework for states to respond to situations in which people flee human rights violations elsewhere. This joint framework defines the entitlements people have while receiving international protection outside their country of origin and consequently dictates the corresponding state obligations.

This chapter examines the aforementioned ways in which international human rights and refugee law are interconnected and the challenges this connection is facing. The chapter first discusses the evolution of the interaction by reviewing how human rights law has and continues to have a significant influence on how persecution or other forms of harm are defined and how the principle of non-refoulement has largely been developed through human rights law rather than refugee law. The chapter then addresses the importance of human rights law in determining the entitlements refugees have; using and addressing the right to asylum as an overarching and justiciable right. Finally, this chapter addresses some of the contemporary challenges the interconnection between international human rights and international refugee law is facing.

2 The cornerstone of international protection: the principle of non-refoulement and the protection from harm

2.1 *The principle of non-refoulement*

In 1950, UNHCR was established by the UN General Assembly to provide international protection to refugees and to seek permanent solutions for the problem of refugees by assisting governments.⁸ The cornerstone of international protection was the principle

6 J. Sztucki, 'Who Is a Refugee? The Convention Definition: Universal or Obsolete?' in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP, 1999) 56.

7 UNHCR, 'Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions' (2011) available at: <http://www.unhcr.org/refworld/docid/4e1729d5.html>, accessed on 19 October 2012.

8 Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428 (V) (14 December 1950) Annex, Art. 1.

of non-refoulement. People whose lives or freedom are at risk in their own country may seek protection elsewhere. States in turn have the responsibility to provide such people with protection in accordance with the principle of non-refoulement.

The principle of non-refoulement traditionally refers to the prohibition of refoulement codified in Article 33(1) of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention).⁹ In the context of refugee protection the principle is affirmed in Article II(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention)¹⁰ and Conclusion 4 of the 1984 Cartagena Declaration on Refugees.¹¹ The OAU Refugee Convention was concluded under the auspices of the Organisation of African Unity but is still part of the architecture of today's African Union. The Cartagena Declaration was the result of a pragmatic and protection-motivated process, largely driven by academics and practitioners in response to the Central American refugee crises. Both regional refugee instruments were drafted inter alia to reflect regional realities, including foreign domination, internal armed conflict, mass human rights violations and large-scale and indiscriminate violence, and to move away from the 1951 Refugee Convention emphasis on individualised harm in the form of persecution and to protect people who flee in large numbers.¹² The principle of non-refoulement is limited to refugees, i.e. those who meet the definition of a refugee as formulated primarily in Article 1A(2) of the 1951 Refugee Convention and further extended in Article I(2) of the OAU Refugee Convention and Conclusion 3 of the 1984 Cartagena Declaration. The principle of non-refoulement has also been developed in international human rights law. In Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),¹³ an explicit prohibition of refoulement is formulated to protect any individual from being returned to a country where there is a risk of him or her being subjected to torture. Similarly, Article 16(1) of the 2006 International Convention for the Protection of Persons from Enforced Disappearance (Convention Against Enforced Disappearance)¹⁴ explicitly prohibits the expulsion, return, surrender or extradition of any person to another state when he or she is at risk of enforced disappearance.

Regional human rights instruments also include the principle of non-refoulement, for example in Article 22(8) of the American Convention on Human Rights¹⁵ and Article 19(2) of the Charter of Fundamental Rights of the European Union.¹⁶ Furthermore, while the

9 Convention Relating to the Status of Refugees (1951) 189 UNTS 137. According to Art. 33(1) of the 1951 Refugee Convention, no state party '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.'

10 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 1001 UNTS 45.

11 Cartagena Declaration on Refugees (1984) OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, 190–93.

12 Marina Sharpe, *The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination*, January 2013, available at: <http://www.refworld.org/docid/50fd3edb2.html>. On the Cartagena Declaration the author is grateful for input received from Dr Michael Reed-Hurtado.

13 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984) 1465 UNTS 85.

14 International Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177 (20 December 2006).

15 American Convention on Human Rights (1969) 1144 UNTS 123.

16 Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

prohibitions of torture and other forms of cruel, inhuman or degrading treatment or punishment laid down in Article 7 of the International Covenant on Civil and Political Rights (ICCPR)¹⁷ and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹⁸ do not explicitly protect from refoulement, the supervising bodies have interpreted these articles as providing protection from refoulement.¹⁹ Prohibitions on refoulement have also been developed and adopted in other fields of international law, including international humanitarian law and international criminal law, i.e. in treaties concerning the protection of victims of armed conflicts and in extradition treaties.²⁰

The principle of non-refoulement applies to any conduct resulting in the removal, expulsion, deportation, return, extradition, rejection at the frontier or non-admission, etc. that would place a person at risk of a certain harm. The harm is most clearly defined in the context of the Convention Against Torture and the Convention Against Enforced Disappearance. For example, the prohibition of refoulement under Article 3 of the Convention Against Torture protects individuals from being subjected to torture as defined in Article 1 of the Convention. The principle of non-refoulement in the context of international human rights law is developed by the case law and views of supervisory judicial and quasi-judicial bodies, linking the principle to a specific human right with the aim of preventing a violation of that human right. While these prohibitions of refoulement restrict the scope of the protection to situations where people are at risk of being subjected to a violation of a specific human right, what amounts to a violation or what comes within the scope of the human rights at stake is often broadly interpreted.

The principle of non-refoulement in international human rights law is most clearly developed in the context of the prohibition of torture and cruel, inhuman or degrading treatment or punishment. What amounts, in particular, to cruel, inhuman and degrading treatment or punishment is either not explained or is broadly interpreted. For example, in most refoulement cases adjudicated under Article 3 of the ECHR, the European Court of Human Rights has not explicitly examined the treatment to which the claimant was subjected or classified such treatment. The Court merely assessed and concluded that the anticipated treatment would meet a certain level of severity.²¹ The assessment is largely concerned with evaluating the risk of the applicant being subjected to ill-treatment upon return. Further, it is increasingly accepted that other human rights may also include a prohibition on refoulement. This includes first and foremost other ‘absolute’ human rights, i.e. rights that have been formulated in absolute terms; not allowing for any exceptions for reasons of public interest or national security, and for which no derogations are permitted in times of war or public

17 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

18 Convention for the Protection of Human Rights and Fundamental Freedoms (as amended).

19 UN Human Rights Committee, General Comment No. 20, ‘Article 7’ (44th session) (1992), para. 9; UN Human Rights Committee, General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (80th session) (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 12; *Soering v United Kingdom*, App No. 14038/88 (ECtHR, Judgment of 7 July 1989); *Cruz Varas and Others v Sweden*, App No. 15576/89 (ECtHR, Judgment of 20 March 1991).

20 For example, Art. 45 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War protects civilians from being ‘transferred to a country where [they] may have reason to fear persecution for [their] political opinions or religious beliefs.’ Art. 3(2) of the 1957 European Convention on Extradition and Art. 4(5) of the 1981 Inter-American Convention on Extradition protect people from being extradited when fearing persecution for reasons such as race, religion, nationality or political opinion.

21 K. Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009) 238–39.

emergencies. This includes in particular the right to life under Article 6 ICCPR²² and Article 2 ECHR.²³ However, non-absolute human rights may also include a prohibition of refoulement, in particular when there is a risk of a flagrant denial of a human right. The European Court of Human Rights for example considered already in 1989 in the case of *Soering v United Kingdom* that an obligation of non-refoulement may exist in exceptional circumstances involving a risk of suffering a flagrant denial of a fair trial.²⁴ It was not until its judgment in 2012 in the case of *Othman v UK* that the Court concluded that a flagrant denial of justice may arise upon return of the applicant when it considered that ‘a flagrant denial of justice will arise when evidence obtained by torture is admitted in criminal proceedings’.²⁵

The principle of non-refoulement developed in the context of international refugee law is far less clear. Article 33(1) of the 1951 Refugee Convention protects refugees from a threat to life or freedom, and Article II(3) of the OAU Refugee Convention adds the notion of physical integrity. While neither of these instruments define or elaborate on the meaning of persecution and physical integrity, it is commonly accepted that both concepts are informed by international human rights and humanitarian law, as will be outlined below.

2.2 The meaning of persecution

Article 33(1) of the 1951 Refugee Convention protects a refugee from threats to his or her life or freedom. In contrast, the definition of a refugee in Article 1A(2) of the Convention uses the words ‘being persecuted’. It was the intention of the drafters that the words ‘life and freedom’ should be given a broad interpretation and that a risk of any kind of persecution should be considered a threat to life or freedom.²⁶ The terms ‘life and freedom’ cannot be used to delineate the term ‘persecution’; it is the other way round.²⁷

Persecution is not defined in the 1951 Refugee Convention. It appears the drafters of the Convention omitted a definition deliberately in order to introduce a flexible concept.²⁸ Furthermore, persecution will depend on the circumstances of each case.²⁹ The flexible and factual character of the term ‘persecution’ precludes a clear definition; it must be open to continuously changing notions of such concepts as ill-treatment, serious harm and

22 GC 31 (n. 19) para. 12.

23 *Bader and Others v Sweden*, App No. 13284/048 (ECtHR, Judgment of November 2005).

24 *Soering v United Kingdom*, Appl No. 14038/88 (ECtHR, Judgment of 7 July 1989), para. 113.

25 *Othman (Abu Qatada) v United Kingdom*, App No. 8139/09 (ECtHR, Judgment of 17 January 2012), para. 282.

26 A. Grahl-Madsen, *The Status of Refugees in International Law, Volume I, Refugee Character* (A.W. Sijthoff, 1966) 196.

27 *Ibid.* 196: ‘We may look at Article 1 in order to determine the scope of Articles 31 and 33, but not vice versa.’ See also UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (reissued 2011) HCR/1P/4/ENG/REV.3, 13, para. 51, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>, accessed on 21 October 2012, which mentions that a threat to life or freedom is always persecution and that persecution may also include other serious human rights violations.

28 Grahl-Madsen (n. 26) 193; See also D.E. Anker, *Law of Asylum in the United States*, 3rd edn (Refugee Law Center, 1999) 171; D.J. Miller, ‘Holding States to their Convention Obligations: The United Nations Convention against Torture and the Need for a Broad Interpretation of State Action’ (2003) 17(2) *Georgetown Immigration Law Journal* 299–324 at 310.

29 UNHCR Handbook (n. 27) para. 52.

discrimination.³⁰ What amounts to persecution is in essence determined by the level of severity or seriousness of certain harm that in turn is determined by the type, nature and scale of the human rights violation(s) that constitute the harm.

The need for a flexible concept has over the years proven to be relevant and useful. For example, many parts of the world have seen large numbers of refugees fleeing an armed conflict and other situations of violence. Such situations are characterised by widespread violence often pursued for a multiplicity of motivations and with discriminate impact on civilians or specific groups in society. As UNHCR puts forward in its Note on Interpreting Article 1 of the 1951 Refugee Convention:

It is sometimes argued that the 1951 Refugee Convention does not provide a suitable legal framework for addressing present-day refugee problems, as these often occur in the context of war and armed conflicts . . . [H]owever . . . even in war or conflict situations, persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons and war and violence are themselves often used as instruments of persecution.³¹

Meanwhile, states in Africa and Latin America have sought to develop regional instruments explicitly extending the definition of a refugee to include people fleeing war, mass human rights violations, or situations of generalised violence or public disorder. In Africa this led to the adoption of the OAU Refugee Convention and the inclusion of a broader refugee definition, and in the Latin American region many states have incorporated a similar broader refugee definition stipulated in Conclusion 3 of the 1984 Cartagena Declaration into their national legislation. As mentioned above, this was inter alia due to regional realities whereby large groups of people flee objective harmful situations of war, violence and massive human rights violations.³² According to Hathaway, the broader refugee definitions acknowledge 'that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of refugee's state or origin, but also as a result of that government's loss of authority'.³³ As a result the emphasis is more on the objective circumstances in the country of origin than on the individual well-founded fear of persecution.

Scholars have long argued which human rights are relevant to determine the scope of persecution, for example, to what extent a distinction must be made between derogable and non-derogable rights, between civil and political rights and economic, social and cultural rights, and between rights protecting a person's physical integrity and those protecting a person's well-being.³⁴ As a result, the process for assessing international protection needs – the refugee status determination process, or 'asylum procedures' – often focuses on identifying

30 See UNHCR written intervention in the case of *Sepet (FC) and Another (FC) v Secretary of State for the Home Department* [2003] UKHL 15 (8 January 2003) 9 para. 3.7, available at: <http://www.unhcr.org/refworld/docid/3e5ba7f02.html>, accessed on 20 October 2012.

31 UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' (2001) 6, para. 20, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>, accessed on 21 October 2012.

32 UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, available at: <http://www.refworld.org/docid/50d32e5e2.html>.

33 J.C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 17.

34 See Wouters (n. 21) 61–67, analysing various schools of thought addressed in the works of Grahl-Madsen and Hathaway.

the applicable human rights standard, rather than the severity or seriousness of the harm. Focusing too much on identifying the applicable human rights standard is problematic for a number of reasons. First, it does not do justice to the evolution of human rights or of the – purposefully left undefined – term persecution. Second, there is a tendency to distinguish between the core and the margins of a human right when assessing the severity or seriousness, and third – and more importantly – it does not do justice to the predicament of the individual and his/her right to be protected from being subjected to harm that seriously may affect his or her life, freedom and well-being in a serious manner. Fortunately the distinction between the core and margins of a human right has been considered to be irrelevant in a judgment by the UK Supreme Court in the case of *RT (Zimbabwe) and others v Secretary of State for the Home Department*,³⁵ and in a judgment of the Court of Justice of the European Union (CJEU).³⁶ In the case of *Germany v Y and Z* the CJEU considered that:

It is unnecessary to distinguish acts that interfere with the ‘core areas’ (‘forum internum’) of the basic right to freedom of religion, which do not include religious activities in public (‘forum externum’), from acts which do not affect those purported ‘core areas’.³⁷

In the same judgment, the CJEU unfortunately ‘legalises’ the predicament of the individual in need of international protection, by using a strictly textual interpretation of what constitutes persecution within the meaning of Article 9(1) of the EU Qualification Directive. The CJEU stated that:

It is apparent from the wording of Article 9(1) of the Directive that there must be a ‘severe violation’ of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution. Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) of the Charter which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter [of Fundamental Rights of the European Union].³⁸

In particular, the word ‘automatically’ is worrying, as it implies that the lawfulness or unlawfulness of acts in terms of human rights will determine the level of severity required for the act to amount to ‘persecution’. However, severity is not determined by the unlawfulness of the act, but rather by the effect of the act, by its nature and/or repetition, on the individual. The severity or seriousness may lie in the fact that a specific human right may be violated, or that the situation as a whole to which an individual is subjected is severe enough to amount to persecution. For example, a threat to life or freedom as well as other serious human rights violations may constitute persecution,³⁹ but circumstances which in themselves would not amount to a serious human rights violation may do so when taken together (cumulative

35 *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38.

36 Joined cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y, Z* [2012] CJEU.

37 *Ibid.* para. 62.

38 *Ibid.* paras. 59–60.

39 UNHCR Handbook (n. 27) para. 51.

grounds).⁴⁰ Further, discrimination will amount to persecution only if it leads to consequences of a substantially prejudicial nature for the person concerned making life intolerable, for example, when it results in serious restrictions on the person's right to earn his livelihood, to practise his religion, or to access normally available educational facilities,⁴¹ when it concerns racial discrimination⁴² or where discriminatory measures are, in themselves, not serious, but may cumulatively be severe enough to produce a feeling of apprehension and insecurity as regards his or her future existence.⁴³

Respect for human rights and the principle of non-discrimination are core aspects of the 1951 Refugee Convention and international refugee law.⁴⁴ The refugee definition and the notion of persecution thus need to be interpreted and applied with due regard for the principle of non-discrimination, including on the basis of age, sex, gender, sexual orientation, gender identity or any other relevant statuses or characteristics people have. Discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.⁴⁵ Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to objective facts and circumstances, including country of origin information as well as the overall circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.⁴⁶ Past persecution is not a prerequisite for refugee status under the 1951 Refugee Convention, and in fact the well-foundedness of the fear of persecution is a prospective test, to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin.⁴⁷

2.3 Absolute protection

The principle of non-refoulement as developed in the context of international human rights law is absolute in character, as the objective is to prevent serious human rights violations. This means no exceptions are allowed for such reasons as past criminal conduct or the public order, health, morals or national security of the state concerned, and no derogation is possible from the principle in times of war or other public emergencies threatening the life of the nation. Under international refugee law the principle of non-refoulement is not absolute. Article 33(2) of the 1951 Refugee Convention allows for exceptions to be made if

40 Ibid. para. 53.

41 Ibid. para. 54.

42 Ibid. para. 69.

43 Ibid. para. 55.

44 1951 Refugee Convention (n. 9) preamble and Art 3.

45 UNHCR Handbook (n. 27) paras 54–55; See also *Kadri v Mukasey*, US 543 F.3d 16 (1st Cir. 2008) available at: <http://www.unhcr.org/refworld/docid/498b0a212.html>, accessed on 21 October 2012. The case was remanded for consideration of the standard for economic persecution, referring to *In re T-Z-*, 24 I & N. Dec. 163 (US Board of Immigration Appeals, 2007), which had found that '[non-physical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life may rise to persecution.'

46 UNHCR Handbook (n. 27) paras 51–53.

47 See e.g. *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31 available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>; *Bromfield v Mukasey*, US 543 F.3d 1071, (9th Cir. 2008) 1076–77; *RRT Case No. 1102877*, [2012] RRTA 101, para. 91, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, accessed on 21 October 2012.

the refugee poses a threat to the security of the country of asylum or because s/he has been convicted by final judgment of a particularly serious crime and constitutes a danger to the community of the country of asylum.⁴⁸ Applying Article 33(2) of the 1951 Refugee Convention does not mean that the person concerned is no longer a refugee, but merely that s/he cannot claim the benefits of the prohibition of refoulement contained in the first paragraph of Article 33. As a result, the person concerned continues to have a well-founded fear of being persecuted and as such is at risk of being subjected to treatment proscribed by international human rights law.

While the refugee may be removed in accordance with Article 33(2) of the 1951 Refugee Convention, s/he may not be removed in accordance with prohibitions of refoulement developed under international human rights law. As a consequence, the refugee remains entitled to the benefits of the 1951 Refugee Convention at large, in particular those provisions of the Convention which do not require lawful presence or residence. Moreover, the applicability of Article 33(2) of the 1951 Refugee Convention becomes questionable. If a refugee cannot be removed on the basis of other absolute prohibitions of refoulement developed under international human rights law, applying Article 33(2) of the 1951 Refugee Convention will no longer be proportionate to its aim of alleviating or negating the danger to the country of asylum.⁴⁹ Interestingly, contrary to the 1951 Refugee Convention, the 1969 OAU Refugee Convention does not allow for exceptions to be made to the principle of non-refoulement and is in line with the absolute character that the principle has attained.

There is an important irony to point to when looking at the absolute character of the prohibition of refoulement and the interconnection between international refugee and human rights law. While people are in need of international protection because of human rights violations, the perpetrators of these violations may equally be in need of international protection. The international law framework includes states' obligations to protect perpetrators of human rights violations and also requires that they are held accountable for their conduct. States therefore cannot avoid identifying those who are responsible for human rights violations amongst those seeking international protection and hold them accountable while ensuring international protection for them.⁵⁰

3 The content and quality of international protection

3.1 *The rights of refugees under international refugee law*

The 1951 Refugee Convention sets out the rights to which refugees are entitled in their country of asylum. These rights concern a refugee's juridical status, her/his gainful employment, the welfare of the refugee, including housing, education and social assistance, and rights concerning administrative assistance, freedom of movement, identity papers, travel documents and so on. The Convention, however, does not grant all rights immediately to all refugees but distinguishes between: refugees in general; refugees who are present in the

48 1951 Refugee Convention (n. 9) Art. 33(2).

49 I have made this argument before in Wouters (n. 21) 564.

50 Elizabeth Santalla Vargas, 'Ensuring Protection and Prosecution of Alleged Torturers: Looking for Compatibility of Non-Refoulement Protection and Prosecution of International Crimes', (2006) 8 *Eur. J. Migration & L.* 41.

country of asylum; refugees whose presence is lawful; and, finally, refugees who are lawfully residing in the country of asylum.

3.2 *The rights of refugees under international human rights law*

International human rights law identifies the duties undertaken by state parties to respect and ensure some of the most basic and instinctive rights afforded to human beings such as the right to life, liberty and security of the person.⁵¹ In addition, human rights also provide individuals with certain other basic civil and political rights, and economic, social and cultural rights. Although certain rights are afforded only to certain groups of individuals, most human rights are afforded to everyone simply because they are human beings and within the jurisdiction of the state.

In contrast, international refugee law has an entirely different function. The 1951 Refugee Convention provides a legal framework for international protection to those compelled to flee because their human rights are at risk of being abused in their state of nationality. Yet, through the application of the 1951 Refugee Convention and through the specific context in which we compartmentalise individuals fleeing persecution, we tend to forget that refugees, regardless of their status and their whereabouts, are afforded and must benefit from human rights because they are, after all, human beings.

4 The right to asylum

4.1 *Background and evolution*

While the principle of non-refoulement is at the centre of international protection, it comes full circle through the right to asylum. The 1948 Universal Declaration of Human Rights (UDHR) provides in Article 14 for a right to seek and enjoy asylum. In turn, the preamble of the 1951 Refugee Convention refers to the UDHR and affirms the importance of the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.⁵² The term ‘asylum’ has no determined meaning in international law and appears to have a dual character.⁵³ The grant of asylum as a sovereign right of states seems well accepted. In general, it refers to protection offered by states in their territory or elsewhere to an individual who came to seek the state’s protection in the absence of protection from his/her own state.⁵⁴ As Goodwin-Gill puts it, ‘the UN General Assembly urges the grant of asylum and observance of the principle of asylum, and States’ constitutions and laws offer the promise of asylum, yet nowhere is this act of States defined.’⁵⁵

Asylum as a enforceable right for individuals is far less acknowledged. Deriving in nature from many basic human rights such as ‘freedom from slavery, torture, arbitrary execution or imprisonment’,⁵⁶ the right to asylum has grown to be recognised as an international human

51 UDHR (n. 3) Art. 3.

52 1951 Refugee Convention (n. 9).

53 M.T. Gil-Bazo, ‘The Charter of Fundamental Rights to the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27(3) *Refugee Survey Quarterly* 33–52 at 38.

54 Institute du Droit International, *L’Asile en Droit International Public* (11 Septembre 1950) quoted in Grahl-Madsen (n. 26) 3.

55 G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn (OUP, 2007) 355.

56 D. Steingbock, ‘The Refugee Definition as Law: Issues of Interpretation’, in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP, 1999) 21.

right, implicitly rooted in various human rights instruments. The right to asylum is increasingly grounded in international law, albeit in instruments of regional scope. Starting with the right to seek and enjoy asylum in Article 14 of the Universal Declaration of Human Rights⁵⁷ and in Article XXVII of the American Declaration of the Rights and Duties of Man,⁵⁸ it is now contained in various binding legal instruments, including in Article II of the OAU Refugee Convention,⁵⁹ Article 22(7) of the American Convention on Human Rights,⁶⁰ Article 12(3) of the African Charter on Human and Peoples' Rights⁶¹ and in Article 18 of the Charter of Fundamental Rights of the EU.⁶² In addition, many countries have incorporated the right to asylum in their constitutions.⁶³

The manner in which a state exercises its sovereignty has a direct effect upon the ability of refugees to seek and enjoy international protection in that state. The right to asylum as a sovereign right of states is often incumbent upon that particular state adhering to human rights instruments and refugee law instruments. Whilst states have a legitimate right to manage immigration and control regarding their territory – the entry, stay and removal of foreigners – this right is limited by human rights obligations and the responsibility of states to protect people who lack the national protection of their own state.⁶⁴

The right to asylum would be illusory if it were subject to rigorous and unlimited state sovereignty, thus creating a meaningless and discretionary opportunity to seek and receive protection. This can further be supported by the fact that most human rights instruments refer to the 'right to asylum' rather than the 'right of asylum'; a right to something implies that it belongs to someone and this someone can only be an individual whereas a right of something is more fitted for state obligations.⁶⁵ Such a distinction is a determining factor in arguing that the right to asylum has developed into an individual enforceable right.

As with most individual rights, the right to asylum would be meaningless if the individual claiming it was unable to enforce its application through a claim or entitlement before a court of law, so as to ensure the enjoyment of this particular right. Developing from a sovereign state right, to an individual enforceable right, to a justiciable right, the right to asylum is now, more than ever, part of the legal structure of many countries and can be subject to adjudication in court.

4.2 *The content of the right to asylum*

The right to asylum, as recognised in international and regional refugee and human rights instruments, encompasses a number of fundamental rights, both substantive and procedural,

57 UDHR (n. 3).

58 American Declaration of the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union) (Bogotá, 30 March–2 May 1948) 38.

59 OAU Refugee Convention (n. 10).

60 ACHR (n. 15).

61 African Charter on Human and Peoples' Rights (1981) 1520 UNTS 217.

62 EU Charter (n. 16).

63 According to the Oceana database 'Constitutions of the Countries of the World', of the 188 Constitutions included, 65 contain an explicit right to asylum, available at: <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID=%7BB41EB37E-BF74-4455-AC52-706FD5AEBFD7%7D>, accessed on 21 October 2012. Overview available with the author.

64 UNHCR, 'The State of the World's Refugees: In Search of Solidarity' (summary, 2012) 3, available at: <http://www.unhcr.org/4fc5ceca9.pdf>, accessed on 21 October 2012.

65 Gil-Bazo (n. 53) 38.

including the principle of non-refoulement, respect for human dignity, due process guarantees and freedom from torture and other ill-treatment. International human rights law, which generally applies to all persons within a state's territory and jurisdiction, provides the overarching framework for the protection of asylum-seekers and refugees.

Central to the realisation of the right to asylum is the principle of non-refoulement, the cornerstone of international refugee protection. This principle is codified, inter alia, in Article 33(1) of the 1951 Refugee Convention. The principle of non-refoulement applies to any conduct resulting in the removal, expulsion, deportation, return, extradition, rejection at the frontier or non-admission, etc. that would place a refugee at risk. The principle of non-refoulement is not subject to territorial restrictions; it applies wherever the state in question exercises jurisdiction.⁶⁶ Further to the 1951 Refugee Convention, the principle of non-refoulement as stated above is codified in regional refugee law instruments,⁶⁷ forms a rule of customary international law,⁶⁸ and is complemented by non-refoulement obligations contained in and developed under international human rights law, prohibiting the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm.⁶⁹ The principle of non-refoulement applies to all refugees, including those who have not been formally recognised as such, and to asylum-seekers who may be refugees, but whose status has not yet been determined.⁷⁰

Thus, while the right to asylum in international law encompasses a number of fundamental rights, it is nevertheless an independent right intended to ensure individual safety and security, with the prospect of continuing to live free from harm. While the principle of non-refoulement is a fundamental right and the cornerstone of international refugee protection, the right to asylum in international law goes beyond the prevention of refoulement, and includes not only admission to a safe territory and access to fair and effective procedures for determining status and protection needs, but also the attainment of a durable solution.⁷¹

4.3 Contemporary challenges

In its 2012 'State of the World's Refugees' report, UNHCR expresses its concern that the institution of asylum is threatened.⁷² From a legal point of view the relevant question is

66 *Hirsi Jamaa and Others v Italy*, App. No. 27765/09 (ECtHR, Judgment of 23 February 2012); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) paras 24, 26, 32–43; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v Italy* (March 2010) paras 4.1.1–4.2.3.

67 See OAU Refugee Convention (n. 10) Art II(3); and 1984 Cartagena Declaration (n. 11).

68 UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' (1997); UNHCR, 'Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees' (2002) HCR/MMSP/2001/09, para. 4; and E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, 2003) 163–64.

69 CAT (n. 13) Art. 3(1); ICCPR (n. 17) Art. 7; ACHR (n. 15) Art. 5(2) and Art. 22(8); Inter-American Convention to Prevent and Punish Torture (1985) 25 ILM 519, Art. 13.

70 UNHCR Handbook (n. 27) para. 28.

71 UNHCR, 'Note on international protection: report of the High Commissioner' (2011) UN Doc. A/AC.96/1098, paras 2 and 3. See also 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' (25 July 1951) UN Doc A/CONF.2/108/Rev.1, Recommendation D.

72 UNHCR (n. 64) 9.

whether the right to asylum was ever adequately developed and implemented. In 1951, Van Heuven Goedhart, the first High Commissioner for Refugees, noted the problem that ‘the world has not yet given practical expression to the conception laid down in the UDHR that every man exposed to political persecution has a claim to asylum and to protection of the law, to the right to work and to the exercise of a profession, to benefits of social security and to full freedom of movement’.⁷³ Van Heuven Goedhart mentioned, among other elements, too many economic and national interests standing in the way of a full and unrestricted fulfilment of the institution of asylum. His hopes for positive change were vested in the 1951 Refugee Convention.

More than half a century later much has been achieved. As outlined above, a strong international legal regime encompassing inter alia refugee law and human rights law instruments has been developed. Nonetheless, states seem reluctant to fully protect those who are in need of international protection. The challenge differs in the ‘developed’ and the ‘developing’ world. In the ‘developed’ world, refugees face the challenge of convincing states that they are refugees.⁷⁴ Governments continue to implement restrictive laws, policies and practices aimed at deterring people from seeking refuge, at least in their respective country or region – for example, through joint border monitoring and operational management.⁷⁵ An often cumbersome and highly individualised administrative procedure is put in place to decide who will be recognised and protected as a refugee and who will not. However, once recognised, refugees are granted a variety of rights at par with nationals and going beyond, to which they are immediately entitled under the 1951 Refugee Convention. In the ‘developing’ world, states have a long-standing practice of receiving – as they are often in the vicinity of ‘refugee-producing’ countries – and recognising on a prima facie basis large numbers of refugees. However, they do not have the will or resources to provide full protection. As a result, refugees are protected from refoulement, but their human rights and further entitlements are limited.⁷⁶

A lack of political will, exacerbated by certain communities’ disenchantment with hosting refugees, as well as increasing government concerns about transnational threats, including terrorism, crime and irregular mixed movements, have complicated – or even jeopardised – protection responses. Humanitarian crises and conflict have been exacerbated by the simultaneous impact of population growth, climate change, and food, water and energy insecurity. Growing levels of poverty and unemployment have proven to be sources of social and political unrest. In this environment, a strong commitment from states is needed to uphold the institution of asylum.

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73 G.J. van Heuven Goedhart, ‘People Adrift’ (1953) 7(1) *Journal of International Affairs* 7–49 at 7.

74 J. Hathaway, *The Rights of Refugees under International Law* (CUP, 2005) 1.

75 This refers to, for example, FRONTEX in the European Union, which is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

76 UNHCR (n. 64) 9.

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