Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law

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DOI:10.1093/acprof:oso/9780198701170.003.0002

Abstract and Keywords

This chapter provides a critical assessment of the interactions between international refugee law and human rights law. Although refugee law and human rights law were initially conceived as two distinct branches of public international law, their multifaceted interaction is now well acknowledged in both state practice and the scholarly literature. However, the normative impact of their relationships has been rarely considered via a systemic perspective. This chapter explores the relations between refugee law and human rights law from a holistic and critical angle. It argues that human rights law has radically informed and transformed the distinctive tenets of the Refugee Convention to such an extent that the normative framework of forced migration has been displaced from refugee law to human rights law.

Keywords: human rights law, refugee law, asylum, non-refoulement, refugee status, UNHCR, refugee definition

Are refugee rights human rights? Such a question may appear provocative at a time when refugees are regularly victims of abuses in a context of restrictive asylum policies. While this sad reality is anything but new, it is further exacerbated by the current recession. The United Nations High Commissioner for Refugees (UNHCR), António Guterres, observes that 'the human rights agenda out of which UNHCR was born, and on which we depend, is increasingly coming under strain. The global economic crisis brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security'.[1] This difficult environment highlights the need to prevent the economic crisis from becoming a protection crisis at the expense of refugee rights.[2]

Against such a background, assessing the relations between refugee law and human rights law is essential in order to identify the full range of states' obligations and thereby inform their practice towards refugees and asylum seekers. Although refugee law and human rights law were initially conceived as two distinct branches of international law, their multifaceted interaction is now well acknowledged in both state practice and academic writing. The literature has schematically evolved around three successive narratives.

Originally, the relationship between the two has been approached as a causal link, the violations of human rights being acknowledged as the primary cause of refugee movements.[3] Since then, the conceptualization of their interrelationship (p.20) has gradually shifted from a preventive approach to an interactive one. This new impetus has mainly focused on the specific linkages between human rights standards and the distinctive tenets of international

refugee law, such as the definition of ‘refugee’[4] and the principle of *non-refoulement*.[5] More recently, this interactive approach has finally paved the way for a more integrative one, which concentrates on the complementary protection[6] to the refugee status under the 1951 UN Convention Relating to the Status of Refugees (Geneva Convention).

While this evolution largely echoes the practice and concerns of states, the abundant literature devoted to the interaction between human rights law and refugee law calls for two preliminary remarks. On the one hand, academic discussions remain very specific and refugee law-oriented, to the detriment of a more systemic analysis.[7] On the other hand, they are grounded on the premise that the (p.21) Geneva Convention is a ‘specialist human rights treaty’.[8] This assertion is generally accompanied by a poignant celebration of the Refugee Convention as opposed to the alleged drawbacks of general human rights treaties. For the community of refugee lawyers, the ‘other’ human rights instruments would be based on ‘inappropriate assumptions’[9] and would ‘not address many refugee-specific concerns’.[10] Slightly more radically, it is asserted that ‘human rights law is often not sufficiently detailed’ and ‘as a whole lacks a coherent structure’,[11] so that its invocation ‘will either be largely rhetorical or it will promot[e] fragmentation’.[12] Even worse, reliance on this branch of law would be ‘a dangerous option’,[13] because ‘international human rights law is strong on principle but weak on delivery’.[14]

These arguments are, however, not convincing for they can be applied equally to international refugee law itself. Indeed, the Geneva Convention has attracted similar criticisms on the ground that ‘the Convention is redundant…or because it is functionally inefficient, overly legalistic, complex and difficult to apply’.[15] Another set of arguments for claiming the primacy of the Refugee Convention by opposition to general human rights treaties may be found in the maxim *lex specialis derogat lex generalis*.[16] However, while this reasoning may have some pedagogical (p.22) virtues, resort to the *lex specialis* is flawed for three main reasons. First, general human rights norms cannot be totally dissociated from their subsequent interpretation by treaty bodies, with the result that they may appear more precise and even clearer than their refugee law counterparts. Second, *lex specialis* presupposes a conflict of norms between human rights law and refugee law that is extremely rare.[17] Third, the Geneva Convention itself provides the means for resolving any potential conflicts of norms, for its Article 5 preserves the continuing applicability of more favourable standards granted apart from this Convention without regard to the so-called speciality of the norms.[18]

Thus, the main rationale for arguing the centrality of the Refugee Convention should be explored elsewhere. Two putative factors may be asserted. First, the professional bias in favour of the Geneva Convention is probably a reaction against states’ strategic manoeuvring under the banner of human rights law. To many observers, complementary protection schemes established at the regional and domestic levels constitute subtle tools for undermining the universal refugee regime. Second, one should not underestimate the weight of professional culture among refugee lawyers. International refugee law is traditionally understood within academic circles as a specialization in its own right primarily grounded in the Geneva Convention. Refugee lawyers are thus naturally inclined to perceive human rights law as a supplementary and therefore secondary source of law.

The present chapter argues that this professional posture is no longer tenable. Contrary to conventional wisdom, the Geneva Convention is not a human rights treaty in the orthodox sense, for both historical and legal reasons. However, human rights law has radically informed and transformed the distinctive tenets of the Geneva Convention to such an extent that the normative frame of forced migration has been displaced from refugee law to human

rights law. As a result of this systemic evolution, the terms of the debate should be inversed: human rights law is *the* primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role. This assertion is grounded on a comparative assessment of applicable norms under both refugee law and human rights law. This normative inquiry into their respective scope and content is centred on the three major pillars of the refugee protection regime, namely the access to international protection (part I), the content of such protection (part II), and its implementation scheme (part III).

(p.23) I. Access to International Protection: Towards a Gradual Merger between Refugee Law and Human Rights Law?

Access to protection is primarily conditioned by two parameters: the definition of 'refugee' (A), and the principle of *non-refoulement* (B). These two critical components express the very essence of the Geneva Convention. At the same time, their scope and content reflect the ambivalent relationship between refugee law and human rights law. Indeed, the refugee definition and the principle of *non-refoulement* crystallize both the idiosyncratic features of refugee law and the profound impact of human rights law on the Geneva Convention.

A. The changing meaning of the refugee definition

The refugee definition tells us more about the distinctive attributes of the Geneva Convention than any other provisions. Like any definition, it draws a delicate—and arguably restrictive—line of demarcation between the insiders and outsiders (this chapter, A.1). While selective by nature, the refugee definition has been critically reshaped by human rights law through a gradual process of pollination (this chapter, A.2).

1. The refugee definition and the original tenets of international refugee law

The scope of refugee law and human rights law represents the most palpable difference between the two branches of international law. Whereas human rights are applicable to everyone because of the dignity inherent in every human being, the benefit of refugee status depends on the identification of a predetermined category of protected persons. From the perspective of general international law, identifying foreigners who deserve protection is the normative corollary to the absence of a generalized freedom of movement. It is not by coincidence that the emergence of modern refugee law coincides with the generalization of migration controls during the interwar period.[19] International refugee law constitutes an exception to the migration control paradigm and, as such, the former legitimates the latter within a self-referential logic.[20]

Defining who is a refugee stands out as a prerequisite not only for identifying the persons in need of protection but also for determining the correlative extent of the international obligations assumed by states under the Geneva Convention. From the beginning, the refugee definition was accordingly considered to be the 'crux of the entire matter',[21] 'the cornerstone on which the entire edifice of (p.24) the Convention rested'.[22] At the same time, state representatives stressed that they 'could not sign a blank cheque and assume unlimited and indefinite commitments in respect of all refugees'.[23] As a result of such anxiety, 'the Convention definition was tailored to fit an approximately foreseeable number of prospective

beneficiaries who fell within acceptable categories'.[24] This reflects in turn the original premise of international refugee law. As observed by Bhabha, 'from the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violation. It was always clear that only a subset of forced transnational migrant persecutes were intended beneficiaries'.[25]

The selectivity inherent in the refugee definition is reinforced by its very structure, which is composed of three different levels of requirements, commonly labelled as the inclusion, exclusion, and cessation clauses. Inclusion criteria in the refugee definition are cautiously spelled out in Article 1(A)(2) of the Geneva Convention on the basis of four cumulative conditions: first, a refugee is outside his/her country of origin; second, he/she is unable or unwilling to avail himself/herself of the protection of his/her country; third, such inability or unwillingness is attributable to a well-founded fear of persecution; and fourth, the persecution is based on five limitative grounds (race, religion, nationality, membership of particular social group, and political opinion).

Such a composite definition highlights the two essential specificities of international refugee law. On the one hand, it reveals the primary function of refugee law as a protection of substitution when the state of origin fails to fulfil its duty of protection towards its own citizens. As notably acknowledged by the House of Lords, 'the general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community'.[26] On the other hand, such a principle of surrogacy was not conceived to obviate any failure of protection from the state of origin.[27] The cumulative effect of the various conditions required by Article 1(A)(2) underlines the selective nature of the refugee definition, which is not bound to cover all causes of forced migration. Such a (p.25) restrictive stance was clearly premeditated, for states were aware that the definition under the Geneva Convention would not include every refugee.[28]

The essential characteristics of refugee law as a surrogate but selective protection are further reinforced by the exclusion clauses. Even if a person duly satisfies all the conditions spelled out in Article 1(A)(2), he/she is excluded from the Geneva Convention under two different sets of circumstances. First, the protection of substitution offered by refugee status is excluded when a person already benefits from other international or national protection, whether he/she receives UN protection (Article 1(D)) or if he/she has the rights and obligations attached to the possession of the nationality in his/her country of residence (Article 1(E)). Second, the selectiveness of the refugee definition is patently reinforced by Article 1(F) which was introduced, according to the French delegate at the 1951 Conference, for the very purpose 'of separating the wheat from the chaff'.[29] In other words, 'the rationale…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'[30] in cases of serious crimes (crime against peace, war crime, crime against humanity, serious non-political crime, and acts contrary to the purposes and principles of the United Nations).

Finally, the cessation clauses enumerated in Article 1(C) reassert the dual nature of refugee status as a surrogate but selective protection. From that angle, refugee status is conceived of as a temporary protection, which is terminated as soon as the need for such protection is no longer justified.

2. The impact of international human rights law on the refugee definition

The selective approach permeating all the components of the refugee definition has been substantially informed—and to some extent mitigated—by the subsequent development of human rights law. Its impact on the refugee definition is primarily grounded in three main factors. First, as with any other conventional rules, Article 1 of the Geneva Convention must be construed and applied within the normative context prevailing at the time of its interpretation, including thus the human rights treaties adopted since its entry into force.[31] As exemplified below, such an *evolutive interpretation* has proved to be essential for adapting the Geneva Convention to the (p.26) ever changing reality of forced migration. Second, human rights law provides a universal and uniform set of standards which represents a particularly persuasive device for harmonizing the unilateral and frequently diverging interpretations of states parties. Third, given the subjectivity inherent in many key notions of the refugee definition, human rights standards offer a more predictable and objective normative framework for determining who is a refugee.

As the cornerstone of the refugee definition, the very notion of persecution clearly illustrates the permeation of human rights law within refugee law. This central concept has been left indeterminate by the Geneva Convention, probably because the lessons learned from the Nazi atrocities militated in favour of a concept flexible enough to encapsulate any possible future forms of mistreatment.[32] While its meaning has thus initially been relinquished to the subsequent interpretation of each state party, the need for a more principled and less subjective application has nevertheless prompted scholars to define persecution by reference to the new and growing body of human rights standards.

As early as 1953, Jacques Vernant 'equates "persecution" with severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights'.[33] Although this understanding was not commonly shared at the time,[34] it has progressively gained recognition with the unprecedented expansion of human rights law during the 1960s and the 1970s. In his pioneer study published in 1983, Goodwin-Gill framed the notion of persecution against the background of human rights.[35] This exercise was then further systematized by Hathaway in his seminal book *The Law of Refugee Status*, published in 1991. He defines persecution as a 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.[36] Since then, defining persecution by reference to human rights has become conventional wisdom in legal doctrine.[37] More decisively, this understanding has been acknowledged in the subsequent practice of states parties to the Geneva Convention. It has notably (p.27) been restated by several domestic jurisdictions[38] and administrative authorities,[39] as well as in the EU Qualification Directive.[40]

The human rights-based approach to the refugee definition has resumed in turn with the underlying purpose of the Geneva Convention. The first paragraph of its preamble recalls in emphatic terms 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'. This evasive but symbolic reference to human rights has been retrospectively interpreted by domestic jurisdictions as informing the whole rationale of the Geneva Convention: '[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination'.[41]

This human rights unction is not limited to the notion of persecution; it also shapes many other distinctive features of the refugee definition. As acknowledged by several domestic courts, the term 'refugee' is 'to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights…and the International Covenant on Civil and Political

Rights'.[42] The grounds of persecution provide one of the most obvious instances of the human rights filiation: the grounds of religion and political opinion are clearly based on freedom of thought[43] and that of opinion and expression,[44] while the other ones—race, nationality, and membership of a particular social group—are anchored within the principle of non-discrimination.[45]

Although gender is not explicitly listed among the grounds of persecution, human rights law has further played a crucial role in developing a gender-sensitive approach that mirrors its own evolution. Gender sensitivity is even a forerunner of the human rights approach of the refugee definition.[46] Hence, (p.28) gender-based claims,[47] as well as those related to sexual orientation,[48] are now commonly considered as being encapsulated within the broad and residual ground of membership of a particular social group.

Human rights law has played a similar influence regarding non-state actors of persecution. While this issue has raised long-standing controversies among the refugee law community, the human rights theory of *Drittwirkung* has critically reshaped the terms of the debate in favour of an inclusive approach. Non-state actors of persecution have been eventually acknowledged by domestic courts[49] and the EU Qualification Directive,[50] the adoption of the latter obliging the most recalcitrant states (Germany and France) to change their previous practice.[51]

In sum, human rights law has become the ultimate benchmark for determining who is a refugee. The authoritative intrusion of human rights has proved to be instrumental in infusing a common and dynamic understanding of the refugee definition that is more consonant with and loyal to the evolution of international law. It thus prevents the Geneva Convention from becoming a mere legal anachronism by adapting it to the changing realities of forced migrations.

B. The principle of *non-refoulement*: a common ground of protection

The distillation of human rights norms within refugee law has been further deepened and reinforced through a similar evolution encapsulating the principle of *non-refoulement*. While this fundamental principle is at the very heart of the refugee protection regime (B.1), human rights law has overtaken it via a persuasive process of appropriation (B.2). The duty of *non-refoulement* has accordingly emerged as an overlapping ground of protection common to both branches of international law.

(p.29) 1. The principle of *non-refoulement*: the cornerstone of international refugee law

The principle of *non-refoulement* is commonly regarded as 'the cornerstone of international refugee law'.[52] Its origins go back to extradition treaties concluded during the nineteenth century,[53] before it was explicitly endorsed for the first time in the 1933 Convention relating to the International Status of Refugees. Under contemporary refugee law, its primary source is Article 33(1) of the Geneva Convention: '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'. The cardinal importance of such an elementary principle is further endorsed by Article 42 which prohibits any reservation to Article 33. Since

then, this founding principle of refugee law has been restated in a large body of interstate instruments,[54] to such an extent that it is now considered a customary norm of international law.[55]

Whatever its legal nature under general international law, the scope of the *non-refoulement* duty is relatively broad. The inclusive language of Article 33—through the generic expression 'in any manner whatsoever'—clearly indicates that the prohibition of *refoulement* applies to any act of forcible removal or rejection that puts the person concerned at risk of persecution. The legal nature of the act (p.30) (expulsion, deportation, extradition, non-admission at the border, interception, transfer, or rendition) is therefore not relevant. The decisive consideration is the consequence of this act, namely whether one's life or liberty would be threatened on account of a Convention reason. Following that stance, the principle of *non-refoulement* covers equally both asylum seekers and recognized refugees, provided that they are under the jurisdiction of a state party. Contrary to many other provisions of the Geneva Convention, Article 33 is not dependent on the presence—whether lawful or unlawful—of asylum seekers within the territory of a state party. It thus applies regardless of whether they enter the territory legally or illegally.

This basic protection is reinforced by Article 31(1) of the Geneva Convention, which prohibits the imposition of penalties on account of the illegal entry of refugees. This last provision is aimed at exempting asylum seekers from the entry requirements generally imposed on immigrants.[56] As acknowledged by domestic courts, the purpose of Article 31 is 'to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law' of states parties to the Geneva Convention.[57]

The principle of *non-refoulement*, combined with this duty of non-penalization, considerably challenges the traditional prerogative of states in the field of migration control.[58] States no longer enjoy an unconditional and uncontrolled discretion to refuse admission to their own territory. However, this does not create an obligation of asylum per se but instead conditions, circumscribes, and ultimately constrains their margin of appreciation. Hence, 'the Convention represents a significant but qualified limitation upon the absolute right of the member states to admit those whom they choose'.[59]

From a conceptual and legal perspective, *non-refoulement* must be distinguished from asylum. At the conceptual level, *non-refoulement* is a negative notion, prohibiting states from sending back refugees to a country of persecution. As underlined during the drafting of the Geneva Convention, '[i]t imposed a negative duty (p.31) forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow a refugee to take up residence'.[60] By contrast, asylum is a positive concept, which entails admission to residence and lasting protection against the jurisdiction of another state. This conceptual distinction between asylum and *non-refoulement* is further grounded on their respective legal natures: *non-refoulement* is an obligation of states, whereas asylum is a right of states. As evidenced by a large body of law, 'it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual'.[61]

As a result of this normative distinction, although the exact content of refugee status is spelled out in considerable detail, the Geneva Convention does not contain any provision on asylum.[62] The silence on this crucial issue may be surprising, for 'to speak of refugees is to speak of asylum, the very condition of their existence'.[63] Such normative hiatus between the right of asylum and the obligation of *non-refoulement* was, however, anything but unintentional. The Geneva Convention was carefully drafted to make sure that no obligation

to grant asylum was explicitly imposed on states parties. The UK delegation made clear at the 1951 Conference that '[t]he right of asylum…was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him'.[64] '[Nevertheless], the only article which had any bearing on that aspect of the matter was the article [33] prohibiting the expulsion of a refugee to a country where his life or freedom would be in danger'.[65]

As admitted by the UK representative, the principle of *non-refoulement* is bound to play a pivotal role in the absence of an individual right to be granted asylum. Furthermore, while conceptually and legally well grounded, the distinctive nature of *non-refoulement* and asylum appears highly artificial in practice.[66] Although *non-refoulement* is primarily an obligation of result, asylum is generally the only practical means to respect and ensure respect for Article 33. Indeed, how can a state remove (p.32) an asylum-seeker without, beforehand, granting temporary admission for assessing whether his/her life or liberty may be threatened in the country of destination? Such constructive ambiguity was probably the price to pay for preserving the appearance of state sovereignty with due regard to the most essential rights of refugees.

In practice, states have two options for complying with their duty of *non-refoulement*: granting temporary asylum in order to examine whether the asylum-seeker is a refugee under the Geneva Convention, or sending him/her to a country where there is no risk of persecution.[67] Even in the last case, removal to a safe third country requires some form of temporary admission for asserting that the third country is not a country of persecution and provides an effective protection against any subsequent *refoulement* in breach of Article 33. It further presupposes that the asylum-seeker would be admissible in the safe third country—a condition which is hardly completed in the absence of a specific obligation spelled out in re-admission agreements or other related schemes for allocating the responsibility of examining the asylum request (such as the Dublin Regulation). In sum, whatever the different options available to states for implementing Article 33, due respect for the principle of *non-refoulement* implicitly requires 'a de facto duty to admit the refugee'.[68]

Such a duty is, however, not absolute. Article 33(2) provides that the benefit of *non-refoulement* cannot be claimed by a refugee who represents a danger to the security of the country in which he is, or who has been convicted by a final judgement of a particularly serious crime, constituting a danger to the community of that country. As with any exceptions to a principle, 'it is clear that Article 33(2) exception must be interpreted restrictively'.[69]

While states retain a substantial margin of appreciation, the threshold of these two exceptions remains relatively high. Regarding the first, '[t]he wording of the provision…requires the person him or herself to constitute a danger to national security'.[70] That a person be able to threaten the security of a whole country confines such a hypothesis to highly exceptional circumstances (mainly limited to terrorism, military operations, espionage, and other related activities aimed at overthrowing its institutions). In any event, 'the threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible'.[71]

While the first exception is aimed at safeguarding the security of the state and its institutions, the second exception focuses on the protection of the host society against criminality. Here again the wording of Article 33(2) is particularly (p.33) restrictive. This last exception is circumscribed by three cumulative conditions: first, the refugee must have been 'convicted by a final judgement' (presupposing thus the exhaustion of all judicial remedies); second, this

conviction is for ‘a particularly serious crime’ (thereby requiring a case-by-case assessment of the nature of the crime, the gravity of the harm inflicted, and the circumstances surrounding its perpetration); and third, because of his/her criminal record and the risk of subsequent offence, the refugee represents ‘a danger to the community’ as a whole.[72]

As exemplified by these exceptions as well as by its ambivalent relations with asylum, the principle of *non-refoulement* operates as a pragmatic attempt to reconcile two competing values. It preserves a subtle—and sometimes insecure—compromise between, on the one hand, the inescapable right of states to control access to their territory and, on the other, the imperious protection of refugees whose lives and liberty are threatened. This balancing act constitutes the driving force of international refugee law and reveals the normative dynamic as well as contradictions inherent in this branch of law.

2. The appropriation of *non-refoulement* by international human rights law

Human rights law does not fundamentally challenge the normative mantra of refugee law. Despite several attempts to do so,[73] the Universal Declaration of Human Rights (UDHR) failed to enshrine an individual right to be granted asylum. Its Article 14 refers instead to a vague and permissive proclamation without any correlative obligation of admission. It declares in minimalist terms that ‘[e]veryone has *the right to seek and to enjoy* in other countries asylum from persecution’.[74] Lauterpacht described this formula as ‘artificial to the point of flippancy’, for ‘there was no intention to assume even a moral obligation to grant asylum’ and, accordingly, ‘no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it’.[75] Referring to the vigilant reluctance of states in this field, the High Court of Australia concluded that:

(p.34) [T]his right ‘to seek’ asylum was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals…Nor was the matter taken any further by the International Covenant on Civil and Political Rights… Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one’s own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate.[76]

Although this may appear frustrating, the failure of human rights law to secure an individual right of asylum simply echoes the existential dilemma of refugee law. Both branches of international law revolve around the same dialectic between, on the one hand, the state obligation of *non-refoulement* and, on the other, its sovereign right of granting or refusing asylum. However, while adopting the same normative stance, human rights law has considerably impacted on the principle of *non-refoulement*, thus reinforcing and consolidating the cornerstone of refugee law as a common ground of protection. The principle of *non-refoulement* has been expressly endorsed, at the universal level, in the 1984 UN Convention against Torture (Article 3) and the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance (Article 16) as well as, at the regional level, the 1969 American Convention on Human Rights (American Convention) (Article 22(8)), the 1985 Inter-American Convention to Prevent and Punish Torture (Article 13(4)), the 2000 Charter of Fundamental Rights of the European Union (Article 19(2)), and—to some extent—the 2004 Arab Charter on Human Rights (Arab Charter) (Article 28).[77]

Beside these explicit endorsements, most general human rights treaties have been construed by their respective treaty bodies as inferring an implicit prohibition of *refoulement*. As early as 1961, the European Commission of Human Rights considered that the removal of aliens may raise an issue under Article 3 of the European Convention on Human Rights (ECHR).[78] This purposive interpretation was notably endorsed in 1965 by the Parliamentary Assembly of the Council of Europe,[79] before being finally confirmed in 1989 by the European Court of Human Rights in the landmark *Soering* case.[80] This implied duty of *non- (p.35) refoulement* deriving from the general prohibition of torture, inhuman and degrading treatment has been further endorsed, at the universal level, by the Human Rights Committee[81] and the Committee on the Rights of the Child[82] as well as, at the regional level, by the Inter-American and African Commissions of Human Rights.[83]

Despite this consensual acknowledgement, treaty bodies have remained surprisingly evasive about the exact basis of their praetorian construction. One could however argue that protection against *refoulement* is anchored within the theory of positive obligations. States not only have the negative obligation to refrain from violating human rights; they also have the positive obligation to prevent violations so as to ensure the effective enjoyment of the basic rights at stake.[84] This obligation of prevention is applicable to virtually all human rights provided there is a real risk of serious violation in the receiving state. The implied duty of *non-refoulement* has been notably acknowledged by the Human Rights Committee with regard to any rights under the Covenant.[85] The European Court is, however, more hesitant and obviously embarrassed by any further enlargement besides the right to life, freedom from arbitrary detention, and the right to a fair trial.[86] In any case, identifying the specific human rights triggering the principle of *non-refoulement* remains a largely academic and arguably sterile exercise. Serious violations of any human rights would prompt the correlative prohibition of *refoulement*, as soon as the gravity of the prospective violation amounts to degrading treatment.

Following that stance, the human rights principle of *non-refoulement* coincides in substance with its refugee law counterpart. While the notions of degrading treatment and of persecution retain their own autonomous meanings, defining them by reference to a serious violation of human rights significantly erodes (p.36) their distinctive character. Already in 1984, the European Commission acknowledged that:

Although the risk of political persecution, as such, cannot be equated to torture, inhuman or degrading treatment,…it may, in a particular case, raise an issue under Art. 3 if it brings about a prejudice for the individual concerned which reaches such level of severity as to bring it within the scope of this provision e.g. an arbitrary sentence…or inhuman detention conditions.[87]

Conversely, from the perspective of the Geneva Convention, degrading treatment equates with persecution under the refugee definition.[88] The same material convergence may be observed with regard to the assessment of the risk. Whether it is phrased as 'a well-founded fear of being persecuted' or 'a real risk of being subjected to torture, inhuman or degrading treatment', both are prospective in nature. Although the different formulae used by treaty bodies and refugee status decision-makers have raised a disproportionate attention among commentators, the difference of wording is largely semantic. The reality of the risk under the Refugee Convention and the human rights treaties requires a case-by-case assessment grounded on two prognostic factors**:** the personal circumstances of the applicant as well as the general situation prevailing in the destination country. In both cases, assessing the well-

foundedness of the alleged risk is in essence a hypothetical prediction of what might happen if the applicant were returned to his/her country of origin.

Notwithstanding this substantial convergence between the two variants of the *non-refoulement* obligation, human rights law provides a broader protection than refugee law on three specific issues. First, the human rights principle of *non-refoulement* is not subordinated to the five grounds of persecution required by the refugee definition under the Geneva Convention. However, this divergence should not be overestimated, for it can be counterbalanced by a cogent interpretation of the grounds of persecution with due regard to the object and purpose of the Geneva Convention. The second distinctive feature is probably more straightforward: whereas the refugee definition exclusively applies to a person who is 'outside the country of his nationality',[89] no such geographical limitation is required under human rights law. As a result, the human rights principle of *non-refoulement* still applies to any person who is in a diplomatic mission, in an area controlled by (p.37) peacekeeping and occupying forces, or is otherwise under the effective control of another state within the territory of his/her own country.[90]

The third and the most well-known characteristic relies on the absolute nature of the *refoulement* prohibition in a state where there is a real risk of torture, inhuman, or degrading treatment.[91] It thus applies to asylum seekers and refugees who have been excluded from the protection of the Geneva Convention under the exclusion clauses of the refugee definition or by application of Article 33(2).[92] This last feature has received most of the attention from both states and commentators in a context largely dominated by the fight against terrorism. In practice, though, one should observe that this feature appears more symbolic than real, for it concerns a highly marginal number of persons compared to the total population of refugees and other persons in need of protection.[93] It remains, however, emblematic of the impact of human rights law on refugee law. Indeed, the archetypal balance between state sovereignty and human rights has reached its breaking point in favour of the latter. This reveals in turn the distinctive rationale underlying each branch of law: whereas refugee law is bound to grant protection only to those who deserve it, human rights law is universal and inclusive in essence.

More specifically, the human rights principle of *non-refoulement* stands out as a practical and powerful means for ensuring effective respect for fundamental rights. It is an integral part of the broader enforcement device of human rights law. Schabas rightly observes in this sense that:

it may be better to see it as a piece in the international struggle for the enforcement of fundamental rights. Approached in this way, States should not expel persons to a place where they may be threatened with torture, or the death penalty, or other serious abuses, because this is a method of promoting global observance of human rights.[94]

From a systemic perspective, the structural function of *non-refoulement* reinforces the normative merger of the two branches of law, since effective respect for human rights also constitutes the ultimate finality of refugee law.[95]

(p.38) This purposive convergence between human rights law and refugee law is further reasserted by their common impact on the traditional right of states to control access to their territory. Under both branches of law, due respect for the principle of *non-refoulement* requires admission, except for possible removal to a safe third country.[96] Hence, while acknowledging that 'the State party is not required to modify its decision(s) concerning the granting of asylum', the Committee against Torture (CAT) has insisted on the fact that:

[I]t does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn).[97]

Regarding the removal to a safe third country, the European Court of Human Rights has underlined in the same line of reasoning that the conclusion of an international agreement for allocating the responsibility of examining asylum requests (such as the Dublin Regulation) does not absolve states from their obligations under human rights law.[98] It concluded that:

When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.[99]

This *obiter dictum* remarkably illustrates the inextricable intermingling between human rights law and refugee law: the former guarantees the effectiveness of the latter and vice versa.

(p.39) II. The Content of International Protection: From Conditionality to Universality

While access to protection has witnessed a gradual merging of human rights law and refugee law, one remaining distinctive feature relies on the legal consequences attached to the principle of *non-refoulement*. In line with other treaty bodies, the CAT has noted in straightforward terms that 'the legal status of the individual concerned in the country where he/she is allowed to stay is not relevant for the Committee',[100] since 'its authority does not extend to a determination of whether or not the claimant is entitled to asylum under the national laws of a country, or can invoke the protection of the Geneva Convention relating to the Status of Refugees'.[101]

By contrast, the principle of *non-refoulement* under the Geneva Convention is accompanied and finalized by the granting of refugee status. Such an attribute has been commonly heralded by commentators as establishing the Geneva Convention as *the* primary source of refugee protection, relegating human rights law to a secondary role. Following a similar assumption (but with clearly different objectives in mind), states have established at the regional and domestic levels more malleable and precarious regimes under the label of so-called complementary protection.

This self-referential dialogue between states and refugee lawyers is arguably grounded on false premises. Indeed, closer examination of the content of the protection granted by the Geneva Convention and the ICCPR reveals a completely different picture. From this angle, human rights law is not only broader than refugee law with regard to both its personal and material scope, but more fundamentally, the former supplants the latter even when their respective norms overlap.

A. Refugee status and the conditionality of protection

Compared to human rights law, the content of international protection provided by refugee status presents significant specificities. Although the Geneva Convention is commonly presented as 'an extraordinary "Bill of Rights" for refugees',[102] it substantially differs from the phraseology of human rights. Formally speaking, the Refugee Convention is framed on the mode of interstate obligations rather than those of individual rights. It primarily addresses contracting states by spelling out their obligations, while the term 'rights' directly pertaining to refugees is rarely mentioned as such in the text of the Geneva Convention.[103] Thus the refugee is not conceived of as a subject (p.40) of law in his or her own right but rather as a beneficiary of common standards regulating the conduct of states. Technically speaking, therefore, the Geneva Convention cannot be labelled as a human rights treaty as is so frequently asserted by the doctrine.[104] In other words, it is a duty-based rather than a human rights-based instrument.[105]

One should not, though, overestimate the difference between rights of individuals and obligations of states, given that the state remains the primary guarantor of human rights. From that angle, several human rights instruments mix obligations of states and rights of individuals.[106] Although such a distinction is still important at the conceptual level, on a more practical plane, obligations contracted under the Geneva Convention indirectly echo—but do not equate with—individual claims of refugees opposable to states parties. Such normative digression was inevitable in the light of the historical context in which the Geneva Convention was drafted. In 1951, the individual did not have human rights conventionally binding at the universal level.[107] One would have to wait for fifteen years after the adoption of the Geneva Convention for the UN Covenants to give a conventional basis to the rights identified in the UDHR.[108] Furthermore, any attempt to draft a true Bill of Rights for refugees would have impinged upon the ongoing negotiations on the forthcoming UN Covenants. Framing refugee status as involving obligations of states rather than rights of individuals thus emerged as a necessity in the absence of legally binding human rights.

From this particular normative context flows the key difference with human rights law, namely the conditionality of refugee status. Contrary to human rights (p.41) treaties adopted subsequently, the Convention does not simply enumerate rights without distinction as to their beneficiaries. On the contrary, the content of refugee status is subordinated by the superposition of two cumulative conditions governing, first, the criteria of entitlement (the applicability of the norm) and, second, the standard of treatment (the content of the norm).[109]

As far as the first set of conditions is concerned, entitlement criteria are determined by reference to three distinct levels of applicability. The first level refers to the term 'refugee' without any further qualification. This concerns a core set of basic guarantees which includes the prohibition of discrimination (Article 3), acquisition of movable and immovable property and other rights pertaining thereto (Article 13), free access to domestic courts (Article 16(1)), rationing (Article 20), primary education (Article 22(1)), fiscal equality (Article 29), transfer of assets (Article 30), and protection against *refoulement* (Article 33(1)).

While all refugees benefit from these core guarantees, additional entitlements are subordinated to the existence of a territorial bond with the asylum state, whose degree of intensity varies from one 'right' to another. The two other levels of applicability, respectively, require presence or stay of the refugee, further depending on its physical or lawful nature. Concerning the second level, on the one hand, mere *physical presence* within the territory triggers the benefit of freedom of religion (Article 4), the delivery of identity papers (Article 27), and the prohibition of penalties on account of illegal entry (Article 31(1)). On the other hand, *lawful presence* is further required for engaging in self-employment (Article 18), for

freely moving within the host territory (Article 26), and for being protected against expulsion (Article 32).

As for the third level of applicability, the Convention envisions an additional subdivision based on the nature of residence that entails three variants. *Physical residence* entitles one to administrative assistance for civil status documents (Article 25). A *lawful stay* on the territory of the asylum state is required for the right of association and to form trade unions (Article 15), access to wage-earning employment (Article 17), liberal professions (Article 19), housing (Article 21), and public relief (Article 23), protection of labour legislation and social security (Article 24), as well as issuance of travel documents (Article 28).[110] Finally, *habitual residence* grants refugees access to legal assistance (Article 16(2)) and the protection of artistic rights and industrial property (Article 14). As a result of this progressive entitlement regime, the Geneva Convention provides for an incremental continuum of protection that depends on the intensity of the territorial bond between a refugee and his/her state of asylum. In sum, the longer the refugee remains in the territory of the state party, the broader the range of entitlements becomes.

(p.42) Once these entitlement criteria are fulfilled, the precise content of applicable norms is determined on the basis of the traditional distinction between nationals and aliens, as, at the time of the Geneva Convention's drafting, no other normative frame of reference existed. The nature and scope of the benefits attached to refugee status are accordingly dependent upon three standards of treatment identified by reference to nationals of the asylum state, most favoured foreigners, and ordinary aliens. First, refugees benefit from the *same treatment accorded to nationals* regarding freedom of religion (Article 4), protection of artistic and industrial property (Article 14), rationing (Article 20), elementary education (Article 22(1)), public relief (Article 23), labour legislation and social security (Article 24), and fiscal charges (Article 29).

Second, refugees are assimilated to the *most favourable treatment accorded to nationals of a foreign country in the same circumstances* concerning their rights of association and to form trade unions (Article 15), as well as their access to wage-earning employment (Article 17). Third, the Convention recognizes refugees as deserving a *treatment not less favourable than that accorded to aliens generally in the same circumstances* as regards their acquisition of movable and immovable property (Article 13), their right to engage in self-employment (Article 18) and liberal professions (Article 19), their right and access to housing (Article 21), to education other than elementary education (Article 22(2)), and their freedom of movement within the asylum state (Article 26).

Albeit striking at first sight in a treaty aiming at defining an international status, the recurrent referral back to states parties' domestic law is both a major specificity of the Geneva Convention and the guarantor of its effectiveness. This comes as no surprise as national law provides a normative support which international law of the time was unable to secure in the absence of legally binding human rights. Accordingly, and contrary to conventional wisdom, there exist as many refugee statuses as states parties to the Geneva Convention, insofar as the content of the applicable standards to aliens and nationals is primarily determined by the legislation of each individual state.[111]

The legal regime deriving from the superposition of various entitlement criteria with different standards of treatment remains extremely complex. The rationale underlying such a patchwork of standards is anything but obvious and one can doubt the practical interest of this sophisticated differentiation. The difficulty in finding a cogent rationale in such a byzantine

gradation is epitomized by the fact that both entitlement criteria and standards of treatment may differ even for rights of a similar nature (such as, for instance, those related to gainful employment).[112]

(p.43) However, one possible way to conceptualize the *ratio legis* of the gradual protection granted by the Geneva Convention is to equate refugee status to an 'assimilative path'.[113] Devising refugee status as an assimilation process within the asylum state proves to be instrumental for two purposes. First, it elucidates and justifies the conditionality inherent in the heteroclite juxtaposition of entitlement criteria with standards of treatment. Second, the progressive entitlement of rights and benefits provides a coherent normative continuum which encapsulates and determines the applicable law at the three essential stages of the refugee's life cycle.

At the starting point of such an incremental protection regime, the declaratory nature of refugee status[114] presupposes that asylum seekers are entitled at a minimum to the core benefits applicable to all refugees without further territorial qualification as well as, depending on the circumstances, those which are contingent on the physical and lawful presence within the state territory. As underlined by the UNHCR, 'the gradations of treatment allowed by the Convention…serve as a useful yardstick in the context of defining reception standards for asylum-seekers'.[115] Seen from that angle, the limited range of benefits is grounded in the assumption that the presence of asylum seekers is bound to be a temporary one for the sole purpose of examining their claims.

At the second stage, once a refugee is formally recognized as such, the incremental continuum of rights and benefits will then facilitate his/her progressive integration in the new country of residence through the granting of an additional range of entitlements. At the end of this assimilative process, Article 34—the last provision devoted to refugee status—envisages as a promise of a common future that '[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees'. In line with the incremental structure of the Geneva Convention, the acquisition of a new nationality will accordingly ensure the full range of rights to which any national is entitled and justify by the same token the end of the interim protection provided by the refugee status.

Albeit attractive, this conceptualization of refugee status as an assimilative process remains an a posteriori and essentially doctrinal reconstruction.[116] Although some support may be found in the drafting history of the Geneva Convention, the position of plenipotentiaries was neither clear nor unanimous.[117] (p.44) Besides the limited utility of the *travaux préparatoires*, subsequent practice is not in line with the assimilative approach, as states are reluctant to acknowledge the plain applicability of refugee status to asylum seekers beyond Articles 31 and 33.[118]

Beyond any possible conceptualization of the rationale underlying refugee status, the historical normative context prevailing at the time of the drafting of the Geneva Convention played a decisive role in framing the refugee rights regime. From such a retrospective perspective, refugee status has emerged as a hybrid legal creation: it is grounded in the very notion of minimum standards inherited from the traditional international law of aliens, while its ultimate objective is to secure the exercise of fundamental rights in line with the new branch of international human rights law. As underlined in its preamble, the *raison d'être* of the Geneva Convention is 'to assure refugees the widest possible exercise of…fundamental rights and freedoms'.

B. Refugee status and the UN International Covenant on Civil and Political Rights

The subsequent development of international human rights law has dramatically changed the normative content of refugee status. Compared to international refugee law, human rights law presents two essential characteristics: it is both inclusive and universal. This distinctive feature is based on the premise that human rights are by definition inherent in the quality of human being. Therefore, 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers [and] refugees…who may find themselves in the territory or subject to the jurisdiction of the State Party'.[119] The added value of human rights law is obvious with regard to asylum seekers who have been excluded from the benefit of most of the provisions of the Geneva Convention through a restrictive and disputable interpretation. But the impact of human rights law goes far beyond the legal status of asylum seekers. It also retains its centrality for asserting the rights of refugees duly recognized as such under the Geneva Convention.

The UN International Covenant on Civil and Political Rights (ICCPR) proves to be essential for supplementing and reinforcing refugee status. Although the Geneva Convention is not indifferent to the civil and political rights of refugees, it contains a fairly limited range of these fundamental rights (including non-discrimination, freedom of religion, freedom of association, access to court, freedom of movement, and due process guarantees governing expulsion). From the outset, the drafters of the Geneva Convention were aware of this apparent lacuna. During the *travaux préparatoires*, the Belgian delegation proposed an explicit reference to Articles 18 and 19 of the UDHR (respectively devoted to freedoms of thought and of expression) in the text of the Geneva Convention. This proposal (p.45) was finally withdrawn after the UK representative explained that 'a Convention relating to refugees could not include an outline of all the articles of the UDHR; furthermore, by its universal character, the Declaration applied to all human groups without exception, and it was pointless to specify that its provisions applied also to refugees'.[120]

The continuing applicability of human rights law has been instrumental in ensuring an additional set of crucial rights. The range of human rights supplementing the Geneva Convention is both expansive and substantial. As far as the ICCPR is concerned, it includes the right to an effective remedy for any violations of the rights recognized in the Covenant (Article 2(3)), the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant (Article 3), the right to life (Article 6), the prohibition of torture and cruel, inhuman, or degrading treatment or punishment (Article 7), freedom from slavery and forced labour (Article 8), the right to liberty and security of person (Article 9), the right of detainees to be treated with humanity (Article 10), the prohibition of detention on the ground of inability to fulfil a contractual obligation (Article 11), the right to a fair trial (Article 14), the prohibition of retrospective application of criminal law (Article 15), the right to recognition as a person before the law (Article 16), the right to private and family life (Article 17), the right to hold opinions and freedom of expression (Article 19), the right of peaceful assembly (Article 21), the protection of children (Article 24), the right to equality before the law (Article 26), and the cultural rights of persons belonging to ethnic, religious, or linguistic minorities (Article 27).

This long list of fundamental rights and freedoms substantially enriches the paucity of civil and political rights in the Geneva Convention and proves to be particularly relevant in a

refugee-specific context. While acknowledging the ICCPR as a 'critical source of rights for refugees',[121] Hathaway has, however, argued that:

even where the subject matter of the Civil and Political Covenant is relevant to refugees, the Covenant often formulates rights on the basis of inappropriate assumptions. For example, the Civil and Political covenant sets guarantees of fairness in judicial proceedings, but does not deal with the more basic issue of access to a court system.[122]

This last example is not the most relevant one, for access to court is implicit in the right to a fair trial.[123] Besides this specific case, alleging that rights under the (p.46) Covenant are based on inappropriate assumptions is arguably misconceived for two primary reasons.

First, the substance of the rights proclaimed in human rights instruments cannot be dissociated from their subsequent interpretation, which contributes to refining their scope and content in more specific contexts. Such a contextual interpretation of human rights has been essential for the purpose of ensuring to refugees two particularly critical rights—the right to family unity and the right to return—which, oddly, are not guaranteed by the Geneva Convention. As regards the right to family unity, the general obligation to protect the family under Article 23 of the ICCPR has been interpreted as including 'the adoption of appropriate measures…to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons'.[124] A refusal of family reunification can also be considered an 'arbitrary or unlawful interference' with the right to family life under Article 17 of the ICCPR.

[E]ven interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances… [I]n cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.[125]

Although states retain a broad margin of appreciation for assessing such a balancing act, denying family reunification to a refugee who has been duly recognized as such is clearly disproportionate to the alleged purpose, for, by definition, he cannot return to his own country and accordingly his family has no realistic prospects of enjoying the right to family life elsewhere.[126]

(p.47) The right to return also illustrates the normative potential offered by a contextual interpretation of human rights for filling the vacuum of the Geneva Convention. Such an essential right of refugees wishing to return to their countries of origin is based on the right to enter one's own country as notably enshrined in Article 12(4) of the Covenant. The Human Rights Committee hence underlines that 'the right of a person to enter his or her own country…includes…the right to return after having left one's own country' which 'is of the utmost importance for refugees seeking voluntary repatriation'.[127] While voluntary repatriation is commonly referred to as 'the ideal solution to refugee problems',[128] the human right to return proves to be crucial for ensuring both the voluntary nature of repatriation and the correlative obligation of states of origin to admit their nationals.[129]

Such contextual framing of the human right to enter one's own country has been further developed by the Committee on the Elimination of Racial Discrimination. Echoing the longstanding practice developed under the auspices of the UNCHR, the Committee on the Elimination of Racial Discrimination restates in its *General Recommendation No. 22* that:

1. (a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;
2. (b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of *non-refoulement* and non-expulsion of refugees;
3. (c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appro-priately for any such property that cannot be restored to them. Any com-mitments or statements relating to such property made under duress are null and void;
4. (d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs (p.48) at all levels and to have equal access to public services and to receive rehabilitation assistance.[130]

Accordingly, human rights law provides an indispensable yardstick for framing the legal content of return and reintegration of both refugees and internally displaced persons in their own countries. Although much remains to be done to ensure their basic rights in peace-building processes,[131] the predominant contextual approach of human rights has been further refined through *The Principles on Housing and Property Restitution for Refugees and Displaced Persons*, endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005.[132]

A second reason also contradicts the alleged inappropriateness of the Covenant for tackling refugee-specific contexts. Besides granting additional rights to refugees and asylum seekers, general human rights instruments prove to be more adequate and more protective even when the rights in question are already covered by the Geneva Convention. The minimum standards prescribed by refugee status have been increased—and in some instances superseded—by human rights law. The plain relevance of this last branch of international law is apparent in many common subjects of concern, such as freedom of movement, expulsion, and detention, insofar as the general provisions of the Geneva Convention have been refined by subsequent human rights instruments.[133]

The most promising avenue for enhancing refugee protection through human rights law relies on the principle of non-discrimination. The non-discrimination clause contained in Article 3 of the Geneva Convention is limited by three substantial qualifications. First, this provision only prohibits discrimination between and among refugees, thereby excluding any other discrimination between refugees and aliens or nationals. Second, the prohibited grounds of discrimination are restricted to 'race, religion or country of origin'. Third, the scope of Article 3 is limited to the application of the provisions of the Geneva Convention. By contrast, the principle of non-discrimination under human rights law is much more inclusive, insofar as state parties are bound to guarantee the exercise of the rights recognized in the relevant instruments 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[134]

(p.49) Moreover, the principle of equality before the law as notably enshrined in Article 26 of the ICCPR provides a free-standing autonomous protection against discrimination which is

not limited to the rights provided for in the ICCPR.[135] Likewise, the reference to 'national origin' and 'other status' among the non-exhaustive list of prohibited discriminatory grounds presumably includes both discrimination between refugees as such and other discriminatory treatments between refugees and nationals. Article 3 of the Geneva Convention has thus largely—if not totally—been neutralized by Article 26 of the Covenant.[136]

Obviously, this general prohibition of discrimination does not mean that any difference of treatment should be banned. The Human Rights Committee has recalled in line with all the other treaty bodies that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[137] This requires a subtle case-by-case assessment for determining the proportionality of the differential treatment with the alleged purpose. For instance, requiring citizenship for property restitution of refugees[138] has been considered as discrimination prohibited under the Covenant.

The overarching duty of non-discrimination under Article 26 of the ICCPR has two further significant consequences which enhance to a great extent the protection under the Geneva Convention. On the one hand, the principle of equality before the law may require states parties to take affirmative action in favour of refugees for the purpose of guaranteeing them an effective and equal enjoyment of human rights.[139] On the other hand, the general applicability of human rights to non-citizens coupled with the prohibition of discrimination based on nationality substantially erode the traditional distinction between nationals and aliens which conditions most of the benefits attached to refugee status. In other words, human rights law cogently requires the assimilation to nationals even for rights which are determined by reference to the treatment accorded to aliens under the Geneva Convention.[140]

A typical illustration can be found in the freedom of association. While Article 15 of the Geneva Convention only requires 'the most favourable treatment (p.50) accorded to nationals of a foreign country, in the same circumstances', freedom of association is granted by the ICCPR to 'everyone' and is therefore equally applicable to nationals and aliens.[141] Furthermore, this fundamental freedom applies to any kind of association and not only 'non-political and non-profit-making associations' as referred to in the Refugee Convention.[142] Nevertheless, as acknowledged by Article 20 of the Covenant, any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law. Hence, asylum states must ban a refugee organization that incites violence and any other national, racial, or religious hatred, whether such propaganda or advocacy is directed towards these states or their states of origin.[143] By contrast, refugee organizations campaigning for the right of peoples to self-determination or for any other democratic changes in their countries of origin are permitted under Article 22 of the Covenant.

III. The Implementation Scheme of Refugee Law and Human Rights Law: The Ultimate Test

The implementation scheme is another way to comprehend the relations between refugee law and human rights law. This shows more contrast in this field than in any other. Refugee law traditionally distinguishes between the content of international protection as enshrined in the

Geneva Convention and an essentially decentralized implementation entrusted to each individual state party. This decentralization scheme is based on two levels of implementation. First, at the domestic level, states retain a particularly broad margin of appreciation in the means of implementing refugee law, since very few procedural guarantees are imposed to them by the Geneva Convention (III.A, this chapter). Second, at the international level, this decentralized regime is reinforced by the absence of a proper monitoring mechanism (III.B, this chapter).

These two distinctive features of refugee law have, however, been considerably counterbalanced and sometimes neutralized by human rights law. This leverage is primarily due to the control-oriented nature of human rights law. States are not (p.51) only bound by procedural guarantees to ensure effective respect for human rights within their domestic orders, but the concrete implementation of their conventional obligations is also monitored by international bodies especially established for this purpose.

A. The implementation of international refugee law and international human rights law at the domestic level

Refugee law and human rights law reveal two opposite conceptions of their respective implementation schemes. Notwithstanding their divergence, human rights law has been instrumental in encapsulating and conditioning the implementation of the Geneva Convention at the domestic level. It has greatly detailed and refined the comparative paucity of the latter instrument by spelling out procedural guarantees on three decisive issues: the refugee status determination procedure (III.A.1), the detention of asylum seekers (III.A.2), and the expulsion process (III.A.3).

1. The refugee status determination procedure and the right to an effective remedy

Following the traditional international law perspective, the Geneva Convention draws a clear-cut distinction between the *international norms* enshrined therein and their *national implementation* entrusted to each individual state party. While both the refugee definition and status are internationally grounded, the functional link between these two components is constituted by domestic procedures for the very purpose of identifying who is entitled to refugee status. States accordingly recapture, at the implementation level, a portion of the sovereignty they have given up at the normative level, by agreeing to a relatively detailed regime. Domestic asylum procedures thus appear as privileged tools for determining the concrete extent of the obligations subscribed to under the Geneva Convention.

As a result of this premise, the Geneva Convention does not formally require a refugee status determination procedure nor explicitly regulate its content and functioning. However, both in principle and in practice, the refugee definition presupposes some kind of identification process, although no specific procedure is explicitly mentioned in the Geneva Convention.[144] Otherwise, states would be bound to apply the refugee status to all persons claiming to be refugees. This implicit duty is also confirmed by several other provisions, such as Articles 9 and 31(2).[145] It is further (p.52) required by the effective implementation of the principle of *non-refoulement* under Article 33. Nevertheless the exact content and modalities of these procedures is supposed to be determined by each contracting state with due regard to its own constitutional and administrative structure.[146]

Despite this considerable margin of appreciation, Article 16(1) of the Geneva Convention retains its relevance, for it ensures free access to courts in particularly inclusive and unconditional terms. The broad material scope of this provision presumably includes access to asylum courts for reviewing any refusals of refugee status.[147] This is confirmed by the personal scope of Article 16(1), for the term 'refugee' without any further qualification is plainly apt to include asylum seekers as a result of the declaratory nature of refugee status recognition.[148] Despite the clear and compulsory meaning of the Geneva Convention, states parties have nonetheless remained astonishingly inconsistent in their interpretation of Article 16(1).

This can possibly be mitigated by the right to a fair trial notably enshrined in Article 14(1) ICCPR. As is apparent from the wording of this provision, its applicability is conditional on the criminal or civil nature of the rights involved in the relevant proceedings. Such a requirement is, however, plainly in line with the very nature of the rights at stake in an asylum procedure. Indeed, the refugee status determination procedure inherently aims at determining the civil rights of the claimant, for its sole purpose is to establish whether an asylum-seeker is entitled to refugee status, which precisely includes a relatively broad range of civil rights and social benefits.[149] While considering that the right to a fair trial does not apply to 'extradition, expulsion and deportation procedures',[150] the Human Rights Committee has tended to presume its applicability to asylum procedures.[151] Its position is nevertheless far from crystal clear. It even gives the impression of deliberately avoiding settling this issue by generating a certain level of confusion between asylum and deportation proceedings.[152] Although the former may have an impact on the latter, they remain in fact as well as in law two distinct procedures. However, this is precisely the confusion between the two types of procedure which led the (p.53) European Court of Human Rights to deduce that none of them is covered by the right to a fair trial.[153]

Whatever the controversies surrounding the applicability of the right to fair trial to asylum procedures, the right to an effective review offers a solid avenue for ensuring procedural guarantees to asylum seekers. As restated by the Human Rights Committee, 'Article 2, paragraph 3, requires that…individuals…have *accessible, effective and enforceable remedies* to vindicate those rights'.[154] Nevertheless, 'article 2 can only be invoked by individuals in conjunction with other articles of the Covenant'.[155] As a result of this requirement, although the right of asylum is not set forth in the ICCPR, other provisions triggering the prohibition of *refoulement* can be invoked in connection with the right to an effective remedy.[156] Asylum seekers must thus be entitled to challenge their removals to any country where there is a real risk of violation of their rights under the Covenant.

From this angle, the substantial overlap between the principle of *non-refoulement* under refugee law and human rights law has a critical impact by compensating for the absence of procedural guarantees in the Geneva Convention. Moreover, except for the ECHR, all the other regional instruments explicitly endorse the right to seek asylum, which must accordingly be exercised with due respect to the right to an effective remedy.[157]

The right to an effective remedy, combined with the human rights principle of *non-refoulement* and/or the right to seek asylum, ensures three main guarantees. First, non-respect of procedural requirements—such as the late submission of an asylum request—cannot be an obstacle to the examination of the merits of the claim by national authorities.[158] The European Court of Human Rights has underlined that:

It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if…such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.[159]

(p.54) Second, the right to an effective remedy 'requires independent and rigorous scrutiny'[160] of the claim that substantial grounds exist to fear a real risk of inhuman or degrading treatment. As restated by the European Court, 'such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective'.[161] To be considered an effective remedy, the relevant domestic authority must have two essential characteristics. It must be empowered to take a binding decision and grant appropriate relief, excluding thus any form of consultative procedure.[162] Moreover, the domestic authority must offer sufficient procedural safeguards for ensuring its independence and basic rights of the claimant, including equality of arms and legal representation.[163]

Third, the effective nature of the domestic remedy requires that any removal must be suspended during the examination of the claim: 'in view of…the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises,…Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect'.[164] In any case, the risks of overloading and abuse of process frequently alleged by states do not exempt them from their duty to provide an effective remedy against any refusals of asylum requests.[165]

2. The procedural guarantees governing the detention of asylum seekers

As exemplified earlier, human rights law plays a crucial role by filling the procedural gap of the Geneva Convention. These guarantees are further strengthened when asylum seekers are deprived of their liberty during the asylum procedure or pending their removal. Article 31(2) of the Geneva Convention addresses this issue in general and arguably vague terms. While permitting states to apply some restrictions to the movement of asylum seekers, any restrictions must fulfil two conditions: they must be 'necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country'. Considerable detail has been added to these general guidelines by human rights law regarding the grounds of detention, its legal basis, and other related procedural guarantees.

The grounds of detention have been refined by human rights law through the prohibition of arbitrary detention notably restated in Article 9 of the ICCPR. The Human Rights Committee has recalled in the leading case *A. v. Australia* that

the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, (p.55) remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.[166]

While considering that the detention of asylum seekers is not arbitrary per se, it observed that

every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[167]

In sum, detaining individuals requesting asylum cannot be systematic or mandatory but must be duly justified on the basis of the particular circumstances of each case, assessing the likelihood of absconding and lack of cooperation. These grounds should persist during the whole period of detention, otherwise the deprivation of liberty is no longer justified.

The principle of proportionality further requires that states examine whether there are other measures they could use to achieve their objectives without interfering with the right to liberty and security. As underlined by the Human Rights Committee, states must demonstrate that

in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's…condition.[168]

Moreover, any detention must be in accordance with and authorized by law. This last requirement has been authoritatively illuminated by the European Court of Human Rights in the landmark case *Amuur v. France*. As restated by the Court, the legal basis in domestic law must be not only predictable and precise, but it must also be applied with due respect to other applicable norms of international law, including the Geneva Convention:

[C]onfinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their (p.56) international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions… In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country…Above all, such confinement must not deprive the asylum-seeker of *the right to gain effective access to the procedure for determining refugee status*.[169]

This last assertion may surprise, for the European Court is not formally empowered to review the application of the Geneva Convention and the European Convention on Human Rights does not explicitly enshrine such a right to effective access to the refugee status determination procedure. However, for the purpose of assessing the arbitrariness of the detention, the Court is entitled to consider compliance with national law, including international norms incorporated into domestic law. Moreover, although not explicitly mentioned in the Geneva Convention, effective access to the refugee status determination procedure is implicitly required by a good faith implementation of the Geneva Convention and in particular of its cornerstone principle of *non-refoulement*. Such acknowledgement by the European Court reflects the mutually supportive nature of human rights law and refugee law through a contextualised interpretation by treaty bodies. The Strasbourg Court even adds that the right to gain effective access to the asylum procedure presupposes adequate 'legal and social

assistance—particularly with a view to completing the formalities relating to an application for political refugee status'.[170]

In parallel to the implicit duties deriving from the Geneva Convention, human rights instruments provide two other essential procedural guarantees to any person deprived of their liberty. First, 'anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.[171] Whilst the content and promptness of this information is to be assessed according to the particular circumstances of each case,[172] notifying the reasons after 76 hours in detention has been held not to be compatible with the requirement that such reasons be given 'promptly'.[173] Moreover, the reasons for the detention must be given 'in simple, non-technical language that he can understand' and they must specify both 'the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness'.[174]

Second, as restated by all human rights treaties, 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention (p.57) and order his release if the detention is not lawful'.[175] Here again treaty body practice has refined and specified the guarantees inherent in such a right to judicial review. As notably underlined by the European Court, 'the person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation'.[176] Although states parties may impose time limits on the applications of detainees for exercising their right to a judicial review, the brevity of such time limits should not impair the accessibility and the effectiveness of the judicial remedy.[177] For instance, a 24-hour period for submitting an application before a court is not compatible with the right to judicial review.[178] Regarding the prompt intervention of the court for reviewing the lawfulness of the detention, the Court considered that six days for delivering a judicial decision was acceptable,[179] whereas a delay of thirty-six days was held to be excessive.[180]

Besides access to court, the scope and content of the judicial review has been spelled out in similar terms by the Human Rights Committee and the European Court of Human Rights. The domestic review must be effective and the lawfulness of the detention should take into account both domestic law and the applicable international instrument.[181] Among the other procedural safeguards, legal representation represents 'an important guarantee' especially when 'the detainee is, by definition, a foreigner in the country in question and therefore often unfamiliar with its legal system'.[182] More generally, conditions of detention must ensure that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.[183] While such a provision is restated in all human rights treaties with the exception of the ECHR, similar protection can be offered through the general prohibition of torture, inhuman, and degrading treatment.

For instance, among its abundant case law devoted to the conditions of detention of asylum seekers in Greece, the European Court has held that 'a period of (p.58) detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3'.[184] A similar conclusion has been drawn with regard to the detention of asylum seekers in a Belgian transit zone[185] and a Turkish police headquarters.[186] Likewise, detaining an unaccompanied five-year-old child in a transit centre for adults 'demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment'.[187] The European Court came to the same conclusion with regard to the detention of four children with their mother during more than one month despite serious signs of psychological distress.[188] It recalled on this occasion that,

according to Article 22 of the UN Convention on the Rights of the Child, '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'.[189]

3. The procedural guarantees governing expulsion

The intermingling of international refugee law and human rights law is further reinforced by the procedural guarantees governing expulsion. In contrast to the absence of provisions on the refugee status determination procedure, Article 32 of the Geneva Convention spells out in a relatively detailed manner the conditions governing expulsion. It has been restated almost verbatim by Article 13 ICCPR.[190] The convergence between international refugee law and human rights law in the field of expulsion comes as no surprise, for Article 32 was inspired by an early draft of the Covenant which was then remodelled on the basis of the Geneva Convention.[191] However, Article 32 appears more specific than Article 13 on three main issues.

First, the grounds of expulsion are explicitly mentioned in the Geneva Convention, whereas the ICCPR contains no similar specification. This difference is nevertheless negligible, because national security and public order are relatively broad notions capable of encapsulating a great diversity of situations and they constitute the traditional grounds of expulsion in domestic law and practice. From this angle, the expression 'in accordance with law' as interpreted by the Human Rights Committee means that 'Article 13 requires compliance with both the substantive and the procedural requirements of the law'.[192] Thus, although 'the interpretation of domestic law is essentially a matter for the courts and authorities of the State (p.59) party concerned', the Human Rights Committee is bound to review the grounds of expulsion when 'they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power'.[193]

Second, the Geneva Convention explicitly enshrines a right to appeal against any expulsion decision, whereas the ICCPR only refers to the right to have the 'case reviewed by…the competent authority'. This difference is, however, largely neutralized by the right to an effective remedy under Article 2(3) of the ICCPR. Indeed, this provision can be invoked in connection with Article 13 and, accordingly, ensures that any expulsion order must be reviewed by an independent authority with all the guarantees inherent in the effectiveness of such remedy. The Human Rights Committee has further confirmed in its *General Comment 15: The Position of Aliens under the Covenant* that '[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one'.[194]

Third, Article 32(3) of the Geneva Convention specifically requires that, before carrying out the expulsion order, states parties shall allow a reasonable period within which refugees can seek legal admission into another country. Here again, although this last indication is not explicitly mentioned in the ICCPR, the subsequent interpretation of Article 13 has contributed to neutralizing the difference from the Geneva Convention. Indeed, the Human Rights Committee has considered that '[n]ormally an alien who is expelled must be allowed to leave for any country that agrees to take him'.[195] In *V. M. R. B. v. Canada*, it accordingly dismissed any risk to the life of an asylum-seeker in the case that he would be deported to his country of origin, after observing that 'the Government of Canada has publicly stated on several occasions that it would not [deport] the author to El Salvador and has given him the opportunity to select a safe third country'.[196]

In the absence of a safe third country, refugees and asylum seekers can be subjected to restrictions of movement. In such a case, Article 12 of the ICCPR and Article 26 of the Geneva Convention governing internal freedom of movement coincide in substance. However, the freedom granted by the Geneva Convention is 'subject to any regulations applicable to aliens generally' without any further qualifications, whereas the ICCPR is more specific by delimiting permissible restrictions to freedom of movement. According to its Article 12(3), any restrictions (p.60) of movement are only permissible when the three following conditions are duly fulfilled by the state: restrictions must have a legal basis; they must be necessary to protect national security, public order, public health, morals, or the rights and freedoms of others; and they must be consistent with the other rights recognized in the Covenant.[197]

While the added value of the Geneva Convention has been largely neutralized by the subsequent interpretation of the ICCPR, the latter instrument offers more comprehensive protection in both personal and material scope. Its personal scope not only includes refugees, but also asylum seekers and any other persons in need of protection. Provisions in both the Geneva Convention and the ICCPR nevertheless subordinate their applicability to those who are 'lawfully' within the territory of the state concerned. The Human Rights Committee has underlined, on this last requirement:

The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, *if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13*.[198]

Although the Human Rights Committee has not yet had the opportunity to further clarify this last assertion, it may have a substantial impact on the refugee status determination procedure. Indeed, it presupposes that asylum procedures must conform to the guarantees spelled out in Article 13 as soon as eligibility to refugee status conditions the lawful presence of an asylum-seeker and the refusal of refugee status leads to his/her removal.[199]

Whatever the uncertainties surrounding the applicability of Article 13 to asylum procedures, another substantial and less controversial added value of human rights law lies in the prohibition of collective expulsion. Although not explicitly mentioned in the ICCPR, the Human Rights Committee considers that this prohibition is implicit in Article 13, because 'it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions'.[200] Moreover, the prohibition of collective expulsion has been explicitly acknowledged in all regional human rights treaties.[201] (p.61) In each of these instruments, it is conceived as an absolute prohibition without any possible exceptions. The main difficulty, however, lies in the definition of the term 'collective expulsion'. The African Charter on Human and People's Rights (African Charter) is the only treaty which attempts to define it. According to its Article 12(5), 'mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups'. It accordingly requires two cumulative conditions regarding the purpose of the expulsion and the characteristics of the group concerned which, taken together, reveal its discriminatory nature.

The European Court of Human Rights privileges a more empirical definition based on the decision-making process, which requires an individual examination of the particular situation

of each alien.[202] In the *Andric* case, the deportation of Bosnian and Croatian asylum seekers was not considered a collective expulsion, because their asylum requests were examined on an individual basis by administrative and judicial authorities. The prohibition of collective expulsion thus has a considerable impact on the refugee status determination procedure, by requiring a case-by-case assessment of each asylum application.

The European Court further added in *Conka v. Belgium* that, even when asylum claims have been individually examined by the competent authorities, the implementation conditions of the expulsion orders must also afford 'sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'.[203] In sum, the individual situation of every asylum seeker must be assessed at each stage of the process: during the refugee status determination procedure, and then, following a refusal of asylum request, when the expulsion decision is ordered and carried out.

B. The supervisory mechanism under international refugee law and international human rights law

As demonstrated, procedural guarantees granted by human rights law at the domestic level prove to be vital to compensate the lacunae of the Geneva Convention. In the meantime, the contextual and dynamic interpretation of treaty bodies has been so instrumental that the two branches of international law are now intimately interdependent. Both in principle and in practice, human rights law and refugee law are bound to work in tandem.

The primary reason for this cross-fertilization process can be found in the very existence of the human rights treaty bodies. They have played a decisive role in the propagation of human rights law within refugee law. Obviously this does not mean (p.62) that there is a hierarchical relation between the two branches, since each regime retains its conventional autonomy. Human rights treaty bodies have constantly reiterated that 'it is not [their] function to examine asylum claims or to monitor the performance of Contracting States with regard to their observance of their obligations under the Geneva Convention on Refugees'.[204] However, from the perspective of the content of their respective norms, the border between the two regimes has been steadily blurred. Both in substance and essence, treaty bodies have—whether consciously or not—counterbalanced the normative and institutional weaknesses of the Geneva Convention.

1. Nature and limits of the supervisory mechanism under the Geneva Convention

Compared to human rights law, the supervision mechanism provided by the Refugee Convention is rather traditional and rudimentary. This is fairly apparent from the final clause on settlement of disputes, which envisages the International Court of Justice (ICJ) as the primary means for settling disputes regarding the Convention.[205] The insertion of such a clause arguably 'corresponds to a trend of the time, which still focused essentially on States as subjects of international law even if the obligations at stake concerned primarily individuals'.[206] One should add, however, that several human rights treaties contain a similar provision.[207] Furthermore, every state party to the Geneva Convention is entitled to refer any violation to the ICJ, even if it is not specifically affected by particular damage.[208] This *actio popularis* highlights in turn a key common characteristic of the very nature of the Geneva Convention and human rights treaties. Both kinds of instruments enshrine *erga omnes partes* obligations, that is, those which all states parties have an interest to protect.[209]

Similar to human rights treaties, the Geneva Convention does not create purely interstate obligations concluded on a contractual basis. It establishes instead a collective regime of objective obligations in favour of a particular category of individuals who are threatened in their life and liberty. The peculiar legal nature of the Geneva Convention was acknowledged from the outset. Already during its (p.63) drafting history, state representatives agreed that 'the text of the Convention was not a treaty under which the Contracting States assumed certain obligations in exchange for certain advantages; it was rather a form of solemn declaration made in order to benefit a third party'.[210] This statement echoes the *obiter dictum* of the ICJ made a few months before with regard to the Genocide Convention. It explained in emphatic terms that can be transposed *mutatis mutandis* to the Geneva Convention that

[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention 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 a convention 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. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[211]

In parallel to their common underlying philosophy, the Geneva Convention and other related human rights instruments are thus grounded on the very notion of collective interests, which transcends the traditional principle of reciprocity. However, the similarity of their normative pattern should not be overestimated, for *erga omnes partes* obligations are not peculiar to human rights treaties. They may be found in other multilateral treaties, such as those related to environmental law or diplomatic relations, to mention but a few instances.

Moreover, while the *erga omnes* nature of these kinds of treaties clearly informs their application and interpretation, experience has shown that referral to the ICJ remains the exception rather than the rule. It, accordingly, offers a limited avenue for defending collective interests. In practice, Article 38 has never been invoked by states parties to the Geneva Convention, thus highlighting the limits inherent in such interstate means of dispute settlement for ensuring the effective protection of individuals.

As a compromise to this state-centred mechanism of implementation, UNHCR has been conceived of as the guardian of the Geneva Convention. Article 35(1) of the Geneva Convention requires states parties 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 the Convention'.[212] Although the duty of cooperation is a rather (p.64) vague and indefinite notion, it establishes a crucial link between the state's obligation to respect the Geneva Convention and the correlative institutional responsibility of UNHCR for supervising its proper application.[213]

As a concrete tool for ensuring its supervisory function, Article 35(2) further requires states parties to 'provide in the appropriate form with information and statistical data requested concerning: (a) the conditions of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees'. This reporting duty is curiously not accompanied by a proper monitoring mechanism for

examining periodical reports of states parties on the implementation of the Geneva Convention.[214] In this area as in many others, the Geneva Convention probably paid the price for being the forerunner of the subsequent human rights treaties. As observed by Zieck, 'whilst innovative at the time, Art. 35, para. 1, in particular the supervisory role of UNHCR, appears to suffer the drawbacks of being one of the first external supervisory mechanisms in that it is of a rather rudimentary nature…when compared to the supervisory mechanisms of human rights treaties'.[215] Seen from this perspective, the absence of an independent supervisory mechanism for monitoring the implementation of the Geneva Convention is clearly 'an historical anomaly'.[216]

There is, however, nothing irremediable nor insurmountable in this situation. The dual obligation enshrined in Article 35 to cooperate with UNHCR and provide relevant information on the implementation of the Geneva Convention constitutes an adequate legal basis to establish a reporting and evaluation procedure. More generally, the very notion of international supervision includes by definition an enforcement component for the purpose of monitoring state compliance and asserting violations.[217] However, the primary responsibility entrusted to UNHCR in this field has been denatured to nothing more than an advisory rather than a truly supervisory function.

While the Refugee Agency plays a key role by providing interpretative guidance on the Geneva Convention and encouraging a harmonized application of its provisions by states parties,[218] enforcement-related activities still remain the weakest (p.65) side of its mandate. Its inability to assume the monitoring tasks inherent in its supervisory responsibility is commonly attributed to two interrelated reasons.[219] First, UNHCR is both politically and financially dependent on states. It is governed by an intergovernmental body—the Executive Committee of the High Commissioner's program (ExCom)—and is therefore 'not even nominally independent of the political will of states'.[220] Its dependence is further exacerbated by the fact that the UNHCR budget is primarily funded by voluntary contributions of states. Second, the enlargement of its initial mandate by the General Assembly has dramatically transformed the very nature of UNHCR. It is becoming the most prominent UN operational agency for delivering humanitarian relief on the ground. While its 'operationality'[221] represents a unique characteristic compared with other human rights agencies, the effectiveness of such assistance programmes requires a close cooperation with states, impeding thus a more critical stance towards them to the detriment of its supervisory responsibility. The schizophrenic position of UNHCR has contributed in turn to the isolation of refugee law from the other branches of international law.

2. The palliative function of human rights treaty bodies

The lack of an independent mechanism for monitoring the Geneva Convention sharply contrasts with the control-oriented paradigm of human rights law. Both universal and regional human rights treaties are supported by their own treaty bodies specifically mandated to monitor state compliance with their conventional obligations. Within the UN, most treaty bodies are entrusted with three core functions: the promotion of interpretative standards (through the adoption of general comments), the processing of interstate and individual petitions on alleged violations, and the examination of states parties' periodic reports. As abundantly exemplified by this chapter, the two first functions have played a critical role in ensuring the protection of refugees and asylum seekers through a contextual interpretation of general human rights treaties. The vital importance of treaty bodies can be further asserted by the fact that between 80 and 90 per cent of all individual complaints submitted to the Committee against Torture are based on Article 3.[222]

(p.66) Beyond giving rejected asylum seekers a chance to submit their claims of *non-refoulement* to a supranational organ, examination of state reports provides a unique opportunity to assess states' human rights records towards refugees and asylum seekers.[223] Among the most recurrent issues, treaty bodies have notably addressed the principle of non-discrimination,[224] the specific needs of children and women refugees,[225] as well as adequate standard of living,[226] and integration of long-term refugees.[227] Further reinforcing the interface between refugee law and human rights law, they also frequently call on states to ratify the Geneva Convention[228] and to cooperate more closely with UNHCR.[229] While human rights treaty bodies are not a panacea,[230] they contribute within their own mandates to filling the institutional deficit of the Geneva Convention.

UNHCR's position towards these newcomers has gradually evolved from a reluctant stance to a more collaborative—albeit selective—approach. This is fairly apparent from its policy paper on *UNHCR and Human Rights* adopted in 1997 where the office states:

Extreme caution traditionally marked UNHCR's approach to any suggestion that it should cooperate and collaborate with established mechanisms for the promotion and protection of general human RIGHTS principles… Motivating this approach was the fear that greater activism would lead to politicisation of UNHCR activities which would compromise our capacity to work with our government counterparts. Over recent years, however, this 'hands off' approach has given way to a policy of more constructive engagement with selected human rights bodies…The approach now is increasingly one of cooperation based on complementarity but respect for and maintenance of differences in mandates and approaches.[231]

(p.67) However, asserting the 'complementarity but difference between the refugee specific mandate of UNHCR and the broader human rights mandates of other concerned organs and institutions'[232] simply appears as another—albeit more subtle—way to insist on the distinctive nature of the two protection regimes. The ExCom steadily reaffirms in this sense that

[t]he need to maintain the mutually supportive but separate character of respective mandates is particularly clear in the area of monitoring. While human rights monitoring missions must investigate and encourage prosecution of human rights violations, action in support of refugees and returnees is essentially humanitarian, involving confidence-building and creation of conditions conducive to peace and reconciliation.[233]

To many observers, maintaining the two distinctive protection regimes appears ineluctable for preserving the vital operational function carried out by UNHCR on the ground. Hence, despite the growing normative convergence between the two bodies of international law, monitoring and enforcement-related measures represent the core—and perhaps irreducible—difference between refugee law and human rights law.

The prevailing dichotomy between their respective implementation schemes may nevertheless be largely attenuated provided that all the stakeholders are willing to do so. This would require the concerted adoption of a complementary set of practical measures at three distinct levels. First, at the UNHCR level, periodical examination of states' reports on the implementation of the Geneva Convention could be undertaken either by UNHCR within its ExCom or by an independent body of experts appointed by the High Commissioner.[234] Each alternative has its own merits and limits. On the one hand, the former option would be a peer-review process more easily acceptable to states but its intergovernmental nature presents obvious risks of politicization and confrontations. On the other hand, the latter option would

present the advantage of being an independent and objective assessment and it would preserve UNHCR from being involved in any conflict of interests. For these reasons, establishing an independent monitoring process is both more credible and more appropriate.

Second, at the Human Rights Council level, a Special Rapporteur on the human rights of refugees and asylum seekers should be established with a view to promoting better awareness and application of the human rights norms applicable to these particularly vulnerable groups. Undoubtedly, a new special procedure cannot be considered an antidote to the absence of a monitoring process of the Geneva Convention. It would nevertheless considerably enrich and strengthen the current (p.68) UN institutional framework for dealing with basic rights of refugees and other persons in need of protection. It would also ensure by the same token a more holistic approach within the Human Rights Council in complementing the work carried out by the Special Rapporteur on the human rights of migrants established in 1999 and the Special Rapporteur on the human rights of internally displaced persons created in 1992.

Third, at the treaty body level, a more cogent and comprehensive approach could be further reinforced within the bodies' own mandates. With this aim in mind, each treaty body should adopt a general comment specifically devoted to the rights of refugees and asylum seekers under their respective treaties. While the Committee on the Elimination of Racial Discrimination (CERD) has already adopted a comment on the right to return, this exercise should be undertaken in a more systematic way by all the nine UN treaty bodies so as to clarify the scope and the content of the relevant human rights instruments.

These three proposals would not only ensure a more consistent approach between the two protection regimes, they would also improve to a large extent due respect for refugee rights.

IV. Conclusion

The interaction between human rights law and refugee law is extremely dense. As a result of a gradual normative process, they have become so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other. Notwithstanding this impressive convergence, the conceptualization of their interrelation still diametrically diverges when seen from the standpoints of different observers. In the refugee lawyers' community, human rights law is generally understood as a safety net, a secondary source for supplementing the primary one (that is, the Geneva Convention). On the contrary, for others, the terms of this relation should be reversed: the accessory is the principal. As argued by Schabas, '[a]lthough this is known as "complementary protection", the human rights regime governing non-refoulement has largely taken over that of the Refugee Convention, which is gradually becoming virtually superfluous'.[235] This kind of assertion is not confined to the principle of *non-refoulement*, but it also concerns refugee status as such. Indeed, several commentators have asserted that '[h]uman rights conventions…eclipse whole sections of the U.N. Refugee Convention concerning the treatment of refugees, even in areas of equal levels of treatments'.[236] Following this last stance, but in slightly less categorical terms, 'a more appropriate way of expressing this relationship is to say that the provisions of international human rights law are more extensive than the specific tenets of refugee law, but the latter is really in essence a subset of the former'.[237]

(p.69) One could be tempted to say that each conception is right. On the one hand, a closer examination of their respective norms clearly demonstrates that human rights law has become the primary source of refugee protection. The Geneva Convention has been accordingly

relegated to a supporting role. Treaty bodies have been instrumental in developing a contextual interpretation of general human rights norms, which—intentionally or not—counterbalances restrictive interpretations carried out by individual states parties to the Geneva Convention in the absence of a proper monitoring mechanism.

Furthermore, this phenomenon of appropriation is structurally grounded on the distinctive characteristics of human rights law regarding both its personal and material scope. Its personal scope is obviously broader, since it includes not only refugees but also asylum seekers and any other persons in need of protection. On the contrary, the Geneva Convention is essentially applicable to recognized refugees, whereas asylum seekers have been consciously excluded from its scope (except for a few elementary provisions, such as penal immunity and the principle of *non-refoulement*). The centrality of human rights law is further reinforced by its material scope, for it sets out a wide range of rights which are not covered by the Geneva Convention. This concerns an extensive number of civil, political and cultural rights for refugees and, under rare exceptions, all human rights of asylum seekers.

By contrast, extremely few rights remain exclusively governed by the Geneva Convention. This primarily concerns very technical and specific matters, such as equality in fiscal charges (Article 29) and transfer of assets (Article 30). One could still argue that, from a conceptual and normative perspective, these two provisions are practical derivatives of the general principle of equality before the law and of the broader human right to property. The same reasoning can be applied with regard to identity papers (Article 27) and travel documents (Article 28), which are frequently heralded as the distinctive advantages of refugee status. Although these two provisions do not have exact human rights equivalents, delivering identity papers to refugees can be considered as a positive obligation deriving from the right to recognition everywhere as a person before the law.[238] The same contextual interpretation of the right to leave any country should further include the granting of travel documents to refugees who have no other possibility to obtain such documents from their country of origin.[239] In fact, the only truly specific right granted by the Geneva Convention concerns penal immunity under Article 31(1). However, as (p.70) already noted, the scope of this provision is circumscribed by three substantial limitations and it does not prohibit the administrative detention of undocumented asylum seekers. In any event, the human rights principle of *non-refoulement* does apply to everyone whether he/she enters legally or otherwise the territory of a state. In sum, compared to human rights law, the Geneva Convention has much more to receive than to give.

On the other hand, one could nevertheless argue that, despite its marginal added value, the Geneva Convention still remains a primary source of protection, not only because it is considered as such by states but, more fundamentally, because human rights law has considerably refined, reinforced, and sustained its normative frame. As noted above, refugee status is primarily structured by the traditional distinction between citizens and non-citizens. In the absence of any other normative frame of reference, the content of the applicable standards was supposed—initially at least—to be determined by the domestic law of each state party. Against such a background, human rights law has given a second life to the Geneva Convention by internationalizing its frame of reference. It provides a vital baseline for determining the minimum standard which domestic legislation cannot go beyond without breaching international human rights law.

The cumulative application of the two branches of international law reinforces the international refugee protection regime through a mutually supportive process of normative sedimentation. As a result of such intermingling, refugee law is now indissociable from

human rights law, each branch of international law being part of the same normative continuum. Following such a stance, one can even argue further that refugee law has been absorbed by human rights law. While the Geneva Convention retains some symbolic relevance, the distinction between nationals and aliens which conditions the very content of refugee status has been largely marginalized and superseded by the general applicability of human rights to non-citizens.

The transformation of refugee law by human rights law has far-reaching effects largely beyond the content of its norms. The gravitational force of human rights law has attracted the Geneva Convention into its orbit and anchored it as a satellite within the constellation of other applicable human rights treaties. As a result of this centripetal force, the conception of the Geneva Convention as a whole has been revisited and reframed through the lens of human rights law. The single and evasive reference to human rights in its preamble has been retrospectively viewed as the ultimate evidence of its human rights origin. The Geneva Convention has thus been reconstructed as a human rights treaty in its own right. This is rather ironic, given that the Refugee Convention is not a human rights treaty per se simply because it is a duty-driven—and not a human rights-based—instrument. Clearly perception counts more than reality. In a normative environment largely dominated by human rights, all observers are now convinced of the human rights nature of the Geneva Convention. Both in principle and in practice, human rights law has thus become the new orthodoxy of refugee law.

From a systemic perspective, human rights law considerably informs the very function of refugee law. It appears as ‘a remedial or palliative branch of human (p.71) rights law’.[240] Its *raison d’être* is to ensure effective respect for human rights, when victims of abuses have no other option than to leave their own country and ask for the substitute protection of another state. From this stance, refugee law cogently constitutes ‘a right to have rights’ following Arendt’s terminology.[241] Echoing the most prominent philosopher of the last century, Lord Clyde acknowledges:

[w]hat [the Geneva Convention] seeks to achieve is the preservation of those rights and freedoms for individuals where they are denied them in their own state. Another state is to provide a surrogate protection where protection is not available in the home state. The convention assumes that every state has the obligation to protect its own nationals. But it recognises that circumstances may occur where that protection may be inadequate. The purpose of the convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination and which he cannot enjoy in his own state.[242]

Although the reverse has not always been true, human rights law *is* refugee law. One question still remains to be addressed: does the ubiquitous stance of state sovereignty in refugee law affect its human rights nature? Undoubtedly, state sovereignty is more visible in refugee law than in many other fields of international law. Territorial sovereignty is both the foundation and the limit of international refugee law. On the one hand, refugees are protected against persecution from their own countries, as a consequence of the territorial jurisdiction of asylum states. The duty of every state to respect the territorial integrity of others means that countries of origin can no longer exercise any act of authority upon their nationals who found asylum abroad. On the other hand, asylum states do not have the correlative obligation to grant protection within their own territory. However, such a normative dilemma is not specific to refugee law, since human rights law is framed by the same dialectic. Under both branches of international law, the sovereign right of granting or refusing asylum is mitigated and sometimes neutralized by the obligation of *non-refoulement*. In short, while state sovereignty

influences the content of the applicable norms, its does not fundamentally affect the very nature of refugee law.

More generally, as recalled by Lord Bingham, ‘like most international conventions, [the Geneva Convention] represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other’.[243] This existential compromise does not radically diverge from other branches of international law. Humanitarian law is grounded on a precarious balance between military necessity (p.72) and considerations of humanity, while human rights law encapsulates national security concerns within the delimitation of individual entitlements.[244]

Twenty years ago, Aleinikoff reminded us that ‘refugee lawyers must be human rights lawyers’.[245] Refugee lawyers are clearly on the right path and they have made substantial steps forward during the last decades. But there are still some obstacles to overcome before they will truly become human rights lawyers. The last step is perhaps the most difficult one. It requires a cultural revolution in the profession, not only in recognizing the centrality of human rights law, but also by accepting all its consequences. While the fetishism of the Geneva Convention is no longer tenable, human rights law requires a holistic approach of refugee protection. This may ultimately revive the ancestral function to asylum: asylum is not only an act of protection; it is also an act of affirmation against another subject of law which is deemed unable to hold its primary function. In essence, granting asylum reflects the judgment that the state of origin has failed to fulfil its duty of protection and has, accordingly, lost its legitimacy.[246]

Whereas the Geneva Convention exclusively focuses on the obligations of asylum states, human rights law provides a broader avenue for encapsulating the correlative responsibility of states of origin. This presupposes in turn that the so-called neutral and humanitarian character of asylum is abandoned to assume the political nature of human rights. Although this dilemma is anything but new, it may represent another motive of dissidence for the refugee lawyers’ community. As rightly emphasized by Bhabha, ‘[i]n the process of using [human rights] norms, however, advocates and decision-makers have had to navigate the delicate path between the Scilla of human rights enforcement and the Charybdis of what one might polemically call human rights imperialism’.[247] Besides the obvious risks of manipulations carried out under the banner of human rights, one cannot fail to notice that assuming refugee law as an integral part of human rights law has both legal and political implications which are intrinsically interconnected. Acknowledging the multifaceted intermingling between refugee rights and human rights paves the way towards a radical change in perception. It calls for revisiting the international regime of refugee protection as a whole, while forcing both states of origin and of asylum to face their responsibilities. As illuminatingly synthesized by Henkin, ‘[i]n sum, and in a few words: Not only compassion but responsibility; not only individual state responsibility but collective responsibility; not only the Refugee Convention but the International Covenants and the U.N. Charter; not only UNHCR but the Human Rights Committee and, if necessary, the U.N. Security Council’.[248]

Notes:

([1]) A. Guterres, Remarks at the Opening of the Judicial Year of the European Court of Human Rights, Strasbourg, 28 January 2011, 2.

([2]) V. Chetail and C. Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?* Research Report, European University Institute (2011).

([3]) See, in particular, P. Weis, 'Refugees and Human Rights', 1 *Israel Yearbook on Human Rights* (1971) 35, esp. at 48–9; O. Kimminich, 'Die Entwicklung des internationalen Flüchtlingsrechts—faktischer und rechtsdogmatischer Rahmen', 20 *Archiv des Völkerrechts* (1982) 369, 405; M. Moussalli, 'Human Rights and Refugees', *Yearbook of the International Institute of Humanitarian Law* (1984) 13; G. J. L. Coles, 'Human Rights and Refugee Law', *Bulletin of Human Rights* (1991/1) 63; T. Stoltenberg, 'Human Rights and Refugees', in A. Eide and J. Helgesen (eds), *The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl* (1991) 145.

([4]) See, most notably, J. C. Hathaway, *The Law of Refugee Status* (1991); T. A. Aleinikoff, 'The Meaning of "Persecution" in United States Asylum Law', 3 *IJRL* (1991) 5; K. Musalo, 'Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms', 15 *Mich. J. Int'l L.* (1994) 1179; J.-Y. Carlier, 'General Report', in J.-Y. Carlier et al. (eds), *Who is a Refugee?* (1997) 685; N. Sitaropoulos, *Judicial Interpretation of Refugee Status* (1999); M. J. Parrish, 'Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection', 22 *Cardozo L. Rev.* (2000) 223; H. Lambert, 'The Conceptualisation of "Persecution" by the House of Lords: *Horvath v. Secretary of State for the Home Department*', 13 *IJRL* (2001) 16; R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (2002).

([5]) Among an abundant literature, see W. Suntinger, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?', *Austrian JPIL* (1995) 203; H. Lambert, 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue', 48 *ICLQ* (1999) 515; B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' 11 *IJRL* (1999) 479; D. Weissbrodt and I. Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties', 5 *Buffalo HRLR* (1999) 1; P. Burns, 'United Nations Committee against Torture and its Role in Refugee Protection', 15 *Geo. Immigr. L.J.* (2001) 403; V. Chetail, 'Le droit des réfugiés à l'épreuve des droits de l'homme: bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants', 37 *RBDI* (2004) 155; J. Doerfel, 'The Convention against Torture and the Protection of Refugees', 24 *RSQ* (2005) 83; V. Chetail, 'Le Comité des Nations Unies contre la torture et l'expulsion des étrangers: dix ans de jurisprudence', 26 *RSDIE* (2006) 63; J. Pirjola, 'Shadows in Paradise—Exploring Non-Refoulement as an Open Concept', 19 *IJRL* (2007) 639; A. Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', 20 *IJRL* (2008) 373; C. W. Wouters, *International Legal Standards for the Protection from Refoulement* (2009).

([6]) See, in particular, W. Kälin, 'Temporary Protection in the EC: Refugee Law, Human Rights and the Temptation of Pragmatism', 44 *GYIL* (2001) 202; D. Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (2002); G. Noll, 'International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive', in C. D. Urbano de Sousa and P. De Bruycker (eds), *The Emergence of a European Asylum Policy* (2004) 183; R. Piotrowicz and C. Van Eck, 'Subsidiary Protection and Primary Rights', 53 *ICLQ* (2004) 138; R. Mandal,

Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection') (2005); M.-T. Gil-Bazo, *Refugee Status, Subsidiary Protection and the Right to be Granted Asylum Under EC Law* (2006) New Issues in Refugee Research, Research Paper No. 136; J. McAdam, *Complementary Protection in International Refugee Law* (2006); J. Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection', 34 *Melb. U. L. Rev.* (2010) 181.

([7]) For a more general overview of the interactions between refugee law and human rights law, see however: J. C. Hathaway, *The Rights of Refugees under International Law* (2005), esp. at 1–14; A. Edwards, 'Human Rights, Refugees and the Right "to Enjoy" Asylum', 17 *IJRL* (2005) 293; J. Bhabha, 'Internationalist Gatekeepers?: The Tension between Asylum Advocacy and Human Rights', 15 *Harv. HRJ* (2002) 155; J.-F. Flauss, 'Les droits de l'homme et la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés', in V. Chetail and J.-F. Flauss (eds), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives* (2001) 91; B. Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law', 69 *NJIL* (2000) 117; T. Clark and F. Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law', 17 *NQHR* (1999) 389.

([8]) McAdam (n 6) at 14. Among a copious literature asserting the human rights nature of the Geneva Convention, see Hathaway (n 7) at 5; Edwards (n 7) at 306; L. Curran and S. Kneebone, 'Overview', in S. Kneebone (ed.), *The Refugees Convention 50 Years On. Globalisation and International Law* (2003) 1; Gorlick (n 7) at 122; F. Nicholson and P. Twomey, 'Introduction', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (1999) 2; Clark and Crépeau (n 7) at 391; A. C. Helton, 'Refugees and Human Rights', 15 *In Defense of the Alien* (1993) 142, 146–7; I. Jackson, 'The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection', 3 *IJRL* (1991) 404; I. Khokhlov, 'The Rights of Refugees under International Law', *Bulletin of Human Rights* (1991/1) 85; P. Nobel, 'Blurred Vision in the Right World and Violations of Human Rights—A Critical Assessment of the Human Rights and Refugee Linkage', *Bulletin of Human Rights* (1991/1) 74. For a more conceptual and critical stance, see however: E. Haddad, 'Refugee Protection: A Clash of Values', 7 *IJHR* (2003) 1; P. Tuitt, 'Human Rights and Refugees', 1 *IJHR* (1997) 66.

([9]) Hathaway (n 7) at 121.

([10]) Hathaway (n 7) at 154. He however acknowledges that 'both in principle and in practice, refugee rights will in the overwhelming majority of cases consist of an amalgam of principles drawn from both refugee law and the [UN] Covenants'. Hathaway (n 7) 9. See also W. Kälin, 'The Legal Condition of Refugees in Switzerland', 7 *JRS* (1994) 82, 93–5.

([11]) K. Jastram, 'Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution', in J. C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (2010) 143, 166–7.

([12]) Jastram (n 11) at 171.

([13]) McAdam (n 6) at 203.

([14]) McAdam (n 6) at 202.

([15]) G. S. Goodwin-Gill, 'Editorial: Asylum 2001—A Convention and A Purpose', 13 *IJRL* (2001) 1, at 1.

([16]) '[T]he Refugee Convention functions as a form of *lex specialis* (specialist law) for all those in need of international protection, and provides an appropriate legal status irrespective of the source of the State's protection obligation': McAdam (n 6) at 1. See also A. Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in R. Arnold and N. Quenivet (eds), *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (2008) 429. See, *contra*, J. C. Hathaway, 'Leveraging Asylum', 45 *Texas ILJ* (2010) 502, 532–4; P. Mathew, 'Review: James Hathaway, The Rights of Refugees under International Law', 102 *AJIL* (2008) 206, 207.

([17]) As will be shown later, the only possible conflict derives from the absolute character of the *non-refoulement* principle under human rights treaties and has been resolved in favour of the latter, thereby discarding the exceptions set out in the Refugee Convention.

([18]) 'Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'.

([19]) C. M. Skran, *Refugees in Inter-War Europe. The Emergence of a Regime* (1995); J. C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950', 33 *ICLQ* (1984) 348.

([20]) Hathaway (n 7) at 231.

([21]) Mr Leslie of Canada, UN Doc E/AC.32/SR.2 (1950), 6.

([22]) Mr Giraldo-Jamarillo of Colombia, UN Doc A/CONF.2/SR.21 (1951), 8.

([23]) Mr Mostafa of Egypt referring to the statement of the French representative, UN Doc A/CONF.2/SR.20 (1951), 5. This concern is also evidenced by the fact that the refugee definition was originally limited to persons fleeing events occurring before January 1951 and states parties were enabled to further restrict its scope to events occurring within Europe. These temporal and geographical limitations have been removed by the 1967 Protocol, thus giving the Geneva Convention universal coverage. See more generally: K. Bem, 'The Coming of a "Blank Cheque"—Europe, the 1951 Convention, and the 1967 Protocol', 16 *IJRL* (2004) 609.

([24]) J. Sztucki, 'Who is a Refugee? The Convention Definition: Universal or Obsolete?', in Nicholson and Twomey (n 8) at 57.

([25]) Bhabha (n 7) at 167.

([26]) *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 497 (Lord Hope of Craighead).

([27]) *Canada v. Ward* [1993] 103 DLR 4th 1, 67–8.

([28]) The Conference of Plenipotentiaries accordingly recommended in the Final Act that states parties should apply the Geneva Convention beyond 'its contractual scope' to other refugees 'who would not be covered by the terms of the Convention'.

([29]) Mr Rochefort of France, UN Doc A/CONF.2/SR.19 (1951), 5.

([30]) *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 63.

([31]) '[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16, at 31. Furthermore, human rights treaties constitute 'any relevant rules of international law applicable in the relations between the parties' under Art. 31(1)(c) of the Vienna Convention on the Law of Treaties.

([32]) P. Weis, 'The Concept of the Refugee in International Law', 87 *JDI* (1960) 928, 970; A. Grahl-Madsen, *The Status of Refugees in International Law* I (1966) 193.

([33]) J. Vernant, *The Refugee in the Post-War World* (1953) 8, quoted in Grahl-Madsen (n 32) at 193.

([34]) Grahl-Madsen (n 32) at 193–4.

([35]) G. S. Goodwin-Gill, *The Refugee in International Law* (1983), 38–46. See also E. Lapenna, 'Le réfugié et l'émigrant dans le cadre des droits et libertés fondamentaux', 22 *AWR Bulletin* (1984) 50; G. Melander, *The Two Refugee Definitions* (1987).

([36]) Hathaway (n 7) at 104–5.

([37]) See, for instance, A. Zimmermann and C. Mahler, 'Article 1 A, para. 2 (Definition of the Term "Refugee")', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (2011) 282, 345–58; M. Foster, *International Refugee Law and Socio-Economic Rights. Refugee from Deprivation* (2007) 27–86; von Sternberg (n 4) at 1–18; D. Alland and C. Teitgen-Colly, *Traité du droit de l'asile* (2002) 370–3; Lambert (n 4) at 19; F. Crépeau and D. Nakache, 'Une porte encore entrouverte: l'interprétation de la définition internationale du réfugié en droit canadien', in Chetail and Flauss (n 7) at 333–5; Parrish (n 4) at 223–67; C. J. Harvey, 'Refugee Law, the Judges and a "New" Human Rights Culture', 14 *Immigration and Nationality Law and Practice* (2000) 5; Sitaropoulos (n 4) at 215–45; J.-Y. Carlier, 'The Geneva Refugee Definition and the "Theory of the Three Scales"', in Nicholson and Twomey (n 8) at 41–5.

([38]) See, most notably, *Canada v. Ward* [1993] 103 DLR 4th 1; *Horvath v. Secretary of State for the Home Department* (n 26); *K. v. Refugee Status Appeals Authority* [2005] NZAR 441 (2004).

([39]) See, for instance, *INS Basic Law Manual*, quoted in D. Anker, *Law of Asylum in the United States* (1999) 174; UK Asylum Policy Instructions, *Considering the Protection (Asylum) Claim and Assessing Credibility* (2010) 22–3.

([40]) Art. 9 of Council Directive 2004/83/EC, OJ 2004 L 304/12, 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.

([41]) *Canada (Attorney-General) v. Ward* [1993] 2 SCR 689, 733 (Laforest J). The House of Lords acknowledges in the same vein: 'The relevance of the preambles is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention'. *Islam v. Secretary of State for the Home Department, R. v. Immigration Appeal Tribunal and another, ex parte Shah* [1999] 2 AC 629, at 639 (Steyn LJ).

([42]) *Applicant A v. Minister for Immigration and Multicultural Affairs* [1997] 190 CLR 225, 296–7 (Kirby J). See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration and Multicultural Affairs)* [1998] 1 SCR 982 1024 (Bastarache J).

([43]) Arts 18 of the UDHR and ICCPR.

([44]) Arts 19 of the UDHR and ICCPR.

([45]) Arts 2 of the UDHR and ICCPR.

([46]) D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm', 15 *Harv. Hum. Rts. L.J.* (2002) 133, at 138–9.

([47]) See, most notably, *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1999] 2 WLR 1015.

([48]) See, for instance, Refugee Appeal No. 1312/93, Re GJ, 30 August 1995; *Hernandez-Montiel v. Immigration and Naturalization Service* [2000] 225 F.3d 1084 (US Court of Appeal for the 9th Circuit).

([49]) In addition to the *Ward* and *Horvath* cases already mentioned, see for instance: *Arteaga v. Immigration and Naturalization* Service [1988] 836 F.2d 1227, 1231 (9th Cir.); *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] HCA 55; Refugee Appeal No. 71427/99 [2000] INLR 608, para. 106.

([50]) Art. 6(c).

([51]) Long before the change of the French practice induced by the EU Directive, the Human Rights Committee expressed its concern with regard to 'the restrictive definition of the concept of "persecution" of refugee used by the French authorities as it does not take into account possible persecution by non-State actors'. UN Doc CCPR/C/79/Add. 80 (1997), para. 21. For further assessment of the French practice, see: V. Chetail, 'The Implementation of the Qualification Directive in France: One Step Forward and Two Steps Backwards', in K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (2007) 87; V. Chetail, 'La réforme française de l'asile: prélude à la banalisation européenne du droit des réfugiés', 131 *JDI* (2004) 817.

([52]) San Remo Declaration on the Principle of Non-Refoulement (September 2001). For an overview of the principle of *non-refoulement*, see W. Kälin, M. Caroni, and L. Heim, 'Article 33, para. 1 (Prohibition of Expulsion or Return ("Refoulement")/Défense d'expulsion et de refoulement)', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (2011) 1327; Wouters (n 5); J.-Y. Carlier, 'Droit d'asile et des réfugiés: de la protection aux droits', 332 *RCADI* (2008) 76; G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007) 201–84; Hathaway, *The Rights of Refugees under International Law* (n 7) at 278–369; 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* (2003) 87; V. Chetail, 'Le principe de non refoulement et le statut de réfugié en droit international', in Chetail and Flauss (n 7) at 3.

([53]) V. Chetail, 'Théorie et pratique de l'asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés', 114 *RGDIP* (2011) 625, at 634–50.

([54]) See in particular: Agreement relating to Refugee Seamen, 23 November 1957, completed by the Protocol to the Agreement relating to Refugee Seamen of 12 June 1973, Art. 10; Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, Art. II(3); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, Art. 14(1); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000; 2004 Qualification Directive, Recital 2 and Art. 21; Council Directive 2005/85/EC, OJ 2005 L 326/13 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Recital 2 and Art. 20(2); Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, Art. 40(4). Among soft law instruments, besides a wide number of resolutions from the General Assembly and the UNHCR ExCom, see, most notably, Declaration on Territorial Asylum, 14 December 1967, Art. 3(1); Resolution (67) 14 of the Committee of Ministers of the Council of Europe on Asylum to persons in Danger of Persecution, 1967; Cartagena Declaration on Refugees, 22 November 1984.

([55]) Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/MMSP/2001/09 (2002), para. 4.

([56]) The drafters of the Geneva Convention were indeed plainly aware that '[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee'. Memorandum by the Secretary General, UN Doc E/AC.32/2 (1950), para. 3.

([57]) *R. v. Uxbridge Magistrates' Court ex parte Adimi* [1999] 4 All ER 520, 527 (Simon Brown LJ). It also confirmed that 'Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that Article 31's protection can apply equally to those using false documents as to those…who enter a country clandestinely'.

([58]) One should stress that while illegal entry is utterly irrelevant for benefiting from the principle of *non-refoulement*, the prohibition of penalties is much more limited in scope. It does not apply to all asylum-seekers but only to those who satisfy the three following conditions imposed by Art. 31(1): they come directly from a country of persecution; they present themselves without delay to the national authorities; and show good cause for their illegal entry or presence.

([59]) *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14, para. 68 (McHugh and Gummow JJ).

([60]) Statement of Mr Weis of the International Refugee Organization, E/AC.32/SR40 (1950), 33. For a recent acknowledgement, see: *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAGC 131, para. 39.

([61]) *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14, para. 42 (McHugh and Gummow JJ). See also among many other similar judicial statements: *R v. Immigration Officer at Prague Airport and another ex parte Roma Rights Centre and others* [2004] UKHL 55, paras 11–17 (Lord Bingham of Cornhill).

([62]) The only explicit reference to asylum can be found in the preamble of the Geneva Convention in rather pejorative terms: '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' (emphasis added).

([63]) Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', I-149 *RCADI* (1976), 316.

([64]) UN Doc A/CONF.2/SR.13 (1951), 13.

([65]) UN Doc A/CONF.2/SR.19 (1951), 18.

([66]) Referring to the interaction between asylum and *non-refoulement*, the House of Lords has acknowledged that 'although a refugee has no direct right to insist on asylum, there are certain statutory restrictions on the Secretary of State's freedom of choice as to the destination to which a person refused permission to remain may be sent, which may in practice achieve the same result'. *T. v. Secretary of State for the Home Department* [1996] AC 742, 754 (Lord Mustill).

([67]) These alternatives are further confirmed by Art. 31(2), which provides that 'restrictions [to the movement of refugees] shall only be applied until their status in the country is regularized or they obtain admission into another country'.

([68]) Hathaway (n 7) at 301. See also Carlier (n 52) at 85; Goodwin-Gill and McAdam (n 52) at 384.

([69]) *Attorney General v. Zaoui* [2004] Dec. No. CA20/04, para. 136.

([70]) *Attorney General v. Zaoui* (n 69) para. 148.

([71]) *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, para. 90. See also *Attorney General v. Zaoui* (n 69) paras 133 and 140; *NSH v. Secretary of State for the Home Department* [1988] Imm AR 410.

([72]) See, in particular, *A. v. Minister for Immigration and Multicultural Affairs* [1999] FCA 227, para. 42.

([73]) See the French proposal presented by René Cassin: UN Doc E/CN.4/AC.1/SR37 (1948), 8.

([74]) Even formulated in such evasive terms, the right to seek and to enjoy asylum is further restricted by the traditional exception based on criminal behaviour and other related acts: '[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

([75]) H. Lauterpacht, 'The Universal Declaration of Human Rights', 25 *BYIL* (1948) 354, 373–4. The 1967 Declaration on Territorial Asylum restates in the same vein as the Universal Declaration on Human Rights (UDHR) that '[a]sylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the UDHR, including persons struggling against colonialism, shall be respected by all other States' (Art. 1(1)) and '[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum' (Art. 1(3)). See also on the blatant failure of the 1977 UN Conference on Territorial Asylum: R. Plender, 'Admission of Refugees: Draft Convention on Territorial Asylum', *SDLR* (1977–1978) 45; P. Weis, 'The Draft United Nations Convention on Territorial Asylum', *BYIL* (1979) 151; A. Grahl-Madsen, *Territorial Asylum* (1980), 61–8.

([76]) *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] HCA 55, para. 138. The right of asylum shares the same fate as the right to property, being the only rights proclaimed in the UDHR that were not restated in the UN Covenants. Moreover, while some regional human rights instruments contain apparently more demanding language through the expression 'the right to seek and be granted asylum', any sense of obligation is further neutralized by subordinating its exercise to the respect for relevant domestic legislations and international conventions: American Convention on Human Rights, 22 November 1969 (American Convention), Art. 22(7); African Charter on Human and People's Rights, 27 June 1981 (African Charter), Art. 12(3). Other regional instruments are even more vague and permissive: Charter of Fundamental Rights of the European Union, 18 December 2000, Art. 18; Arab Charter on Human Rights (Arab Charter), Art. 28.

([77]) Art. 28 refers to the prohibition of extradition instead of the more generic term of *refoulement*.

([78]) *X v. Belgium*, EComHR (1961) Appl. No. 984/61, (1961) 6 CD 39.

([79]) PACE, Recommendation 434 (1965) on the Granting of the Right of Asylum to European refugees, paras 3–4.

([80]) *Soering v. The United Kingdom*, ECHR (1989) Series A, No. 161, paras 87–88.

([81]) HRCttee, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (1992), para. 9.

([82]) CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6 (2005), para. 27.

([83]) *The Haitian Centre for Human Rights et al. v. United States*, IAComHR (1997) Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev., para. 167; *John K. Modise v. Botswana*, ACommHPR (2000) Comm. No. 97/93, para. 91.

([84]) Chetail, 'Le droit des réfugiés à l'épreuve des droits de l'homme' (n 5) esp. 160–70. For further discussions about the possible rationale underlying the implicit duty of *non-refoulement*, see also H. Battjes, 'The *Soering* Threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law', 11 *EJML* (2009) 205; M. Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law', *NZ L. Rev.* (2009) 257, at 265–79; M. Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *EJML* (2008) 277; W. Kälin, 'Limits to Expulsion under the International Covenant on Civil and Political Rights', in F. Salerno (ed.), *Diritti Dell'Uomo, Estradizione ed Espulsione* (2003) 143; G. Noll, *Negotiating Asylum* (2000), 453–74.

([85]) See, for instance, HRCttee, *Kindler v. Canada*, CCPR/C/48/D/470/1991 (1993), para. 13.2; *G.T. v. Australia*, CCPR/C/61/D/706/1996 (1997), paras 8.1–8.7; HRCttee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/add.13 (2004), para. 12.

([86]) See, especially, *Z and T v. The United Kingdom*, ECHR (2006) Appl. No. 27034/05; *Tomic v. The United Kingdom*, ECHR (2003) Appl. No. 17387/03.

([87]) *C. v. Netherlands* (1984) DR 38, 224. Beside the specific examples mentioned by the Commission, assessing whether the level of severity amounts to degrading treatment requires an *in concreto* examination of all the circumstances of each case. Moreover, an accumulation of human rights violations may cross the threshold under Art. 3: *Ireland v. The United Kingdom*, ECHR (1978) Series A, No. 25, para. 162; *M.S.S. v. Belgium and Greece*, ECHR (2011) Appl. No. 30696/09, para. 220; *Ireland v. The United Kingdom*, ECHR (1978) Series A, No. 25, para. 167.

([88]) Among an abundant case law, see *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 1 CF 314, 324; *SZ and JM (Iran CG) v. The Secretary of State for the Home Department* [2008] UKAIT 00082, paras 168–169.

([89]) Art. 1(A)(2) of the Geneva Convention; *R v. Immigration Officer at Prague Airport and another ex parte Roma Rights Centre and others* [2004] UKHL 55, paras 16–18 (Lord Bingham of Cornhill).

([90]) Curiously enough, despite its far-reaching effects, this last characteristic has not yet given rise to a substantial practice by treaty bodies. For the time being, the most relevant practice essentially relates to the rights to liberty and security rather than *non-refoulement* per se. See, in particular, *W.M. v. Denmark*, EComHR (1992) Appl. No. 17392/90 and implicitly at least: HRCttee, *Concluding Observations on the United States of America*, CCPR/C/USA/CO/3/REV.1 (2006), para. 16.

([91]) The absolute nature of the *non-refoulement* duty also applies when there is a real risk of enforced disappearance under Art. 16 of the UN Convention for the Protection from Enforced Disappearance.

([92]) See, most notably, *Saadi v. Italy*, ECHR (2008) Appl. No. 37201/06, paras 138–141; *Chahal v. The United Kingdom*, ECHR (1996) Reports 1996-V, para. 80; CAT, *Tapia Paez v. Sweden*, CAT/C/18/D/39/1996 (1996), para. 14.5.

([93]) In France, for instance, exclusion from refugee status only represents around 0.25 per cent of the judicial decisions delivered each year on the basis of Art. 1 of the Geneva Convention: Alland and Teitgen-Colly (n 37) at 520.

([94]) W. A. Schabas, 'Non-Refoulement', in *Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism*, ODIHR.GAL/14/07 (2007) at 47.

([95]) As acknowledged by Kälin, 'granting refugee status and asylum together with the scrupulous observance of the principle of non-refoulement is one of the most effective means of securing human rights protection in that it ensures that the violator can no longer reach the victim of persecution'. W. Kälin, 'The Prohibition of Inhuman Return and its Impact upon Refugee Status Determination', in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection* (1997), 139.

([96]) The implied duty of admission has sometimes been labelled as an individual right to be granted asylum: R. Plender and N. Mole, 'Beyond the Geneva Convention: Constructing a De Facto Right of Asylum from International Human Rights Instruments', in Nicholson and Twomey (n 8) at 81; T. Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to *De facto* Asylum', 2 *IJRL* (1990) 361; D. S. Nance, 'The Individual Right to Asylum Under Article 3 of the European Convention on Human Rights', *Mich. Y. B. Int'l Leg. Stud.* (1982) 477. Such an assertion is arguably not correct. Under both refugee law and human rights law, the principle of *non-refoulement* is conceived as a duty-driven norm addressed to states and not as a right of individuals per se. Moreover, the choice between admission and removal to a safe third country pertains to the state and not the individual. In sum, '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"' Goodwin-Gill and McAdam (n 52) at 295. See also W. Kälin, *Grundriss des Asylverfahrens* (1990), 211.

([97]) CAT, *Aemei v. Switzerland*, CAT/C/18/D/34/1995 (1997), para. 11.

([98]) *T.I. v. The United Kingdom*, ECHR (2000) Reports 2000-III; *M.S.S. v. Belgium and Greece* (n 87) para. 342.

([99]) *M.S.S. v. Belgium and Greece* (n 87) para. 342.

([100]) CAT, *M.B.B. v. Sweden*, CAT/C/22/D/104/1998 (1999), para. 6.4.

([101]) CAT, *X v. Spain*, CAT/C/15/D/23/1995 (1995), para. 7.3.

([102]) Gorlick (n 7) at 122.

([103]) The vast majority of its provisions are worded in the following manner: 'The Contracting States shall accord to refugees…'. Among the rare examples of true rights or freedoms directly bestowed on refugees by the Geneva Convention, see Art. 12 referring to the 'rights previously acquired by a refugee and dependent on personal status' and Art. 26 on 'the right to choose their place of residence and to move freely within [contracting states'] territory'. Even Art. 15, although entitled 'right of association', is not written in the mode of an individual right but as a treatment accorded by contracting states.

([104]) Among the plethora of authors already referred to in n 9, Edwards considers that 'the United Nations Convention Related to the Status of Refugees is a rights-based and rights-granting instrument. Its coverage in Articles 3 to 34 is of the same nature as some rights granted under various human rights instruments', Edwards (n 7) at 306. This (mis)perception has also found an increasing echo among domestic courts. See Refugee Status Appeals Authority, *Refugee Appeal No. 71684/99* [2000] INLR 165, para. 61.

([105]) Among the very rare authors acknowledging this distinctive feature, Goodwin-Gill recalls that 'the formal scheme of the Convention, however, remains one of *obligations between states*. The refugee is a beneficiary, beholden to the state, with a status to which certain standards of treatment and certain guarantees attach'. He adds that 'a number of key obligations nevertheless rapidly made the transition into the doctrine and into the developing and strengthening discourse of individual rights'. G. S. Goodwin-Gill, *Refugees and their Human Rights* (2004) 7. See also M. G. Wachenfeld and H. Christensen, 'Note: An Introduction to Refugees and Human Rights', 59 *Nordic JIL* (1990) 178, at 180.

([106]) They notably include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.

([107]) At the time, only the Charter of the United Nations (UN Charter) had proclaimed in its first Article 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion', without identifying the rights and freedoms in question. The 1948 UDHR was adopted as a non-binding resolution of the General Assembly for the purpose of identifying such rights and fundamental freedoms 'as a common standard of achievement for all peoples and all nations'. At the regional level, only the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950 but it only entered into force after the adoption of the Geneva Convention in September 1953.

([108]) The two UN Covenants finally entered into force in 1976, ten years after their adoption.

([109]) For other possible classifications, see Carlier (n 52) at 271–98; Goodwin-Gill and McAdam (n 52) at 506–27; Hathaway (n 7) at 154–200.

([110]) Although the English version of the Geneva Convention refers to 'stay', the term 'residence' is perhaps closer to the intention of the drafters, especially because this last one is retained in the French version by opposition to a simple sojourn. This is, however, a descriptive term which does not coincide with the legal meaning of residence under private international law.

([111]) Only an indefeasible hard core of standards remains out of the contingency of domestic law. It essentially includes the prohibition of discrimination, access to courts, and the principle of *non-refoulement*. The importance of these core obligations is further asserted by the prohibition of any reservations to the relevant provisions as laid down in Art. 42 of the Geneva Convention.

([112]) A lawful stay is required for both wage-earning employment (Art. 17) and liberal profession (Art. 19), while self-employment activities only depend on a lawful presence (Art. 19). In any case, there is no causal relation between the entitlement criteria and the standards of treatment, for refugees are assimilated to most favoured aliens for the purpose of wage-earning employment, whereas self-employment and liberal profession are determined by reference to the minimum treatment accorded to ordinary aliens. More generally, the already complicated structure of entitlements provided by the Geneva Convention has been exacerbated by the substantial number of reservations formulated by states parties.

([113]) Hathaway (n 7) at 156.

([114]) As acknowledged by the UNHCR Handbook (para. 38), '[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'. See also 2004 Qualification Directive, Recital 14.

([115]) *Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, Global Consultations on International Protection, 3rd meeting, EC/GC/17 (2001), para. 3.

([116]) See, also in this sense, Carlier (n 52) at 288–9.

([117]) See, especially, UN Doc E/AC/32/SR.15 (1950) and UN Doc E/AC.32/SR.42 (1950).

([118]) See, for instance, *R v. Secretary of State for the Home Departement, ex parte Jammeh* [1998] INLR 701 (CA), 710–1; *Krishnapillai v. Minister of Citizenship and Immigration* [2002] 3(1) FC 74, para. 25.

([119]) HRCttee, *General Comment No. 31* (n 85) para. 10. See also *General Comment No. 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 at 18 (1986), para. 2.

([120]) UN Doc E/AC.32/SR11 (1950), 8.

([121]) Hathaway (n 7) at 121.

([122]) Hathaway (n 7) at 121. Among many other similar assertions, see also McAdam (n 6) at 203; Jastram (n 11) at 166–7.

([123]) The Human Rights Committee has confirmed in line with the interpretation prevailing among other treaty bodies that 'Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law….The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or

statelessness, or whatever their status, whether asylum-seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party'. *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 9.

([124]) HRCttee, *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23)*, UN Doc HRI/GEN/1/Rev. 5 (1990), para. 5. The Committee has restated later that 'Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification'. *Ngambi v. France*, CCPR/C/81/D/1179/2003 (2004), para. 6.4.

([125]) HRCttee, *Byahuranga v. Denmark*, CCPR/C/82/D/1222/2003 (2004), para. 11.7 (this case, however, concerned a removal decision, reunification cases being rarely submitted to the Human Rights Committee).

([126]) Such a conclusion is clearly in line with the predominant interpretation of the Human Rights Committee, although to the author's knowledge, it has not yet dealt with a refusal of family reunification by an asylum country. In a case concerning a Libyan refugee recognized in Switzerland, the Committee considered that the confiscation of passport and refusal of Libya to permit the departure of his wife and children constituted a violation of Art. 17 in so far as 'the State party's action amounted to a definitive, and sole, barrier to the family being reunited in Switzerland'. It further underlined that 'the author, as a person granted refugee status under the 1951 Convention, cannot reasonably be expected to return to his country of origin'. *El Dernawi v. Libyan Arab Jamahiriya*, CCPR/C/90/D/1143/2002 (2007), para. 6.3. In another particularly complex case concerning a person initially recognized as a refugee under the Geneva Convention (although the decision was later cancelled and was still under review at that time), the Committee concluded that the removal of his wife and children breached Art. 17: 'Taking into account the specific circumstances of the case, namely the number and age of the children…, the difficulties that Mrs Bakhtiyari and her children would face if returned to Pakistan without Mr Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors'. *Bakhtiyari v. Australia*, CCPR/C/79/D1069/2002 (2003), para. 9.6. One should nevertheless add that the proportionality test would probably be in favour of the state's interest when the whole family is able to live in a safe third country or when one of its members has been subjected to a final conviction for a serious criminal offence.

([127]) HRCttee, *General Comment No. 27: Freedom of Movement*, CCPR/C/21/Rev.1/Add.9 (1999), para. 19.

([128]) UN Doc A/RES/39/169 (1994). Since then, the General Assembly has constantly referred to voluntary repatriation as 'the preferred solution' by contrast to the other possible solutions provided by local integration or resettlement in a third country. See also among the numerous and somewhat repetitive Excom Conclusions: No. 109 (LXI)—2009, 16th preambular paragraph; No. 108 (LIX)—2008 (l); No. 104 (LVI)—2005, first preambular paragraph; No. 95 (LIV)—2003 (i); No. 90 (LII)—2001 (j); No. 87 (L)—1999 (r); No. 85 (XLIX)—1998 (g); No. 81 (XLVIII)—1997 (q); No. 79 (XLVII)—1996 (q).

([129]) For further discussion, see V. Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents', 23 *RSQ* (2004) 1, with the bibliographical references mentioned therein.

([130]) CERD, *General Recommendation No. 22: Article 5 and Refugees and Displaced Persons*, UN Doc A/51/18 (1996).

([131]) See generally V. Tennant, 'Return and Reintegration', in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (2009) 307, and the special issue on Displacement, Peace Processes and Post-Conflict Peacebuilding in 28 *RSQ* (2009).

([132]) UN Doc E/CN.4/Sub.2/2005/17 (2005). The Pinheiro Principles elaborate key human rights relating to the equitable restitution of housing and property and provide guidelines to states and international actors for ensuring access to these rights. One should recall in this regard that, contrary to the UDHR and the Geneva Convention, the two UN Covenants do not contain an explicit provision on the right to property because of the diverging conceptions prevailing at the time of the Cold War. However this difference between human rights law and refugee law remains marginal. As will be shown later, the equal protection before the law under Art. 26 of the ICCPR prohibits discrimination in access to property rights. Moreover, all regional human rights instruments guarantee the right to property.

([133]) See III.A, this chapter.

([134]) Art. 2(1) ICCPR.

([135]) HRCttee, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6, at 146 (1989), para. 12.

([136]) See *contra* Hathaway (n 7) at 258–9.

([137]) HRCttee, *General Comment No. 18* (n 135) para. 13. Among other similar statements, see CESCR, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, UN Doc E/C.12/GC/20 (2009), para. 13; CERD, *General Recommendation No. 30: Discrimination against Non Citizens*, CERD/C/64/Misc. 11/rev.3 (2004), para. 4.

([138]) *Kríž v. Czech Republic*, CCPR/C/85/D/1054/2002 (2005), para. 7.3.

([139]) '[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant'. HRCttee, *General Comment No. 18* (n 135) para. 10. See also Arts. 1(4) and 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination and CERD, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, CERD/C/GC/32 (2009).

([140]) One should add that, even for rights assimilated to those of nationals, human rights law ensures that such treatment cannot be below the minimum assigned by human rights treaties.

([141]) HRCttee, *General Comment No. 15* (n 119) para. 7: 'Aliens receive the benefit of the right of peaceful assembly and of freedom of association…there shall be no discrimination between aliens and citizens in the applications of these rights'.

([142]) Some regional instruments have adopted a more restrictive—though rarely applied—stance with regard to the political activity of aliens: Art. 16 ECHR and Art. 24 Arab Charter. However, states parties to both the Covenant and one of these regional instruments are bound to apply the most favourable treatment enshrined in the Covenant.

([143]) At the regional level, the African Charter specifically prohibits 'any individual enjoying the right of asylum' from engaging in 'subversive activities' (Art. 23(2)). See also Art. 3(1) of the OAU Convention. As any exception to a right (ie, freedoms of expression, of association and of peaceful assembly), the very notion of 'subversive activities' must be interpreted restrictively and must not impair the essence of the rights in question. In any case, the prohibition of subversive activities has to be compatible with the lawful restrictions provided in the other relevant provisions (Arts. 8 to 11 of the African Charter).

([144]) For a similar account see notably F. Crépeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (1995), 123; P. Hyndman, 'The 1951 Convention and Its Implications for Procedural Questions', 6 *IJRL* (1994) 246; R. Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', 7 *IJRL* (1995) 401. See however Hathaway (n 7) at 180–1.

([145]) Art. 9 allows states to take provisional measures in times of war and other exceptional circumstances 'pending a determination by the Contracting State that that person is in fact a refugee'. Art. 31(2) governing restrictions to the movements of refugees also mentions that 'such restrictions shall only be applied until their status in the country is regularized…', presupposing thus a refugee status determination procedure.

([146]) In practice, Western states have established sophisticated national procedures for determining who is a refugee. But the identification process may take other forms. States parties to the Geneva Convention—including those from the global south—may delegate such a task to the UNHCR and/or resort to *prima facie* basis group determination of refugee status notably in cases of massive influx.

([147]) For a similar interpretation, see Hathaway (n 7) at 645; Carlier (n 52) at 320.

([148]) See, in this sense, *R v. Secretary of State for the Home Departement, ex parte Jahangeer et al.* [1993] Imm AR 564, per Jowitt J., 566. See *contra, Krishnapillai v. Minister of Citizenship and Immigration* (2002) 3(1) FC 74, paras 31–32, per Décary JA.

([149]) See, in this sense, Hathaway (n 7) at 649; S. Persaud, *Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights* (2006), 15.

([150]) HRCttee, *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32 (2007), para. 17.

([151]) *Adu v. Canada*, CCPR/C/60/D/654/1995 (1997), para. 6.3. In this case, the Committee implicitly admitted the applicability of the right to a fair trial in a refugee status determination procedure by assessing the fairness of the asylum procedure. See also *Dranichnikov v. Australia*, CCPR/C/88/D/1291/2004 (2006), paras 6.7–7.2.

([152]) A typical illustration of such confusion may be found in *Kaur v. Canada*, CCPR/C/94/D/1455/2006 (2007), paras 7.4–7.5.

([153]) According to the Grand Chamber, 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention'. *Maaouia v. France*, ECHR (2000) Reports 2000-X, para. 40. The Court then transposed its conclusion *mutatis mutandis* to asylum procedures. *Ciçek v. Netherlands*, ECHR (2001) Appl. No. 49866/99, para. 2; *IN v. Sweden*, ECHR (2009) Appl. No. 1334/09, para. 40.

([154]) HRCttee, *Kazantzis v. Cyprus*, CCPR/C/78/D/972/2001 (2003), para. 6.6 (emphasis added).

([155]) HRCttee, *Kazantzis v. Cyprus* (n 154) para. 6.6.

([156]) See, for instance, *Maksudov and others v. Kyrgyzstan*, CCPR/C/93/D/1461, 1462, 1476, and 1477/2006 (2008), para. 12.7; *Al Zery v. Sweden*, CCPR/C/88/D/1416/2005 (2006), para. 11.8.

([157]) See Arts. 22(7) and 25(1) American Convention, Arts. 7(1)(a) and 12(3) African Charter, as well as Arts. 23 and 28 Arab Charter.

([158]) See, in particular, *Jabari v. Turkey*, ECHR (2000) Reports 2000-VIII, paras 40 and 49. In this case, the European Court held that the refusal of an asylum request on the sole ground that it was not submitted within five days after the arrival of the asylum-seeker is a violation of the right to an effective remedy.

([159]) *Bahaddar v. The Netherlands*, ECHR (1998) Reports 1998-I, para. 45.

([160]) *Jabari v. Turkey* (n 158) para. 50.

([161]) *Chahal v. The United Kingdom* (n 92) para. 152.

([162]) *Chahal v. The United Kingdom* (n 92) paras 145 and 154.

([163]) *Chahal v. The United Kingdom* (n 92) paras 145 and 154.

([164]) *Gebremedhin v. France*, ECHR (2007) Appl. No. 25389/05, para. 66. See also *Conka v. Belgium*, ECHR (2002) Reports 2002-I, paras 81–85; *Jabari v. Turkey* (n 158) para. 50.

([165]) *Conka v. Belgium*, ECHR (2002) (n 164) para. 84.

([166]) HRCttee, *A v. Australia*, CCPR/C/59/D/560/1993 (1997), para. 9.2. For similar statements at the regional level, see *Gangaram Panday Case*, IACtHR (1994) Series C, No. 16, para. 47; *Organisation Mondiale Contre La Torture v. Rwanda*, ACHPR (1996) Comm. Nos. 27/89, 46/91, 49/91, 99/93; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon*, ACHPR (1997) Comm. No. 39/90. See however *Saadi v. United Kingdom*, ECHR (2008) Appl. No. 13229/03, para. 45.

([167]) HRCttee, *A v. Australia* (n 166) para. 9.4.

([168]) HRCttee, *C. v. Australia* (2002), CCPR/C/76/D/900/1999, para. 8.2. For similar restatements, see *D. and E. v. Australia*, CCPR/C/87/D/1050/2002 (2006), para. 7.2; *Baban v. Australia*, CCPR/C/78/D/1014/2001 (2003), para. 7.2.

([169]) *Amuur v. France*, ECHR (1996) Reports 1996-III, at para. 43 (emphasis added).

([170]) *Amuur v. France* (n 169) at para. 45.

([171]) Art. 9(2) ICCPR. See also Art. 7(4) American Convention; Art. 5(2) ECHR; Art. 14(3) Arab Charter.

([172]) *Conka v. Belgium* (n 164) para. 50.

([173]) *Saadi v. The United Kingdom* (n 166) para. 84.

([174]) *Conka v. Belgium* (n 164) para. 50.

([175]) Art. 9(4) ICCPR; Art. 7(6) American Convention; Art. 5(4) ECHR; Art. 7(1) African Charter; Art. 14(6) Arab Charter.

([176]) *Al-Nashif v. Bulgaria*, ECHR (2002) Appl. No. 50963/99, para. 92. See also *Sanchez-Reisse v. Switzerland*, ECHR (1986) Appl. No. 9862/82, para 51.

([177]) *Farmakopoulos v. Belgium*, EComHR (1990) Appl. No. 11683/85, para. 51.

([178]) *Farmakopoulos v. Belgium* (n 177) para. 53.

([179]) *Muskhadzhiyeva and others v. Belgium*, ECHR (2010) Appl. No. 41442/07, para. 83.

([180]) *Sanchez-Reisse v. Switzerland* (n 176) para. 60.

([181]) 'In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4…is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that *such review is, in its effects, real and not merely formal*. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant'. HRCttee, *A. v. Australia* (n 166) para. 9.5 (emphasis added). With regard to the European Court, see especially *Chahal v. The United Kingdom* (n 92) para. 127 *Dougoz v. Greece*, ECHR (2001) Reports 2001-II, at para. 55, para. 61.

([182]) *Sanchez-Reisse v. Switzerland* (n 176) para. 47. See also HRCttee, *A. v. Australia* (n 166) para. 9.6; *Chahal v. The United Kingdom* (n 92) para. 130; *Mohammed Zamir v. United Kingdom*, EComHR (1983) Appl. No. 9174/80, para. 113.

([183]) Art. 10(1) ICCPR.

([184]) *S.D. v. Greece*, ECHR (2009) Appl. No. 53541/07, para. 51.

([185]) *Riad and Idiab v. Belgium*, ECHR (2008) Appl. No. 29787/03 and 29810/03, paras 106–110.

([186]) *Abdolkhani and Karimnia v. Turkey*, ECHR (2010) Appl. No. 50213/08, para. 31.

([187]) *Mayeka and Mitunga v. Belgium*, ECHR (2006) Appl. No. 13178/03, para. 58.

([188]) *Muskhadzhiyeva and others v. Belgium*, ECHR (2010) Appl. No. 41442/07, paras 60–63.

([189]) *Muskhadzhiyeva and others v. Belgium* (n 188) para. 62. See also, with regard to Art. 24 ICCPR, HRCttee, *Bakhtiyari v. Australia* (2003) (n 126) para. 9.7.

([190]) See also, with regard to regional human rights treaties, Art. 1 Protocol No. 7 to the ECHR; Art. 22(6) American Convention; Art. 12(5) African Charter; Art. 26(2) Arab Charter.

([191]) See, respectively, UN Doc E/AC.32/5 (1950), para. 60; UN Doc E/2256 (1952), para. 199.

([192]) HRCttee, *Maroufidou v. Sweden*, CCPR/C/OP/1 (1981), para. 9.3.

([193]) HRCttee, *Maroufidou v. Sweden* (n 192) para. 10.1. See also: HRCttee, *Hammel v. Madagascar*, CCPR/C/29/D/155/1983 (1987), para. 19.3; *Giry v. Dominican* Republic, CCPR/C/39/D/193/1985 (1985), para. 5.5.

([194]) HRCttee, *General Comment No. 15* (n 119) para. 10. Curiously enough, the Committee does not explicitly refer to Art. 2(3) for deducing the right to an effective remedy. It even considers that the right to appeal is implicit in Art. 13 after stating that '*the principles of article 13 relating to appeal against expulsion* and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require'. HRCttee, *General Comment No. 15* (n 119) para. 10 (emphasis added). In *Ahani v. Canada*, it stressed in the same vein that 'article 13…incorporates notions of due process also reflected in article 14 of the Covenant'. HRCttee, *Ahani v. Canada*, CCPR/80/D/1051/2002 (2004), para. 10.9.

([195]) HRCttee, *General Comment No. 15* (n 119) para. 9.

([196]) HRCttee, *V.M.R.B. v. Canada*, CCPR/C/333/D/236/1987 (1988), para. 6.3.

([197]) See also HRCttee, *General Comment No. 27* (n 127) paras 14 and 18; *Karker v. France*, CCPR/C/70/D/833/1998 (2000), para. 9.2; *Celepli v. Sweden*, CCPR/C/51/D/456/1991 (1993).

([198]) HRCttee, *General Comment No. 15* (n 119) para. 9 (emphasis added).

([199]) See also, in this sense: 'That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise'. HRCttee, *General Comment No. 15* (n 119) para. 9.

([200]) HRCttee, *General Comment No. 15* (n 119) para. 10. Although a similar interpretation could be argued with regard to Art. 32 of the Geneva Convention, it still lacks official endorsement in state practice.

([201]) Art. 22(9) American Convention, Art. 12(5) African Charter, Art. 4 Protocol No. 4 of ECHR; Art. 26(b) Arab Charter.

([202]) '[C]ollective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis'. *Andric v. Sweden*, ECHR (1999) Appl. No. 45917/99, para. 1.

([203]) *Conka v. Belgium* (n 164) para. 63.

([204]) *T.I. v. United Kingdom* (n 98); *M.S.S. v. Belgium and Greece* (n 87) para. 286.

([205]) Art. 38 Geneva Convention and Art. IV of the 1967 Protocol.

([206]) K. Oellers-Frahm, 'Article 38 of the 1951 Convention/Article IV of the 1967 Protocol', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (2011) 1550.

([207]) Art. 22 of the International Convention on the Elimination of All Forms of Racial Discrimination; Art. 29 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women; Art. 30 of the Convention Against Torture; Art. 42 of the International Convention for the Protection of All Persons from Enforced Disappearance.

([208]) W. Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond', in Feller, Türk, and Nicholson (n 52) 632. See also C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 75.

([209]) Although they may overlap, *erga omnes partes* obligations are by definition limited to the states parties to a particular treaty and must be distinguished from the broader notion of *erga omnes* obligations enshrined in general international law towards the international community as a whole.

([210]) UN Doc A/CONF.2/SR.19 (1951).

([211]) *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports (1951), 23.

([212]) The same conventional obligation is laid down in Art. II(1) of the 1967 Protocol and restated in several other instruments, such as in the Preamble to the 1957 Agreement relating to Refugee Seamen, Art. 8 of the OAU Convention, recommendation (e) of the Cartagena Declaration and Art. 21 of the EU Asylum Procedures Directive.

([213]) 'The primary purpose of Article 35(1) of the 1951 Convention and Article II(1) of the 1967 Protocol is thus to link the duty of States Parties to apply the Convention and the Protocol with UNHCR's task of supervising their application by imposing a treaty obligation on States Parties (i) to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and (ii) to cooperate actively with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of all provisions of the

Convention and its Protocol'. Kälin (n 208) at 617. See also V. Türk, 'UNHCR's Supervisory Responsibility', 14 *RQDI* (2001) 135.

([214]) Information gathering from states parties is carried out by UNHCR on an informal and confidential basis. Kälin (n 208) at 624–5.

([215]) M. Zieck, 'Article 35 of the 1951 Convention/Article II of the 1967 Protocol', in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (2011), 1508.

([216]) Hathaway (n 7) at 995.

([217]) T. Chowdhury, *Legal Framework of International Supervision* (1986), at 181, quoted in Türk (n 213) 146.

([218]) V. Türk, 'The Role of UNHCR in the Development of International Refugee Law', in Nicholson and Twomey (n 8) 153; C. Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution', 17 *IJRL* (2005) 67.

([219]) See Hathaway (n 7) at 995–8; Kälin (n 208) at 627–8 and 633–4; Türk (n 213) at 153; T. Glover and S. Russell, *Coordination with UNHCR and States* (2001); S. Takahashi, *Effective Monitoring of the Refugee Convention* (2001).

([220]) Takahashi (n 219) at 3.

([221]) Türk (n 213) at 138.

([222]) Chetail, 'Le Comité des Nations Unies contre la torture' (n 5) at 65–6; M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), at 159. For a general overview of the role of treaty bodies in refugee protection, see C. Beyani, 'The Role of Human Rights Bodies in Protecting Refugees', in A. F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers. Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2006) 270; N. Poynder, '"Mind the Gap": Seeking Alternative Protection under the Convention against Torture and the International Covenant on Civil and Political Rights', in Kneebone (n 8) 173; S. Takahashi, 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention', 20 *NQHR* (2002) 53; O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', 9 *IJRL* (1997) 392.

([223]) For a comprehensive account of the UN treaty bodies' activities in this field until 2000, see Gorlick (n 7) at 147–75.

([224]) See, for instance, CERD, *Concluding Observations: Congo*, CERD/C/COG/CO/9 (2009), para. 18; *Nepal*, CERD/C/64/CO/5 (2004), par. 19; *Japan*, CERD/C/304/Add.114 (2001), para. 19; *Denmark*, CERD/C/60/CO/5 (2002), para. 17; CESCR, *Concluding Observations: Nepal*, E/C.12/1/Add.66 (2001), paras 29 and 54.

([225]) Concerning refugee children, see, for instance, CRC, *Concluding Observations: Armenia*, CRC/C/15/Add.119 (2000), para. 47; *Central African Republic*, CRC/C/15/Add.138 (2000), para. 6; *Portugal*, CRC/C/15/Add.162 (2001), paras 46–47; *Niger*, CRC/C/15/Add. 179 (2002), para. 60; *Indonesia*, CRC/C/15/Add.223 (2004), para. 65; *Nigeria*,

CRC/C/NGA/CO/3–4 (2010), para. 73. See also regarding women refugees: CEDAW, *Concluding Comments: Malawi*, CEDAW/C/MWI/CO/5 (2006), paras 35–36; *India*, CEDAW/C/IND/CO/3 (2007), paras 50–51; *Lebanon*, CEDAW/C/LBN/CO/3 (2008), para. 40.

([226]) See, notably, CERD, *Concluding Observations: Bangladesh*, CERD/C/304/Add.118 (2001), para. 12; CRC, *Concluding Observations: Georgia*, CRC/C/GEO/CO/3 (2008), para. 58.

([227]) See, among others, CERD, *Concluding Observations: Iceland*, CERD/C/304/Add.111 (2001), para. 10; *Zambia*, CERD/C/ZMB/CO/16 (2005), para. 14.

([228]) CESCR, *Concluding Observations: Nepal,* CESCR E/2002/22 (2001) para. 30; CRC, *Concluding Observations: Lebanon*, CRC/C/SR.751–2 (2002), para. 53; CERD, *Concluding Observations: India*, CERD/C/IND/CO/19 (2007), para. 16; CAT, *Conclusions and Recommendations: Uzbekistan*, CAT/C/UZB/CO/3 (2008), para. 24.

([229]) CERD, *Nepal* (n 224) para. 19; CAT, *Uzbekistan* (n 228) para. 24; CAT, *Conclusions and Recommendations: Costa Rica*, CAT/C/CRI/CO/2 (2008), para. 9.

([230]) Beside the non-binding nature of their observations, treaty bodies are victims of their own success, with increased petitions concerning removal decisions to the extent that the few resources at their disposal are not adequate for addressing their caseload. Moreover, many state reports are overdue.

([231]) UNHCR, *UNHCR and Human Rights* (1997), at 1.

([232]) ExCom, *Note on International Protection*, UN Doc A/AC.96/989 (1998), para. 47.

([233]) ExCom, *Note on International Protection* (n 232) para. 47. This cautious and arguably conservative tone was reiterated in 2003. Although acknowledging that 'the refugee experience, in all its stages, is affected by the degree of respect by States for human rights and fundamental freedoms', the ExCom simply took note of 'the possible role of the United Nations human rights mechanisms in this area' and 'suggest[ed] that these bodies may, in turn, wish to reflect, within their mandates, on the human rights dimensions of forced displacement'. ExCom, *General Conclusion on International Protection*, No. 95(LIV) (1993), para. (l).

([234]) For further discussion, see A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009), at 275–81; Kälin (n 208) at 657–61; Türk (n 213) at 154–8.

([235]) Schabas (n 94) at 23.

([236]) Wachenfeld and Christensen (n 105) at 183.

([237]) T. Maluwa, 'Human Rights and Refugees in Southern Africa: Some Perspectives on Recent Legislative Developments in Malawi', 53 *ZaöRV* (1993) 88, at 92. Helton acknowledged in the same vein that '[h]uman rights law thus serve refugees, asylum seekers, and displaced persons in way that refugee…law cannot, by providing them with broad principles upon which to establish an entitlement to protection'. A. C. Helton, 'The Role of

Refugee, Humanitarian and Human Rights Law in Planning for the Repatriation of Kampuchean Asylum Seekers in Thailand', 3 *IJRL* (1991) 546, at 559.

([238]) Art. 16 ICCPR; Art. 8 Convention on the Rights of the Child; Art. 3 American Convention; Art. 22 Arab Charter.

([239]) Art. 12(2) ICCPR; Art. 5(d)(ii) International Convention on the Elimination of All Forms of Racial Discrimination; Art. 10(2) Convention on the Rights of the Child; Art. 22(2) American Convention; Art. 2(2) Protocol No. 4 to the ECHR; Art. 12(2) African Charter; Art. 27(1) Arab Charter.

([240]) Hathaway (n 7) at 5.

([241]) H. Arendt, *The Origins of Totalitarianism* (1958), at 296–7.

([242]) *Horvath v. Secretary of State for the Home Department* (2001) (n 4) at 508.

([243]) *R v. Immigration Officer at Prague Airport and another ex parte Roma Rights Centre and others* (n 61) para. 15 (Lord Bingham of Cornhill).

([244]) Most human rights are not absolute and they can accordingly be subjected to restrictions on the ground of public order and security considerations. Several human rights treaties also allow states parties to derogate from their obligations in time of public emergency threatening the life of the nation.

([245]) T. A. Aleinikoff, 'The Refugee Convention at Forty: Reflections on the IJRL Colloquium', 3 *IJRL* (1991) 617, at 625.

([246]) For further discussion, see M. E. Price, *Rethinking Asylum: History, Purpose, and Limits* (2009); Chetail (n 53).

([247]) Bhabha (n 7) at 168–9.

([248]) L. Henkin, 'Introduction. Refugees and Their Human Rights', 18 *Fordham Int'l L.J.* (1994–1995) 1079, at 1081.