

PROTECTION FROM REFUGE

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A thesis submitted for the degree of
Doctor of Philosophy of The Australian National University

April 2019

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STATEMENT OF ORIGINALITY

I hereby declare that this thesis and the work reported herein was composed by and originated entirely from me. Information derived from the published and unpublished work of others has been acknowledged and references are given in the footnotes and bibliography. This thesis has not been submitted for any other degree at any other university or educational institution.

The case law in this thesis is up to date to 31 August 2017.

This thesis uses the style and citation guidelines in the Australian Guide to Legal Citation, Fourth Edition.

Word count: 76, 868 (excluding footnotes).

Signed:

A handwritten signature in black ink, appearing to read 'Kate', with a large, sweeping flourish underneath.

Kate Elizabeth Ogg

Date:

1 April 2019

ACKNOWLEDGEMENTS

I could write an additional 100,000 words thanking everybody who helped me through this thesis. First, I must thank my supervisor, Professor Hilary Charlesworth, who has challenged me as a researcher and writer and inspired me as an academic and teacher. It has been a privilege to be her PhD supervisee and observe the ways she combines wisdom and creativity in her research alongside meticulous precision and attention to detail. I became a mother during this thesis and I could not have had a supervisor who was more supportive and compassionate in the journey of pregnancy, early motherhood and then returning to work and study. Thank you to Professor Michelle Foster and Associate Professor Fiona Jenkins who also supervised this project. It was an honour to be supervised by Michelle and I am very grateful to her for the time she took to provide feedback and support based on her extraordinarily deep erudition in refugee law. Her enthusiasm about this project and for refugee law scholarship more broadly were often crucial motivators for me. Equally, many thanks to Fiona whose guidance on the theoretical aspects of this thesis was indispensable. I also valued her many frank and supportive conversations with me about balancing an academic career with motherhood.

Thanks must also go to the academic community at RegNet and the ANU College of Law. In particular, I would like to thank my academic supervisors Professors Donald Rothwell, Fiona Wheeler and Kim Rubenstein and my teaching partner Professor Peta Spender, all of whom have supported my research endeavours and provided guidance on how these can inform and be balanced with my teaching responsibilities. Thank you to former ANU College of Law student Samuel Rutherford who proofread earlier versions of the thesis. Capstone Editing provided copyediting and proofreading services, according to the guidelines laid out in the university-endorsed national ‘Guidelines for Editing Research Theses’.

Thank you to my parents, Patricia Eckford and Peter Ogg, for giving me every opportunity to pursue university study. Without their support and encouragement through high school, undergraduate and masters studies, I may never have been able to undertake a PhD.

To Josiah Levy who arrived into the world during this thesis and propelled and disrupted it in ways both unexpected and welcome. Watching you grow has been magical and finishing this thesis is all the more wonderful because it means more time with you.

Finally, to Ron Levy. This thesis would not have been possible without your unfailing love and support. So many of the ideas in this thesis have been discussed and debated with you and because of that it will always be precious to me. Thank you for creating a home filled with love, joy, creativity and conversation. It and you have been my solace throughout the thesis as well as my source of inspiration.

ABSTRACT

This thesis addresses one of the most significant problems facing the refugee protection regime: that the places in which people in need of international protection seek refuge are often as dangerous and bleak as the conditions they fled. In response, many refugees and asylum seekers travel within and across borders in attempts to secure what they believe to be places of genuine sanctuary. While there are studies of these journeys by anthropologists, sociologists and criminologists, there is little investigation of the role courts play. This is despite refugees and asylum seekers in numerous jurisdictions increasingly turning to courts and other adjudicative bodies to ask for protection, not from persecution in their home country, but from a place of ostensible 'refuge'. I call these legal challenges 'protection from refuge' claims, and they have been made across four continents: Africa, Europe, North America and Oceania. Accordingly, the refugee litigants rely on different areas of domestic, regional and international law to frame their claims. This is the first study to group these cases together to examine how decision-makers respond to them and the consequences for refugees' journeys in search of safe havens.

While there are a number of examinations of how judges and other adjudicative decision-makers interpret refugee definitions, this thesis contributes to the literature by assessing how they approach the remedy: refuge. Many scholars put forward ideas of what refuge is or should be and legal experts outline the protections to which refugees are entitled. However, there is no dedicated study of how adjudicative decision-makers draw the contours and content of refuge through the prism of different areas of domestic, regional and international law. This thesis also adds new dimensions to gender scholarship by investigating how these judicial conceptualisations of refuge facilitate or hamper journeys for those who face the greatest challenges in reaching places of sanctuary such as single women and unaccompanied minors.

I argue that when protection from refuge claims first come before courts and other adjudicative bodies, decision-makers adopt rich and robust ideas of refuge beyond basic notions of safety and survival. These judicial approaches enable large numbers of refugees to use courts to access places where they believe they can attain a sense of refuge, but decision-makers are also sensitive to the ways factors such as gender, age, sexuality, disability and care responsibilities relate to a person's protection needs. However, these legal victories are ephemeral. In each jurisdiction, decision-makers transition from purposive and comprehensive understandings of refuge to rudimentary ones. They also reframe these legal challenges in a way that creates additional

legal hurdles for refugees who have the greatest difficulties in attaining refuge such as female-headed families, children and those with disabilities. This trajectory of judicial approaches to protection from refugee claims indicates that courts can play a powerful role in enabling access to refuge and addressing injustices and inequities in refugee protection, but, ultimately, legal decision-makers compound the difficulties inherent in finding sanctuary, perpetuate global inequities in refugee responsibility and render refuge elusive.

TABLE OF CONTENTS

STATEMENT OF ORIGINALITY	I
ACKNOWLEDGEMENTS.....	II
ABSTRACT	IV
CONTENTS.....	VI
LIST OF ABBREVIATIONS.....	IX
CHAPTER ONE JOURNEYS IN SEARCH OF REFUGE.....	1
I INTRODUCTION.....	1
II PROTECTION FROM REFUGE FRAMEWORK: TENSIONS AND QUERIES.....	4
III WHAT IS REFUGE AND WHAT ARE THE DIFFERENT TYPES OF PROTECTION FROM REFUGE CLAIMS?	7
IV METHODOLOGY	13
V ORIGINALITY AND CONTRIBUTIONS TO SCHOLARSHIP.....	15
VI THESIS LIMITATIONS AND SCOPE.....	21
VII CONCLUSION	24
CHAPTER TWO REFUGE AS A CONCEPT AND PLACE	26
I INTRODUCTION.....	26
II REFUGE, SANCTUARY, ASYLUM AND INTERNATIONAL PROTECTION: SYNONYMOUS TERMS?.....	27
III CONCEPTUALISING REFUGE: WHERE TO BEGIN?.....	28
A <i>Historical and Cultural</i>	29
B <i>Experiential</i>	30
C <i>Rights-Based</i>	31
D <i>Philosophical</i>	32
E <i>Categorical</i>	33
IV WHAT ARE REFUGE’S FUNCTIONS?.....	34
A <i>Being Reborn in Exile: Restoration of a Meaningful Life</i>	35
1. <i>Restoring refugees to a position where they can be alive and have a life</i>	36
2. <i>Not just surviving, but thriving in exile</i>	39
B <i>Dreaming of and Creating a Tomorrow</i>	42
C <i>Living With the Past</i>	44
V WHAT IS THE NATURE OF REFUGE?	47
VI SCOPE OF REFUGE.....	50
A <i>Scope of Refuge for Convention Refugees</i>	51
B <i>Scope of Refuge for Palestinian Refugees</i>	55
C <i>Scope of Refuge for Putative Refugees and Internally Displaced Persons</i>	57
VII WHAT IS THE THRESHOLD FOR ADEQUATE REFUGE?.....	59
VIII THE REALITY OF REFUGE.....	61
A <i>Refuge in a Refugee Camp</i>	61
B <i>Refuge in the Global North</i>	63
C <i>Refuge in Remote Islands</i>	67
D <i>Places of Refuge for Palestinian Refugees</i>	69
E <i>Refuge in an Internally Displaced Persons’ Camp</i>	70
IX CONCLUSION	72

CHAPTER THREE USING HUMAN RIGHTS LAW TO TRAVEL IN SEARCH OF REFUGE IN EUROPE.....	73
I INTRODUCTION.....	73
II THE INDIVIDUAL V THE STATE: THE FORCE OF HUMAN RIGHTS LAW	74
III HUMAN RIGHTS AS A PRISM TO ENGAGE WITH THE CONCEPT OF REFUGE	76
A <i>Identifying Irreducible Experiences of Refugeehood</i>	76
B <i>Using a Categorical Approach to Delineate Refuge’s Objectives and Remedial Nature</i>	81
C <i>Consequential Protection from Refuge Victories</i>	84
IV REFUGE AS A COMMODITY	86
A <i>From Vulnerable Refugees to the ‘Peculiarly Vulnerable’ Refugee</i>	86
B <i>Fragmented and Rudimentary Refuge</i>	92
V THE PECULIARLY VULNERABLE REFUGEE	95
A <i>Gender Blind Decisions</i>	95
B <i>Notional Consideration of Gender, Age and Disability</i>	96
VI CONCLUSION	99
CHAPTER FOUR USING HUMAN AND REFUGEE RIGHTS TO CONTINUE QUESTS FOR REFUGE IN AFRICA	101
I INTRODUCTION.....	101
II FROM CATEGORICAL TO EXPERIENTIAL REASONING: ILLUMINATING REFUGE	102
A <i>Understanding Refugeehood</i>	102
B <i>Understanding Refugees</i>	109
C <i>Understanding Refugee Rights</i>	117
III FROM CATEGORICAL AND EXPERIENTIAL TO EXCEPTIONAL: THE DESERVING REFUGEE	123
A <i>Diminishing Significance of Refugeehood and the Individualisation of Human and Refugee Rights Claims</i>	123
B <i>The Exceptional Refugee</i>	125
C <i>An End to Encampment?</i>	129
IV CONCLUSION	132
CHAPTER FIVE DIRECT CHALLENGES TO BILATERAL AND MULTILATERAL CONTAINMENT AGREEMENTS IN REFUGEES’ JOURNEYS IN SEARCH OF REFUGE	134
I INTRODUCTION.....	134
II BORDERS AND BOUNDARIES.....	135
III SETTING A THRESHOLD FOR ADEQUATE PROTECTION: THE ROLE OF BORDERS IN JUDICIAL REASONING	137
A <i>Refuge Beyond Non-Refoulement?</i>	138
B <i>Manoeuvring Juridical Borders in Protection Elsewhere Challenges</i>	148
C <i>Gendered Juridical Borders</i>	152
IV MISALIGNED BORDERS.....	154
A <i>Asymmetrical Borders</i>	154
B <i>The Gendered Nature of Malleable and Misaligned Borders</i>	160
C <i>Judicial Dissonance</i>	161
V THE TRAPPED REFUGEE.....	163
A <i>State of Exception or State of Exceptionality?</i>	164
B <i>Beyond the Pale of Law or Trapped Between Dissonant Legal Systems?</i>	165
VI CONCLUSION	169

CHAPTER SIX SEEKING REFUGE AS A PALESTINIAN REFUGEE	172
I INTRODUCTION.....	172
II THE REFUGEE CONVENTION AS A CONTAINMENT MECHANISM.....	174
III ARTICLE 1D AS A CONTAINMENT MECHANISM.....	178
IV A BROAD SCOPE OF REFUGE FOR PALESTINIAN REFUGEES	184
V FROM RIGHTS PROTECTION TO MERE SURVIVAL: CIRCUMSCRIBING THE AMBIT OF REFUGE FOR PALESTINIAN REFUGEES.....	189
A <i>Refuge as Protection of Life</i>	189
B <i>Women's Physical Security Ignored</i>	190
C <i>Discriminatory Denial of Protection</i>	191
VI THE INVOLUNTARY REFUGEE	193
A <i>Involuntary Flight: An Oxymoron?</i>	193
B <i>Gendered Understandings of Involuntariness</i>	195
VII CONCLUSION	196
CHAPTER SEVEN RESISTING THE PROSPECT OF REFUGE IN AN INTERNALLY DISPLACED PERSONS' CAMP	199
I INTRODUCTION.....	199
II INTERNALLY DISPLACED PERSONS: NEGLECTED IN REFUGEE LAW AND SCHOLARSHIP.....	200
III REAL AND MEANINGFUL REFUGE	202
IV REFUGE AS THE CHANCE OF MERE SURVIVAL.....	208
V THE RESILIENT REFUGEE	214
VI CONCLUSION	218
CHAPTER EIGHT CONCLUSION: ELUSIVE REFUGE.....	220
I INTRODUCTION.....	220
II REFUGE AS A POTENT CONCEPT	221
III DIMINISHING REFUGE	227
IV THE GENDERED EXCEPTIONAL REFUGEE	231
V CONCLUSION.....	236
BIBLIOGRAPHY	238

LIST OF ABBREVIATIONS

1954 Statelessness Convention	<i>Convention Relating to the Status of Stateless Persons</i> , opened for signature 28 September 1954, 360 UNTS 117 (entry into force 6 June 1960)
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , opened for signature 10 December 1984, 1456 UNTS 85 (entered into force 26 June 1987)
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i> , opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)
CRC	<i>Convention on the Rights of the Child</i> , opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
CRPD	<i>Convention of the Rights of Persons With Disabilities</i> , opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008)
Dublin Regulation	<i>Regulation (EC) 604/2013 of 29 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)</i> [2013] OJ L180/31-180/59
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953)
European Union Charter	<i>Charter of Fundamental Rights of the European Union</i> , opened for signature 7 December 2000, [2012] OJ C 326/321 (entered into force 1 December 2009)
Guiding Principles	<i>Guiding Principles on Internal Displacement</i> , UN ESCOR, 54 th sess, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998)
ICCPR	<i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i> , opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

IDP	internally displaced person
Kampala Convention	<i>Convention for the Protection and Assistance of Internally Displaced Persons in Africa</i> , opened for signature 23 October 2009 (entered into force 16 December 2012)
NGO	non-government organisation
OAU Refugee Convention	<i>Convention Governing the Specific Aspects of the Refugee Problems in Africa</i> , opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974)
Refugee Convention	<i>Convention Relating to the Status of Refugees</i> , opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the <i>Protocol Relating to the Status of Refugees</i> , opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)
TWAIL	third world approaches to international law
UDHR	<i>Universal Declaration of Human Rights</i> , GA Res 217A (III), UN GAOR, 3 rd sess, 183 rd plen mtg, UN Doc A/810 (10 December 1948)
UN	United Nations
UNCCP	United Nations Conciliation Commission for Palestine
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

CHAPTER ONE

JOURNEYS IN SEARCH OF REFUGE

I INTRODUCTION

The word ‘refugee’ has its roots not in what people are escaping from, but in what they are seeking: refuge.¹ Today, the number of people searching for sanctuary in foreign lands is the highest ever recorded.² However, many of the places to which people flee are sites of refuge only in a nominal sense. They are often unsafe and insecure,³ provide little access to healthcare,⁴

¹ ‘Refugee’ derives from the Old French word ‘*réfugié*’, meaning ‘gone in search of refuge’: Glynnis Chantrell (ed), *The Oxford Dictionary of Word Histories* (Oxford University Press, 2002) 424.

² The United Nations High Commissioner for Refugees (‘UNHCR’) estimates that at the end of 2017, the global refugee population was 25.4 million: UNHCR, *Global Trends: Forced Displacement in 2017* (25 June 2018) <<http://www.unhcr.org/en-au/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html>> 13 (‘*Forced Displacement in 2017*’).

³ See, eg, Sharon Carlson, ‘Contesting and Reinforcing Patriarchy: An Analysis of Domestic Violence in the Dzaleka Refugee Camp’ (Working Paper No 23, Refugee Studies Centre, University of Oxford, 2005) 27–33; Jeff Crisp, ‘No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa’ (Working Paper No 68, The Center for Comparative Immigration Studies, University of California, 2002) 14–16; Elena Fiddian-Qasmiyeh, ‘Concealing Violence Against Women in the Sahrawi Refugee Camps: The Politicisation of Victimhood’ in Hannah Bradby and Gillian Lewando-Hundt (eds), *Global Perspectives on War, Gender and Health: The Sociology and Anthropology of Suffering* (Ashgate, 2010) 91; Barbara Harrell-Bond, ‘Are Refugee Camps Good for Children?’ (New Issues in Refugee Research Working Paper No 29, UNHCR, 2000) 7; Barbara Harrell-Bond and Guglielmo Verdirame, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn Books, 2005) 120–78; Arafat Jamal, ‘Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya’ (Report 2000/05, Evaluation and Policy Analysis Unit, UNHCR, 2000) 18; Amy Lewis, ‘Gender-Based Violence Among Refugee and Internally Displaced Women in Africa’ (2005–2006) 20 *Georgetown Immigration Law Journal* 269; Daniel Ntwari, ‘Over 600 Refugee Children Abused in Rwanda Camps’, *The East African* (online) 9 April 2016 <<https://allafrica.com/stories/201604090267.html>>; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014) ch 5; Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) ch 4; UNHCR, ‘Refugee Women and Children Face Heightened Risk of Sexual Violence amid Tensions and Overcrowding at Reception Facilities on Greek Islands’ (Press Briefing, 9 February 2018) <<http://www.unhcr.org/en-au/news/briefing/2018/2/5a7d67c4b/refugee-women-children-face-heightened-risk-sexual-violence-amid-tensions.html>>.

⁴ See, eg, Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (Second Edition)* (2017) 37; Crisp (n 3) 23; Human Rights Watch, *Greece: Inhumane Conditions at Land Border* (27 July 2018) <https://www.hrw.org/news/2018/07/27/greece-inhumane-conditions-land-border?mc_cid=0e50786a23&mc_eid=677b225ed4>; Harrell-Bond and Verdirame (n 3) 241–52; Human Rights Watch, *Greece: Asylum-Seekers Locked Up* (14 April 2016) <<https://www.hrw.org/news/2016/04/14/greece-asylum-seekers-locked>> (‘*Greece: Asylum-Seekers*’); Jamal (n 3) 21.

education⁵ and employment;⁶ and have inadequate sanitation, shelter, food and water.⁷ Hathaway laments that ‘people guilty of absolutely no crime except for doing what we have said they may do, which is to come seek asylum, find themselves in horrific conditions’.⁸ These problems exist in places of so-called refuge in both the developing and developed world. Carens explains that despite being ‘supposedly safe havens’, in some refugee camps in the Global South, ‘the deprivation and danger appear to be as bad as the conditions from which refugees fled’.⁹ Recalling a refugee settlement known as the ‘Jungle’ in Calais, an Afghani refugee writes that it ‘looked as though the world’s toilet had been flushed and the mess washed up here’.¹⁰ The conditions in some locales in which people seek refuge are so grim that many wish to return to the place from which they had initially fled.¹¹

In response to these dangerous and bleak conditions of refuge, asylum seekers and refugees adopt various strategies. As Ramsay explains, ‘[e]ven in contexts of uncertainty, refugees ... imagine, and actively work toward, new futures’.¹² Some move from camp environments to

⁵ See, eg, Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018) [53]; Harrell-Bond (n 3) 8–9; Harrell-Bond and Verdirame (n 3) 253–9; Jamal (n 3) 21–2.

⁶ See, eg, Jeff Crisp, ‘A State of Insecurity: The Political Economy of Violence in Refugee-Populated Areas in Kenya’ (2000) 99 *African Affairs* 601, 628; Harrell-Bond and Verdirame (n 3) 215–24; Jamal (n 3) 8.

⁷ Amnesty International, *EU: Asylum-Seekers Must be Moved from Appalling Conditions* (14 December 2016) <<https://www.amnesty.org.au/eu-asylum-seekers-must-be-moved-from-appalling-conditions/>> (‘EU: Asylum-Seekers’); Australian Human Rights Commission (n 4) 35; Harrell-Bond (n 3) 1; Harrell-Bond and Verdirame (n 3) 225–40; Human Rights Watch, *Greece: Asylum-Seekers* (n 4); Jamal (n 3) 19–20; Henri Rueff and Alain Viaro, ‘Palestinian Refugee Camps: From Shelter to Habitat’ (2010) 28(2–3) *Refugee Survey Quarterly* 339, 356.

⁸ James Hathaway, ‘The UN’s “Comprehensive Refugee Response Framework”: Actually a “Contingent Refugee Assistance Project”’ (Speech delivered at the Refugee Law Initiative Eighth International Refugee Law Seminar Series, Institute of Advanced Legal Studies, University of London, 21 May 2018) <<https://soundcloud.com/refugeelawinitiative/the-uns-crrf-actually-a-contingent-refugee-assistance-project>> (‘The UN’s “Comprehensive Refugee Response Framework”’).

⁹ Joseph Carens, ‘Refugees and the Limits of Obligations’ (1992) 6(1) *Public Affairs Quarterly* 31, 40.

¹⁰ Gulwali Passarlay and Nadene Ghouri, *The Lightless Sky: An Afghan Refugee Boy’s Journey of Escape to a New Life* (Atlantic Books, 2015) 292.

¹¹ Riham Alkousaa and Maximilian Popp, ‘European Purgatory: Migrant Smugglers Helping Refugees to Return to Turkey’, *Spiegel* (online at 30 June 2016) <<http://www.spiegel.de/international/europe/why-refugees-in-greece-are-trying-to-go-back-to-turkey-a-1100452.html>>; Amnesty International, ‘EU: Asylum-Seekers’ (n 7); Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017) 129; Behrouz Boochani, *No Friend But the Mountains: Writing from Manus Prison* (Pan Macmillan Australia, 2018) 164; Jeanne Carstensen, ‘Syrian Refugees Are Now Paying Smugglers to Take Them Back’, *Global Post Investigations* (online at 2 November 2016) <<https://gpinvestigations.pri.org/syrian-refugees-are-now-paying-smugglers-to-take-them-back-6fa9ef8242e3>>; Christiano D’Orsi, ‘The World’s Largest Refugee Camp: What the Future Holds for Dadaab’, *The Conversation* (online at 13 December 2017) <<https://theconversation.com/the-worlds-largest-refugee-camp-what-the-future-holds-for-dadaab-88102>>; Human Rights Watch, *Lebanon: Refugees in Border Zone at Risk* (20 September 2017) <<https://www.hrw.org/news/2017/09/20/lebanon-refugees-border-zone-risk>>; Rebecca Murray, ‘Refugees in Greek Legal Limbo: “I Want to Go Bank to Syria to Die”’, *Middle East Eye* (online at 23 March 2017) <<http://www.middleeasteye.net/news/refugees-europe-s-periphery-face-traumatic-wait-1189757890>>; Georgina Ramsay, ‘Benevolent Cruelty: Forced Child Removal, African Refugee Settlers, and the State Mandate of Child Protection’ (2017) 40(2) *Political and Legal Anthropology Review* 245, 255.

¹² Georgina Ramsay, ‘Incommensurable Futures and Displaced Lives: Sovereignty as Control over Time’ (2017) 29(3) *Public Culture* 515, 516.

urban areas due to the prospect of greater security, better living conditions and employment opportunities.¹³ Others are able to make much longer expeditions across a number of international borders in search of sanctuary.¹⁴ These voyages are often hindered by various mechanisms states use to constrain refugees' movements.¹⁵ Factors such as age, gender, care responsibilities and disability increase the challenges refugees face in their quests for refuge.¹⁶ As a result, journeys in search of refuge are rarely linear, but are instead 'fragmented'.¹⁷ For example, refugees sometimes become trapped in certain places, unable to travel onwards or return

¹³ Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018) 87 ('Impossible Refuge'); UNHCR, *UNHCR Policy on Alternatives to Camps*, UN Doc UNHCR/HCP/2014/9 (22 July 2014) 4; UNHCR, *UNHCR Resettlement Handbook* (2011) 17 <<http://www.unhcr.org/46f7c0ee2.pdf>>.

¹⁴ See, eg, Gadi BenEzer and Roger Zetter, 'Searching for Directions: Conceptual and Methodological Challenges in Researching Refugee Journeys' (2015) 28(3) *Journal of Refugee Studies* 297; Richard Black, 'Breaking the Convention: Researching the "Illegal" Migration of Refugees to Europe' (2003) 35(1) *Antipode: A Radical Journal of Geography* 34; Alice Bloch, Nando Sigona and Roger Zetter, 'Migration Routes and Strategies of Young, Undocumented Migrants in England: A Qualitative Perspective' (2011) 34(8) *Ethnic and Racial Studies* 1286; Jan-Paul Brekke and Grete Brochmann, 'Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation' (2015) 28(2) *Journal of Refugee Studies* 145; Michael Collyer, 'Stranded Migrants and the Fragmented Journey' (2010) 23(3) *Journal of Refugee Studies* 273; Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States and Canada* (University of California Press, 2016); Alison Gerard and Sharon Pickering, 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2014) 27(3) *Journal of Refugee Studies* 338; Ramsay, 'Impossible Refuge' (n 13); Dallal Stevens and Angeliki Dimitriadi, 'Crossing the Eastern Mediterranean Sea in Search of "Protection"' (2018) *Journal of Immigrant and Refugee Studies* DOI: 10.1080/15562948.2018.1444831: 1–17; Martina Tazzioli, 'Containment Through Mobility: Migrants' Spatial Disobediences and the Reshaping of Control Through the Hotspot System' (2018) 44(16) *Journal of Ethnic and Migration Studies* 2764; Susan Zimmermann, 'Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge' (2009) 22(1) *Journal of Refugee Studies* 74; Norman Zucker and Naomi Zucker, *Desperate Crossings: Seeking Refuge in America* (ME Sharpe, 1996).

¹⁵ See, eg, Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) *Human Rights Law Review* 287, 289; Janet Dench and François Crépeau, 'Interdiction at the Expense of Human Rights: A Long-Term Containment Strategy' (2003) 21(4) *Refugee* 1; Jennifer Hyndman and Alison Mountz, 'Refuge or Refusal: The Geography of Control' in Derek Gregory and Alan Pred (eds), *Violent Geographies: Fear, Terror and Political Violence* (Routledge, 2007) 77; Lana Maani, 'Refugees in the European Union: The Harsh Reality of the Dublin Regulation' (2018) 8(2) *Notre Dame Journal of International and Comparative Law* 83; Nicholas Maple, 'Rights at Risk: A Thematic Investigation Into How States Restrict the Freedom of Movement of Refugees on the African Continent' (New Issues in Refugee Research No 281, UNHCR, 2016); Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 2–15; Andreas Schloenhardt and Colin Craig, 'Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea' (2015) 27(4) *International Journal of Refugee Law* 536; Martina Tazzioli and Glenda Garelli, 'Containment Beyond Detention: The Hotspot System and Disputed Migration Movements Across Europe' (2018) *Environment and Planning D: Society and Space* 1; Leanne Weber, 'Policing the Virtual Border: Punitive Preemption in Australian Offshore Migration' (2007) 34(2) *Social Justice* 77.

¹⁶ See, eg, Mary Crock et al, *The Legal Protection of Refugees with Disabilities* (Edward Elgar, 2017) [5.1]; Chona Echavez et al, 'Why Do Children Take the Unaccompanied Journey?' (Issues Paper PDES/2014/03, Afghanistan Research and Evaluation Unit, UNHCR, 2014); Gerard and Pickering (n 14); Mariana Nardone and Ignacio Correa-Velez, 'Unpredictability, Invisibility and Vulnerability: Unaccompanied Asylum-Seeking Minors' Journeys to Australia' (2016) 29(3) *Journal of Refugee Studies* 295; Sharon Pickering, *Women, Borders and Violence: Current Issues in Asylum, Migration and Trafficking* (Springer, 2010) ch 2; Sharon Pickering and Brandy Cochrane, 'Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders' (2013) 17(1) *Theoretical Criminology* 27; Angelica Tello et al, 'Unaccompanied Refugee Minors From Central America: Understanding Their Journey and Implications for Counselors' (2017) 7(4) *The Professional Counselor* 360.

¹⁷ Collyer (n 14) 275.

home. In other situations, refugees who feel they have found a place of refuge are forced to leave and must find ways to stay or return.

As part of these fragmented journeys to secure a place of genuine refuge, some refugees and asylum seekers turn to courts or other adjudicative bodies. In these legal challenges, they ask for protection, not from persecution in their home country, but from a place of ‘refuge’. They want rescue from a place that raises serious protection concerns, but which is, notionally at least, serving as a place of refuge to hundreds or thousands of others. I refer to these actions as ‘protection from refuge’ claims and they are the focus of this thesis. While there are studies of refugees’ journeys in fields such as anthropology, sociology and criminology,¹⁸ there is little consideration of the role such litigation plays in refugees’ searches for refuge.¹⁹ To address this lacuna, this thesis provides an account of how adjudicative decision-makers approach and determine protection from refuge claims and examines whether these judicial²⁰ approaches assist or hinder refugees (or particular refugees) in their search for a safe haven.

In Chapter One, I first outline the ‘protection from refuge’ conundrum in more detail, specify my research questions and explain how they relate to the frictions inherent in these legal claims. I then describe the different types of protection from refuge claims emerging across different jurisdictions and areas of law and illustrate how they inform the thesis’ structure and theoretical framing. Next, I discuss the three methodologies employed across the thesis. Finally, I acknowledge the project’s scope and limitations, but highlight the ways the thesis adds to refugee law scholarship and the significance of these contributions more broadly.

II PROTECTION FROM REFUGE FRAMEWORK: TENSIONS AND QUERIES

I include in the ‘protection from refuge’ rubric cases determined by an adjudicative decision-making body²¹ in which an asylum seeker or refugee is either resisting being sent to an alternative place of ‘refuge’ or is petitioning to be transferred from their current place of ‘refuge’ to another. For example, a refugee living in an urban area in Nairobi may be challenging their forced transfer to a refugee camp. Alternatively, an unaccompanied child asylum seeker living

¹⁸ See above nn 14 and 16.

¹⁹ One notable exception is Costello’s examination of rights protections for refugees in Europe in which she ‘follows the journey of the protection seeker ... in her attempt to reach a place of refuge’: Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015) 232, 252–77. I distinguish this thesis from Costello’s work below on page 17.

²⁰ Some protection from refuge claims are brought before courts but others are heard by adjudicative tribunals or United Nations (‘UN’) treaty bodies. I use the term ‘judicial’ for simplicity.

²¹ This includes courts, but also other bodies that issue decisions or rulings on questions of law and/or fact such as adjudicative tribunals and UN treaty bodies.

in the Jungle in Calais may have initiated court proceedings in the United Kingdom seeking relocation there. I define ‘refugee’ broadly to include anyone granted refugee status under the *Convention Relating to the Status of Refugees* (‘Refugee Convention’)²² or a regional refugee instrument,²³ given complementary protection,²⁴ or eligible for protection and assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (‘UNRWA’).²⁵ While refugee status is declaratory as opposed to constitutive,²⁶ I use the term ‘asylum seeker’ to refer to a person who is seeking international protection, but whose status has not been confirmed.

Protection from refugee claims are a burgeoning and global trend. They started to emerge in the late twentieth century, but have increased in number over the last decade and have arisen in Africa, Europe, North America and Oceania. The majority are instigated in domestic courts and adjudicative tribunals, but others have been brought before supranational courts and United Nations (‘UN’) treaty bodies. Accordingly, protection from refugee claims are grounded in different aspects of international, regional and domestic law. What unites them is that all of the asylum seeker and refugee litigants are seeking the same outcome: a place of genuine refuge.

Despite differences in the ways protection from refugee cases are framed, they raise similar quandaries for decision-makers that have implications for the international protection regime more broadly. These tensions are reflected in the phrase ‘protection from refuge’, which may, at first, appear to be paradoxical. The term ‘refuge’ is associated with notions of safety and

²² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

²³ For example, the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

²⁴ Complementary protection is the term used to refer to those, ‘fleeing serious harm but who do not fall within the technical legal definition of a “refugee”’: Jane McAdam, *Complementary Protection in International Law* (Oxford University Press, 2007) 1. See, eg, the European Union’s *Directive 2011/95/EU of the European Parliament and of the Council of 13 December on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast)* [2011] OJ L 337/9-337/26 arts 2(f), 15.

²⁵ Predominantly it is Palestinian refugees (those whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict) and descendants of male Palestinian refugees who are eligible for UNRWA protection and assistance: UNRWA, *Consolidated Eligibility and Registration Instructions (CERI)* (May 2006) [1] <https://www.unrwa.org/sites/default/files/ceci_24_may_2006_final.pdf>.

²⁶ *Refugee Appeal No 75574* (Unreported, New Zealand Refugee Status Appeals Authority, Chairperson Haines and Member Molloy, 29 April 2009) [58]; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (1979, re-edited 1992) [28]; James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 11 (‘*The Rights of Refugees*’).

wellbeing. Why would a person seek protection from a place intended to provide security and shelter? The apparent contradiction arises because the word ‘refuge’ is used both to refer to the idea of providing a safe haven (refuge as a concept) as well as the site in which that sanctuary may be provided (refuge as a place).²⁷ In protection from refugee challenges, the ideal and the actuality of refuge both enter the judicial arena. When refugees make these claims, they draw attention to the disparities between ideas of what refuge is supposed to be with the material reality of the place in which they are or will be located. In other words, they highlight the incongruities between refuge as a concept and place. In arbitrating these disputes, decision-makers have the opportunity to draw on frameworks available in international, regional and domestic law to elucidate the concept of refuge. For example, they may understand refuge as allowing refugees to thrive or merely survive. They could posit refuge as a duty or as an act of charity or discretion. Decision-makers must then determine the extent to which they can use these notions of refuge to cast judgment on spaces of refuge within or outside their borders.

Another conundrum inherent in these cases and reflected in the title of the thesis is why a person must seek protection from a place of refuge. If a person does not feel secure in their current location, why can they not simply find alternative places of sanctuary? The reason why refugees often need to resort to legal processes to obtain protection from such places is due to the operation of containment mechanisms. Containment mechanisms are laws, policies or agreements that aim or are used to prevent refugees from moving within and across borders and restrict them to particular places of ostensible refuge.²⁸ A containment mechanism could be, for example, an encampment policy or regional or bilateral agreement restricting refugees’ movements and delineating responsibility for hosting refugees. Some scholars argue that states use the Refugee Convention as a containment mechanism.²⁹ When refugees bring protection from refuge

²⁷ The Oxford English Dictionary defines ‘refuge’ as meaning both ‘shelter from pursuit or danger or trouble’ and ‘a person or place etc. offering this’: RE Allen (ed), *The Concise Oxford Dictionary of Current English* (Clarendon Press, 8th ed, 1990) 1009. A similar definition is provided in Mark Gwynn and Amanda Laugesen (eds), *Australian Concise Oxford Dictionary* (Oxford University Press, 6th ed, 2017) 1197. Grahl-Madsen makes the same point with the word ‘asylum’. He explains that it, ‘has acquired a double meaning. It may mean a place or territory where one is not subject to seizure by one’s pursuers, or it may mean protection or freedom from such seizure’: Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume 2* (AW Sijthoff-Leyden, 1966) 3. In Chapter Two, I outline why I use the term ‘refuge’, rather than ‘asylum’.

²⁸ Andrew Shacknove, ‘From Asylum to Containment’ (1993) 5(4) *International Journal of Refugee Law* 516, 516, 521–3. States do not use the terms ‘containment agreement’ or ‘containment mechanism’ to describe these arrangements, but euphemistic terms such as ‘regional resettlement agreement’: Mathew and Harley (n 15) 9–10. However, Boochani stresses that it is important not to employ such euphemisms, because in doing so one succumbs ‘to the language of oppressive power’: Boochani (n 11) 369.

²⁹ See, eg, BS Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23(3) *Refugee Survey Quarterly* 55, 61–3 (‘From Resettlement’); BS Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350, 356 (‘Geopolitics’); Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of Law*

claims, they initiate a contest between their entitlement to refuge and states' interests in constraining refugees' movement within and across borders. The ways decision-makers determine this conflict will either disrupt or cement containment mechanisms. These judicial approaches could impede or facilitate refugees' journeys in search of refuge. They also may assist or create additional hurdles for those who face the greatest difficulties in travelling in search of refuge, such as unaccompanied minors and single female-headed families.

No study has grouped together protection from refuge challenges and examined the ways decision-makers respond to them and the consequences for refugees' mobility. To address this, the research question posed in this thesis is: how do adjudicative decision-makers approach and determine protection from refuge claims? I also ask three sub-questions. First, how do decision-makers conceptualise refuge, in particular, its functions, nature, threshold and scope, and does this differ with respect to factors such as age, gender, family responsibilities and disability? Second, how do decision-makers respond to the conflict between refugees' searches for refuge and states' desires to constrain refugees' mobility within and across borders? Third, due to the ways decision-makers approach protection from refuge claims, are particular refugees more likely to be able to use courts to continue their journeys in search of refuge?

III WHAT IS REFUGE AND WHAT ARE THE DIFFERENT TYPES OF PROTECTION FROM REFUGE CLAIMS?

There are many different theories and models of adjudicative decision-making,³⁰ but this thesis specifically investigates how adjudicative decision-makers approach protection from refuge claims and involves a consideration of how they conceptualise refuge. To investigate these questions, in Chapter Two I outline how scholars, UN institutions and refugees envision refuge. This provides the background against which I examine how decision-makers approach and understand refuge and address the discrepancies between these ideas of refuge and the reality. While there is no settled understanding of what refuge is,³¹ the analysis in Chapter Two indicates that there are commonalities across scholarship from different disciplines with respect to

(Ashgate, 2014) 128; Patricia Tuitt, 'Defining the Refugee by Race: The European Response to "New" Asylum Seekers' in Paddy Ireland and Per Laleng (eds), *The Critical Lawyers' Handbook 2* (Pluto Press, 1997) 96, 97; Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press, 1996) 69–71 ('False Images').

³⁰ See, eg, Tracey George and Albert Yoon, 'Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging' (2008) 61(1) *Vanderbilt Law Review* 1; Virginia Hettinger, Stefanie Lindquist and Wendy Martinek, 'Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals' (2004) 48(1) *American Journal of Political Science* 123; Joseph Smith and Emerson Tiller, 'The Strategy of Judging: Evidence from Administrative Law' (2002) 31(1) *The Journal of Legal Studies* 61; Paul Weiler, 'Two Models of Judicial Decision-Making' (1968) 446(3) *Canadian Bar Review* 406.

³¹ Ramsay, 'Impossible Refuge' (n 13) 156.

the starting points for elucidating what refuge is or should be. The literature on refuge also indicates that the concept is a robust one. There are sophisticated accounts of what refuge is intended to achieve beyond the ‘absolute priority on “saving lives”’.³² There are also well-developed understandings of the nature of refuge as a remedy, legal status, duty and process. Scholars and UN institutions understand refuge to have a broad scope, encompassing a wide range of refugees’ needs, desires and hopes. The threshold of what is deemed to be adequate refuge is usually a high one, surpassing the basic duties of guaranteeing safety and providing essentials for the sustenance of life. Further, the conceptualisation of refuge presented in the literature is dynamic in the sense that there are considerations of the ways it may differ for people of different genders, sexualities and ages as well as those with disabilities and care responsibilities. To highlight the discrepancies between refuge as a concept and place, in Chapter Two I also discuss literature that examines the conditions in which refugees live. While some scholars explore the ways refugees adapt and cope in exile,³³ I focus on studies, reports and testimonies that document the dismal reality of many places of refuge across the Global North and Global South.

I explore the ways decision-makers respond to these disjunctures between ideas and actualities of refuge in Chapters Three to Seven. Across these chapters, I survey protection from refugee claims made in five distinct contexts. These different types of protection from refugee claims inform the thesis’ structure and theoretical frameworks. First, I examine protection from refugee claims grounded in human rights instruments. While the Refugee Convention provides a refugee-specific rights regime,³⁴ in many jurisdictions refugee litigants cannot directly plead the Refugee Convention. Therefore, they must frame their claim using other human rights instruments. There is debate within human rights scholarship as to the utility of using human rights law to counter state policy. I draw on this literature to inform my assessment of the ways decision-makers employ human rights law to conceptualise refuge and respond to challenges to containment mechanisms.

³² Jean-François Durieux, ‘Three Asylum Paradigms’ (2013) 20(2) *International Journal on Minority and Group Rights* 147, 162.

³³ See, eg, Randa Farah, ‘Refugee Camps in the Palestinian and Sahrawi National Liberation Movements: A Comparative Perspective’ (2009) 38(2) *Journal of Palestine Studies* 76; Elena Fiddian-Qasbiyeh, ‘When the Self Becomes Other: Representations of Gender, Islam and the Politics of Survival in the Sahrawi Refugee Camps’ in Dawn Chatty and Bill Findlay (eds), *Dispossession and Displacement: Forced Migration in the Middle East and North Africa* (Oxford University Press, 2010) 17; Nadya Hajj, *Protection amid Chaos: The Creation of Property Rights in Palestinian Refugee Camps* (Columbia University Press, 2016); Lucy Hovil, ‘Self-Settled Refugees in Uganda: An Alternative Approach to Displacement?’ (2007) 20(4) *Journal of Refugee Studies* 599.

³⁴ James Hathaway, *The Rights of Refugees* (n 26) 4; McAdam (n 24) 5–6.

I begin my investigation of protection from refugee claims grounded in human rights instruments in Chapter Three, where I look to Europe. In the European context, asylum seekers and refugees use human rights law to request or challenge a transfer made pursuant to the European Union's Dublin Regulation³⁵ or other containment agreement. While these cases do not directly call into question the validity of these agreements, they have potential to set precedents that jeopardise their continued operation. These protection from refugee claims invoke the right to be free from torture and inhuman and degrading treatment and the right to family life. These rights are not contained in the Refugee Convention and, when compared to the literature on what constitutes adequate refuge, would be considered inadequate on their own. Nevertheless, I consider how decision-makers use these rights as a prism to conceptualise refuge. I investigate whether these ideas of refuge, channelled through human rights instruments, lend potency to refugees' attempts to resist the constraints on their ability to travel across borders employed by European states. Finally, I ask whether, because of the way decision-makers approach these claims, only certain refugees can successfully wield human rights arguments to pursue their journeys in search of refuge in Europe.

I continue my examination of the use of human rights arguments to secure protection from a place of refuge in Chapter Four, in which I discuss African forced encampment case law. In this chapter, I analyse legal challenges instigated by refugees living in urban areas who face the prospect of forced relocation to a refugee camp, as well as cases where refugees living in camps are petitioning for the right to leave. These cases are grounded in domestic, regional and international human rights and refugee law. They involve a much broader spectrum of rights than the European cases considered in Chapter Three. I explore whether the different human rights frameworks in Africa and Europe prompt distinct understandings of refuge and approaches to states' powers to constrain refugees' movements. I also ask whether, because of the ways African decision-makers determine these claims, particular refugees are in a better position to use legal processes to resist confinement to a refugee camp.

³⁵ *Regulation (EC) 604/2013 of 29 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)* [2013] OJ L180/31-180/59 ('Dublin Regulation'). The Dublin Regulation is a European Union treaty that determines the European Union member state responsible for determining an asylum seeker's refugee claim. There is a proposal for its reform: European Commission, 'Proposal for a Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), COM (2016) 270 final' (4 May 2016).

In Chapter Five, I shift focus and analyse protection from refugee claims that directly challenge the operation or validity of a bilateral or regional containment agreement. This has occurred in three regions: North America (an agreement between the United States and Canada), Oceania (agreements between Australia and Malaysia, Australia and Papua New Guinea and Australia and Nauru) and the European Union (the Dublin Regulation).³⁶ Human rights arguments are present in these cases, but they are less central. The arguments pleaded by the refugee plaintiffs and defendant states traverse many areas of domestic, regional and international law. In deciding these cases, judges must determine the extent to which they will take regional law, international law or foreign jurisprudence into account. Another contentious issue is whether these legal frameworks permit them to pass judgment on another state's laws and policies. Therefore, the main theme in Chapter Five is the role that cartographic and juridical borders play in protection from refugee challenges. I draw on theoretical literature on the relationship between law and borders to inform my analysis of how decision-makers approach these protection from refugee claims. I examine the ways decision-makers position and manoeuvre juridical borders in constructing ideas of refuge and determining the legality of states' attempts to prevent refugees crossing international borders in search of refuge. I investigate how the ways decision-makers place and shift these borders may advantage or disadvantage particular refugees and asylum seekers in their quest for refuge.

The final two case studies consider protection from refugee claims that arise under the Refugee Convention. Human rights arguments are present in these claims and the role of borders is significant, but another factor at play is the movement of those in need of protection from the Global South to the Global North. In these case studies, I investigate how decision-makers approach protection from refugee claims against the backdrop of Global North states' concerns that potentially significant numbers of people may use the Refugee Convention to transfer their place of refuge from the developing to the developed world.³⁷ To assist a dissection of decision-

³⁶ With respect to the European Union, I examine *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (C 411/10) (C 493/10) [2011] ECR I-13905. In this case, the Court of Appeal of England and Wales and High Court of Ireland referred a number of questions to the Court of Justice of the European Union, the answers to which would affect the Dublin Regulation's operation: Costello (n 15) 324, 333. This case is different from the cases discussed in Chapter Three, most of which are challenges made before the European Court of Human Rights under the Council of Europe's *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) ('ECHR'). These cases do not directly call into question the Dublin Regulation's validity and the European Court of Human Rights does not have jurisdiction to make such a determination: Costello (n 15) 307.

³⁷ Chinni, 'Geopolitics' (n 29) 351; James Hathaway, 'Why Refugee Law Still Matters' (2007) 8 *Melbourne Journal of International Law* 89, 89–90; James Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human*

makers' approaches to these claims, I draw on literature that employs critical race theory and third world approaches to international law to position the Refugee Convention as a containment mechanism.

I embark on this line of investigation in Chapter Six in which I examine cases that are instigated by Palestinian refugees seeking refugee protection outside an UNRWA area of operation (Jordan, Lebanon, Syria, the Gaza strip, East Jerusalem or the West Bank). In making these journeys, Palestinian refugees confront article 1D: the Refugee Convention's only exclusion and 'contingent inclusion' clause.³⁸ Decision-makers' approach to these claims determine whether Palestinian refugees must remain in the UNRWA region to receive international protection or can seek refugee protection elsewhere. I investigate the ways decision-makers elucidate the concept of refuge in the Palestinian context. I ask whether decision-makers' approaches to these claims provide grounds for large numbers of Palestinian refugees to obtain a place of refuge in the Global North or prioritise only particular Palestinian refugees.

In Chapter Seven, I analyse cases in which decision-makers have to determine whether a person can seek refuge in an internally displaced persons' ('IDP') camp. These cases arise under article 1A(2) of the Refugee Convention and are made by putative refugees.³⁹ In most jurisdictions, decision-makers will ask whether the putative refugee can relocate to another part of their country of origin or habitual residence in which they will have protection.⁴⁰ In some of these cases, the putative refugee has pleaded that if they relocate, for example, from a rural to an urban area, they would end up living in an IDP camp. These cases have arisen in the United Kingdom and

Rights Journal 115, 116; Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 189, 206; Matthew Zagor, 'The Struggle of Autonomy and Authenticity: Framing the Savage Refugee' (2015) 21(4) *Social Identities* 373, 378–80.

³⁸ Susan Akram, 'Palestinian Refugees and their Legal Status: Rights, Politics and Implications for a Just Solution' (2002) 31(3) *Journal of Palestine Studies* 36, 39; Guy Goodwin-Gill and Susan Akram, 'Brief *Amicus Curiae* on the Status of Palestinian Refugees under International Law' (2000) 11 *Palestine Yearbook of International Law* 187, 191; Mutaz Qafisheh and Valentina Azarov, 'Article 1D' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) [25].

³⁹ Persons outside their country of origin or habitual residence whose circumstances indicate they satisfy one part of the refugee definition (a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion), but who have not yet established another aspect of the refugee definition (that they are unable or unwilling to avail themselves of the protection of their country of origin or habitual residence).

⁴⁰ See James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 332 ('*The Law of Refugee Status*') for a discussion of the legal basis of the internal protection alternative enquiry.

New Zealand.⁴¹ These decisions come within the protection from refugee rubric because the putative refugee is resisting the prospect of seeking refuge in an IDP camp, a place intended to provide refuge to significant numbers of people displaced from their homes.⁴² I examine how decision-makers conceptualise refuge in the context of there being many other people in the putative refugee's homeland in need of protection. Due to the ways decision-makers approach these claims, which putative refugees are best able to resist the prospect of life in an IDP camp?

In the concluding chapter, I identify patterns in the ways decision-makers across all of these jurisdictions, grappling with different legal instruments and doctrines, approach and determine protection from refugee claims. When protection from refugee cases first come before judicial and other decision-making bodies, adjudicators engage with the concept of refuge and even advance ideas about its functions, nature and scope. This judicial approach to the notion of refuge prevails over states' containment policies and facilitates refugees' journeys, particularly with respect to refugees from more marginalised backgrounds. However, these protection from refugee victories are short lived. In subsequent cases, decision-makers disengage from the notion of refuge and defer to state interests. These cases project minimalist notions of refuge and impede refugees' ability to continue their journeys in search of a safe haven. They also create additional barriers for women, children and people with disabilities and care responsibilities wanting to use court processes in their quests for a place of genuine refuge.

⁴¹ I conducted an extensive search of internal protection case law in Australia, Canada, New Zealand, the United States of America and European Union member states on LexisNexis, Westlaw and Refworld. The United Kingdom and New Zealand are the only jurisdictions in which the question of relocation to an IDP camp has arisen in cases where protection under the Refugee Convention (n 22) is being sought. The issue of internal relocation to an IDP camp has arisen in some decisions in which the individuals bringing the case are not entitled to refugee protection. See below n 96 for an example of such a case. As outlined on page 22, protection from refugee claims made by those whose claims for international protection have been unsuccessful are outside the scope of this thesis.

⁴² The *Guiding Principles on Internal Displacement* provide that IDPs, 'shall not be interned in or confined to a camp' unless 'absolutely necessary': *Guiding Principles on Internal Displacement*, UN ESCOR, 54th sess, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998) principle 12(2). However, this 'addresses the use of closed camps which internally displaced persons cannot leave, and has to be distinguished from the practice of using camps to host large numbers of such persons': Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (Paper No 32, American Society of International Law Studies in Transnational Legal Policy, 2008) 32. In most contexts, IDP camps are intended to be sites of protection for IDPs and many are staffed by representatives from various international organisations such as the UNHCR, International Committee of the Red Cross, the United Nations International Children's Fund and World Health Organisation: Brookings Institution, *Protecting Internally Displaced Persons: A Manual for Law and Policy Makers* (October 2008) 63 <<http://www.unhcr.org/50f955599.pdf>>; International Committee of the Red Cross, *ICRC Position on Internally Displaced Persons (IDPs)* (May 2006) 4 <https://www.icrc.org/eng/assets/files/other/2006_idps_en_icrcexternalposition.pdf>; Tim Morris, 'UNHCR, IDPs and Clusters' (2006) 25 *Forced Migration Review* 54, 54; Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring: Monitoring and Protecting the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps*, 168-9 <<https://www.ohchr.org/Documents/Publications/training7part10en.pdf>>; World Health Organisation, *Environmental Health in Emergencies: Displaced People* <http://www.who.int/environmental_health_emergencies/displaced_people/en/>.

IV METHODOLOGY

In this thesis, I employ three methodologies. First, I conduct what Minow calls a ‘recasting project’: a study that gathers ‘more than one “line” of cases across doctrinal fields’ to ‘show why they belong together’ and offer ‘a new framework or paradigm’ in which they can be examined.⁴³ While analyses of case law are commonly categorised according to the legal framework in which actions are grounded,⁴⁴ I bring together cases on the basis of similarities in what the litigants are seeking. Thus, this project has methodological parallels with studies of remedies. Remedies scholars collate jurisprudence with reference to what a court orders or grants as opposed to specific causes of action and draw together cases framed in different areas of law such as contract, tort, equity and property.⁴⁵ Zakrzewski highlights the significance of such approaches by underlining that all civil litigants come to lawyers or courts wanting a remedy.⁴⁶ It is the lawyer’s job to work backwards and assist them to obtain that remedy by pleading their case using the appropriate cause of action.⁴⁷ Similarly, Barnett and Harder emphasise that ‘the first question a client often has when consulting her solicitor is “what can I get?” rather than “what cause of action do I have?”’⁴⁸ Translated to refugee law, the litigants in protection from refugee cases all seek what they believe to be a genuine place of refuge. Their representatives use the legal frameworks available to them to achieve this objective. The legal frameworks will differ depending on the refugee’s status and circumstances and whether they are in, for example, Malawi, Greece, Canada, Australia or Papua New Guinea. There are significant distinctions between the ways protection from refugee cases are framed and the jurisdictions and institutional cultures of the decision-making bodies that determine them. Nevertheless, at the core of these claims, refugees and asylum seekers are using the legal frameworks available to them to resist transfer to or seek rescue from a place of refuge. While there are myriad studies on the ways decision-makers have interpreted the refugee definition,⁴⁹ drawing all of these cases together in the one project will enable me to examine the ways they draw the contours and content of refuge as a legal remedy.

⁴³ Martha Minow, ‘Archetypal Legal Scholarship: A Field Guide’ (2013) 63(1) *Journal of Legal Education* 65, 66.

⁴⁴ Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 5.

⁴⁵ See, eg, Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 1; Peter Birks, ‘Personal Property: Proprietary Rights and Remedies’ (2000) 11(1) *Kings College Law Journal* 1; Michael Tilbury, *Principles of Civil Remedies* (Butterworths, 1990); Zakrzewski (n 44).

⁴⁶ Zakrzewski (n 44) 1.

⁴⁷ *Ibid* 1.

⁴⁸ Barnett and Harder (n 45) 1.

⁴⁹ See below n 58.

A second methodology is comparative legal analysis. This involves searching for similarities and differences across legal systems and, in particular, looking for ‘differences in an area of perceived similarities, and for similarities in an area of perceived difference’.⁵⁰ In the first two case studies (Europe and Africa), I assess whether these distinct human rights frameworks lead to analogous or divergent understandings of refugee and approaches to states’ abilities to constrain refugee movements. In the next case study, I compare the ways courts in Canada, Australia, Papua New Guinea and the European Union approach challenges to regional and bilateral containment agreements. In particular, I assess the different ways courts in these countries position and manoeuvre juridical borders when determining direct challenges to a containment agreement’s operation or validity. The Palestinian case study involves a comparison between states’ divergent interpretations of article 1D of the Refugee Convention. Finally, the chapter on resisting the prospect of refuge in an IDP camp necessitates a consideration of jurisprudence from the United Kingdom and New Zealand—two jurisdictions that adopt different tests for when an internal protection alternative is available.⁵¹ This thesis also involves a comparison of decision-makers’ approaches across these different types of protection from refugee claims. Throughout the case studies and in the final chapter, I expose the similarities in decision-makers’ approaches despite these legal challenges being grounded in divergent legal frameworks and arising in different jurisdictions.

Third, in my literature review and case studies, I ask ‘the woman question’.⁵² Bartlett explains that ‘looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them’ is a form of feminist legal methodology.⁵³ Charlesworth highlights that this requires interrogation of the positive rules of law and the issues deemed ‘irrelevant or of little significance’.⁵⁴ Edwards adds that these silences often ignore or ‘distort the concerns that are more typical of women than men’.⁵⁵ Asking the woman question, or ‘asking

⁵⁰ Gerhard Danneman, ‘Comparative Law: Studies of Similarities or Differences?’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 384, 406.

⁵¹ New Zealand adopts the approach recommended in the First Colloquium on Challenges in International Refugee Law, ‘Michigan Guidelines on the Internal Protection Alternative’ (1999) 21 *Michigan Journal of International Law* 134: *Refugee Appeal No 71684/99* [2000] INLR 165 [65]. This approach has been rejected in the United Kingdom: *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 [15]. The differences are elaborated on in Chapter Seven. For a general comparison between the jurisprudence on the internal protection alternative in these two jurisdictions, see Bríd Ní Ghráinne, ‘The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?’ (2015) 27(1) *International Journal of Refugee Law* 29.

⁵² Katharine Bartlett, ‘Feminist Legal Methods’ (1990) 103(4) *Harvard Law Review* 829, 837.

⁵³ *Ibid* 843.

⁵⁴ Hilary Charlesworth, ‘Feminist Methods in International Law’ (1999) 93(2) *American Journal of International Law* 379, 381.

⁵⁵ Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2010) 30 (‘*Violence Against Women*’).

the gender question’,⁵⁶ does not only involve consideration of women or gender. It includes ‘identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women *and members of other excluded groups*’.⁵⁷ In Chapter Two, I pose the gender question by exploring literature that looks at what women are seeking when they search for refuge. Much of this scholarship provides a different perspective to understandings of refuge that do not specifically consider gender. I also cover material that gives insights on the nature of refuge sought by children and refugees with disabilities. In the case studies, I evaluate whether decision-makers’ conceptualisations of refuge respond to the needs of refugees of different genders, sexualities and ages as well as refugees with care responsibilities or disabilities. I also ask whether the ways decision-makers approach protection from refuge claims, and in particular, what they deem crucial and irrelevant, disadvantages certain refugees. Are women or men more likely to be the ideal protection-from-refuge litigant? Do decision-makers prioritise unaccompanied minors or families with young children in protection from refuge decisions? Are refugees with disabilities in a more or less advantageous position to use courts and other decision-making bodies to continue their journey in search of refuge?

V ORIGINALITY AND CONTRIBUTIONS TO SCHOLARSHIP

There is a large body of literature on how courts and other decision-making bodies interpret refugee definitions and grounds for complementary protection.⁵⁸ These studies examine how

⁵⁶ Ibid 30.

⁵⁷ Bartlett (n 52) 831 (my emphasis).

⁵⁸ See, eg, Deborah Anker, ‘Legal Challenges From the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 46; Michelle Foster, ‘*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law’ (2009) *New Zealand Law Review* 257; Michelle Foster, ‘Why We Are Not There Yet: The Particular Challenge of Particular Social Group’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 17 (‘Why We Are Not There Yet’); James Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2011) 44(2) *New York University Journal of Law and Politics* 315; Satvinder Juss, ‘Problematizing the Protection of “War Refugees”: A Rejoinder to Hugo Storey and Jean-François Durieux’ (2013) 32 *Refugee Survey Quarterly* 122; Shauna Labman and Catherine Dauvergne, ‘Evaluating Canada’s Approach to Gender Persecution: Revisiting and Re-Embracing “Refugee Women and the Imperative of Categories”’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 264; Constance MacIntosh, ‘When Feminist Beliefs Became Credible as Political Opinions: Returning to a Key Moment in Canadian Refugee Law’ (2005) 17 *Canadian Journal of Women and the Law* 135; Audrey Macklin, ‘Opening the Door to Women Refugees: A First Crack’ in Wenona Giles, Helene Moussa and Penny Van Esterik (eds), *Development and Diaspora: Gender and the Refugee Experience* (Artemis Enterprises, 1996) (‘Opening the Door’); Audrey Macklin, ‘Refugee Women and the Imperative of Categories’ (1995) 17 *Human Rights Quarterly* 213 (‘Refugee Women’); Penelope Mathew, ‘First Do No Harm: Refugee Law as a Response to Armed Conflict’ in David Lovell and Igor Primoratz (eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate, 2012) 159; Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ (2009) 13(2/3) *International Journal of Human Rights* 391 (‘Discretion to

judicial approaches predominantly widen, but sometimes narrow, the categories of people who can claim international protection. In particular, there has been focus on the ways developments in jurisprudence on refugee definitions and complementary protection are consequential for female refugees,⁵⁹ sexualities minorities,⁶⁰ refugees with disabilities⁶¹ and child refugees.⁶²

In this thesis, I shift the focus from how decision-makers interpret refugee definitions to how they approach the remedy: refuge. While scholars from a number of different disciplines project ideas about what refuge should be,⁶³ and legal experts and the United Nations High Commissioner for Refugees ('UNHCR') outline the rights to which refugees are entitled,⁶⁴ this thesis will add to refugee law scholarship by elucidating *decision-makers'* conceptualisations of refuge. There is no study that specifically addresses decision-makers' ideas of refuge and the consequences for refugees' mobility. The best-known study of the rights refugees are entitled to in a place of refuge is Hathaway's seminal 2005 publication⁶⁵ in which he elucidates a refugee rights regime through synthesising entitlements in the Refugee Convention with rights in the

Disbelief'); Hugo Storey and Rebecca Wallace, 'War and Peace in Refugee Law Jurisprudence' (2001) 95 *American Journal of International Law* 349.

⁵⁹ See, eg, Anker (n 58); Foster, 'Why We Are Not There Yet' (n 58) 17; Labman and Dauvergne (n 58) 264; Mackintosh (n 58); Macklin, 'Opening the Door' (n 58); Macklin, 'Refugee Women' (n 58).

⁶⁰ See, eg, Hathaway and Pobjoy (n 58); Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44(2) *New York University Journal of International Law and Politics* 497; Millbank, 'Discretion to Disbelief' (n 58).

⁶¹ Mary Crock, Christine Ernst and Ron McCallum, 'When Disabilities and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2013) 24(4) *International Journal of Refugee Law* 735.

⁶² Mary Crock, 'Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia' (2005) 22(2) *Law in Context* 120; Alice Edwards, 'Age and Gender Dimensions in International Refugee Law' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2014) 46; Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017).

⁶³ This scholarship is explored in Chapter Two.

⁶⁴ See, eg, Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223; Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff, 2015) 665; Fourth Colloquium on Challenges in Refugee Law, 'The Michigan Guidelines on Protection Elsewhere' (2007) 28(2) *Michigan Journal of International Law* 207; UNHCR, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum Seekers (Lisbon Expert Roundtable, 9-10 December 2002)* (February 2003) [12] <<http://www.refworld.org/docid/3fe9981e4.html>>; UNHCR Executive Committee, *Conclusion No 85 (XLIX)*, UN Doc A/53/12/Add.1 (9 October 1998) [aa]; UNHCR, *UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries* (1 December 1992) <<http://www.refworld.org/docid/3ae6b31d47.html>>.

⁶⁵ Hathaway, *The Rights of Refugees* (n 26).

*International Covenant on Civil and Political Rights*⁶⁶ and the *International Covenant on Economic, Social and Cultural Rights*.⁶⁷ However, when refugees seek courts' assistance in securing transfer to or rescue from a place of refuge, it is rare that they can directly plead these rights. As noted above, they often have to resort to other legal instruments to frame their case. Hathaway says that '[d]espite its length', his study 'is no more than a first step in the development of a clear appreciation of how best to ensure the human rights of refugees under international law'.⁶⁸ In this thesis, I take another step. Rather than starting my enquiry, as Hathaway does, with reference to international legal instruments, I begin with the legal claims refugees have brought in their attempts to secure a place of genuine refuge. In this respect, this study has some parallels with Costello's analysis of European cases in which asylum seekers and refugees are resisting transfers to third countries.⁶⁹ This project departs from and adds to Costello's important work by including but also looking beyond Europe, providing a more global perspective and investigating how decision-makers conceptualise what refuge is or should be through the prism of different legal frameworks. For example, do decision-makers conceive of refuge as providing only for refugees' basic and immediate needs, or is there recognition that it must also enable refugees to live a rewarding life and look forward to a promising future?

I also add a new dimension to the literature by asking these questions with reference to considerations of gender. There is a large literature on decision-makers' approaches to questions of gender, but the overwhelming majority of these studies focus on how decision-makers interpret refugee definitions and grounds for complementary protection.⁷⁰ There are also studies of and guidance from the UNHCR on gender and protection of refugees while in a place of refuge.⁷¹

⁶⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁶⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976).

⁶⁸ Hathaway, *The Rights of Refugees* (n 26) 991.

⁶⁹ Costello (n 19) ch 6.

⁷⁰ Arbel, Dauvergne and Millbank provide the most recent assessment of decision-makers' approaches to gender concerns and describe their project as, 'an international comparative project on gender-related persecution and [refugee status determination]': Efrat Arbel, Catherine Dauvergne and Jenni Millbank, 'Introduction, Gender in Refugee Law – From the Margins to the Centre' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 1, 9 ('Introduction'). There is only one chapter in Arbel, Dauvergne, and Millbank's edited collection concerning what I call protection from refuge challenges, Arbel's study of litigation on a containment agreement between Canada and the United States, which I draw on in Chapter Five. Edwards, 'traces the history of feminist engagement with refugee law and policy' from 1950 to 2010: Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010' (2010) 29(2) *Refugee Survey Quarterly* 21. Her analysis of the ways decision-makers approach gender focusses on the refugee definition: at 23–31.

⁷¹ See, eg, Chaloka Beyani, 'The Needs of Refugee Women: A Human-Rights Perspective' (1995) 3(2) *Gender and Development* 29; Dale Buscher, 'Refugee Women: Twenty Years On' (2010) 29(2) *Refugee Survey Quarterly*

What is missing is an assessment of the role of gender in decision-makers' conceptualisations of refuge and approaches to refugees' searches for refuge. In the most recent study of decision-makers' approaches to refugee status assessment, Arbel, Dauvergne and Millbank state that jurisprudence has moved from being gender blind and being 'a much better fit for men than for women'⁷² to a situation where 'decision-makers in Western refugee receiving countries routinely put gender on the tick-box of topics for consideration'.⁷³ In this thesis, I examine whether there has been a similar trajectory with respect to judicial approaches to the concept of refuge and contests between refugees' entitlement to refuge and states' interests in constraining refugees' mobility.

There are four reasons why these contributions to scholarship are significant. First, examining how decision-makers approach and determine protection from refuge challenges will shed light on the ways adjudicative bodies cement or alter the current inequities in location of and responsibility for refugees. Two of the most significant problems in refugee protection are protracted encampment situations⁷⁴ and that the majority of the world's refugees are hosted by states least able to do so.⁷⁵ Accordingly, Juss posits that 'the relevant ethical question' is not 'Who is a refugee?' but 'Whose refugee?'⁷⁶ Betts and Collier explain that the role law can play in creating a fairer system is an important 'empirical question' and encourage scholars to investigate the

4; Jane Freedman, 'Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection' (2009) 48(1) *International Migration* 175; Jane Freedman, 'Mainstreaming Gender in Refugee Protection' (2010) 23(4) *Cambridge Review of International Affairs* 589; Susan Martin, 'Refugee and Displaced Women: 60 Years of Progress and Setbacks' (2011) 3(2) *Amsterdam Law Forum* 72; Helene Moussa, 'Violence Against Refugee Women: Gender Oppression, Canadian Policy and the International Struggle for Human Rights' (1998) 26(3/4) *Resources for Feminist Research* 79; Malinda Schmiechen, 'Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugees and Internally Displaced Women in Camps' (2003) 22(2) *Saint Louis University Public Law Review* 473; UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (1st ed, January 2008) <<http://www.unhcr.org/47cfa9fe2.pdf>>; UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* (May 2003); UNHCR Executive Committee, *Conclusion No 93 (LIII)*, UN Doc A/AC.96/973 (8 October 2002) (b)(iii).

⁷² Arbel, Dauvergne and Millbank, 'Introduction' (n 70) 3.

⁷³ *Ibid* 1.

⁷⁴ UNHCR Executive Committee, *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14 (10 June 2004); Betts and Collier (n 11) 137.

⁷⁵ Developing regions host 85 per cent of the refugees under the UNHCR's mandate: UNHCR, *Forced Displacement in 2017* (n 2) 2. Also, in Europe, southern border states host disproportionate numbers of refugees due to the operation of the Dublin Regulation: Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill, 2016) 156, 165–6; Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill, 2016) 101, 112.

⁷⁶ Satvinder Juss, *International Migration and Global Justice* (Ashgate, 2006) 199.

conditions under which law can be used to reshape the current system of refugee responsibility.⁷⁷ While there is scepticism about the long-term utility of using litigation as a tool to reshape refugee protection policy,⁷⁸ for many refugees, turning to adjudicative bodies is the only option they have when attempting to continue their journey in search of refuge. When refugees instigate protection from refuge challenges, decision-makers must determine questions about where they should be required to live and/or the state responsible for them. Through analysing the ways decision-makers determine protection from refuge challenges, I highlight the approaches likely to help to create a more just and equitable system of refugee protection and those that compound current injustices and inequities.

Second, understanding the ways adjudicative decision-makers conceptualise refuge will provide an indication of the contours of refuge as a legal concept in situations where refugees are requesting or resisting transfer within and across borders. In many contexts, refuge is achieved or provided ‘outside or against the law’.⁷⁹ For example, individuals often need to break the law when crossing borders to seek protection⁸⁰ and those who harbour them sometimes do so at great risk to themselves and families.⁸¹ While I draw on these extra-legal ideas of refuge in Chapter Two, when decision-makers determine protection from refuge cases they outline the nature and content of refuge as a *legal* remedy. Legal doctrines are not only pragmatic tools to achieve particular outcomes, they are also a reflection of a community’s values. Durieux suggests that ‘to define refugees is to say as much about “who we are” as about “who they are” – it goes to the identity of the definer’.⁸² Similarly, where we set the ambit of refuge—whether we are generous or uncharitable—is a reflection of the principles we hold. This thesis will provide insights on this by interrogating the ways adjudicative decision-makers as agents of states,

⁷⁷ Betts and Collier (n 11) 209.

⁷⁸ Costello states that, ‘real access for most refugees will not be assured by litigation’ and suggests that the European Union must consider reforms such as issuing humanitarian visas: Costello (n 19) 232.

⁷⁹ Linda Rabben, *Give Refuge to the Stranger: The Past, Present, and Future of Sanctuary* (Left Coast Press, 2011) 196.

⁸⁰ While many states impose criminal penalties on refugees for entering the country without proper authorisation, article 31(1) of the Refugee Convention (n 22) provides that states shall not impose penalties on refugees on account of their otherwise illegal entry of presence. For a discussion, see Hathaway, ‘*The Rights of Refugees*’ (n 26) 370–439.

⁸¹ For example, Rabben discusses the dangers assumed by those who harboured Jews during World War Two or hid escaping African American slaves before the American Civil War: Rabben (n 79) chs 5, 6. In some countries, harbouring refugees or providing them with assistance to cross a border is a criminal offence. For example, the *Code de l’entrée et du séjour des étrangers et du droit d’asile* [Code for Entry and Sojourn of Foreigners and Right of Asylum] (France) art L622-1 provides that it is an offence to facilitate a person’s illegal entry or stay in France. In 2017, Cédric Herrou, a French farmer, was prosecuted for helping more than 200 asylum seekers enter and stay in France. However, in 2018 France’s Constitutional Court ruled that the principle of fraternity protected him from being charged and prosecuted for helping asylum seekers: Constitutional Council Decision No 2018-717/718, QPC (6 July 2018).

⁸² Durieux (n 32) 151.

regional organisations and UN treaty bodies judge the quality of refuge to which a person is entitled. This is important because courts and other adjudicative bodies often provide an ‘alternative narrative’ of refugee rights when compared to a state’s legislative or executive arm of government.⁸³

Third, studying judicial notions of refuge will indicate whether courts and other decision-making bodies can provide a forum to make refugees’ journeys in search of refuge more realisable for refugees from more marginalised backgrounds. The literature on refugees’ searches for adequate places of refuge shows that these quests are often much more difficult for women, refugees with care responsibilities and disabilities, children and the elderly.⁸⁴ In their assessment of gender in refugee law scholarship and advocacy, Arbel, Dauvergne and Millbank state that renewed focus on gender in refugee law is vital, because ‘while much has been accomplished, in the most recent years ground has also been lost’.⁸⁵ In this thesis, I answer this call by examining whether the challenges women, children, parents and people with disabilities face in continuing their searches for refuge may be eased or compounded by the ways decision-makers approach protection from refuge challenges. I will investigate whether courts enable these refugees to continue their searches for refuge in a safe and legal manner.

Fourth, understanding how decision-makers determine protection from refuge challenges is significant because adjudicative bodies provide decisions that, in most cases, are binding.⁸⁶ While the best outcome for refugees in their attempts to find places of genuine sanctuary may be achieved by regional or international legal reform, this has not eventuated. The international community has recently adopted a Global Compact on Refugees that seeks to establish a ‘more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees’.⁸⁷ However, the Global Compact on Refugees is not legally binding⁸⁸ and relies on states’

⁸³ Marinella Marmo and Maria Giannacopoulos, ‘Cycles of Judicial and Executive Power in Irregular Migration’ (2017) 5(1) *Comparative Migration Studies* 16: 1–18, 4.

⁸⁴ See, eg, Crock et al (n 16) [5.1]; Echavez et al (n 16); Gerard and Pickering (n 14); Nardone and Correa-Velez (n 16); Pickering (n 16) ch 2; Pickering and Cochrane (n 16); Tello et al (n 16) 360.

⁸⁵ Arbel, Dauvergne and Millbank, ‘Introduction’ (n 70) 14.

⁸⁶ The only decisions considered in this thesis that are not binding are those of the Human Rights Committee considered in Chapter Three. The Human Rights Committee’s decisions are formally called ‘views’.

⁸⁷ *New York Declaration for Refugees and Migrants*, GA Res 71/1, 71st session, 6th plen mtg, UN Doc A/RES/71/1 (3 October 2016) [68]. Pursuant to para 69 of this United Nations General Assembly Resolution, the UNHCR was tasked with developing a comprehensive refugee response in coordination with states. The UNHCR released the final draft in June 2018: UNHCR, *The Global Compact on Refugees: Final Draft* (26 June 2018) <<http://www.unhcr.org/5b3295167>>. The final draft was provided to the United Nations on 2 August 2018: UNHCR, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact*, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018, reissued 13 September 2018) (*The Global Compact*). The United Nations adopted the Global Compact on Refugees on 17 December 2018.

⁸⁸ UNHCR, *The Global Compact* (n 87) [4].

benevolence and good will in responding to refugee situations.⁸⁹ Early assessments indicate that the Global Compact on Refugees will continue the current ‘charitable approach’, whereby states, especially those in the Global North, are not obligated to assist developing regions struggling with large numbers of refugees.⁹⁰ The Global Compact on Refugees may help to change states’ normative attitudes towards refugees,⁹¹ but norm change takes time and refugees are ‘dying while we talk’.⁹² Accordingly, the adoption of the Global Compact on Refugees is unlikely to reduce the significance of litigation for refugees attempting to secure a proper place of refuge. Through bringing these legal challenges before courts and other adjudicative bodies, refugees and asylum seekers are taking action to control their own destiny, rather than waiting for the international community to develop a more just system of refugee protection.

VI THESIS LIMITATIONS AND SCOPE

There are three limitations with respect to this thesis’ exploration of protection from refugee claims. First, I only examine cases that have come before decision-making bodies and reached the stage where a decision has been delivered. A broader project would also consider who has access to these decision-making bodies in the first place. Many factors determine whether an asylum seeker or refugee is able to access courts or other decision-making bodies to secure protection from a place of refuge. In particular, refugees in many jurisdictions do not receive free legal representation.⁹³ Even when legal representation is available, factors such as language difficulties, youth, gender, disabilities, restrictions on freedom of movement, illiteracy, mental health conditions and mistrust of legal authorities can inhibit an asylum seeker or refugee’s

⁸⁹ BS Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2019) 20(2) *International Journal of Refugee Law* (advance); Kaldor Centre for International Refugee Law, *The Global Compacts on Refugees and Migration* (November 2018) <<https://www.kaldorcentre.unsw.edu.au/publication/2018-global-compacts-refugees-and-migration>>. International cooperation will be achieved through measures such as a periodic global forum where states and other actors can make ‘concrete pledges and contributions towards the objectives of the global compact’ (UNHCR, *The Global Compact* (n 87) [17]) and seeking contributions from states to ‘establish, or enlarge the scope, size, and quality of, resettlement programmes’ (ibid [91]).

⁹⁰ Hathaway, ‘The UN’s “Comprehensive Refugee Response Framework”’ (n 8). See also James Hathaway, ‘The Global Cop-Out on Refugees’ (2019) 20(2) *International Journal of Refugee Law* (advance).

⁹¹ Alexander Betts, ‘The Global Compact on Refugees: Towards a Theory of Change?’ 20(2) *International Journal of Refugee Law* (advance).

⁹² Hathaway, ‘The UN’s “Comprehensive Refugee Response Framework”’ (n 8).

⁹³ Eleanor Acer, ‘Making a Difference: A Legacy of Pro Bono Representation’ (2004) 17(3) *Journal of Refugee Studies* 347, 349; Stephen Anagost, ‘The Challenge of Providing High Quality, Low Cost Legal Aid for Asylum Seekers and Refugees’ (2000) 12(4) *International Journal of Refugee Law* 577, 577; Barbara Harrell-Bond, ‘Starting a Movement of Refugee Legal Aid Organizations in the South’ (2007) 19(4) *International Journal of Refugee Law* 729, 730; Hathaway, ‘*The Rights of Refugees*’ (n 26) 907–8; Shani King, ‘Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors’ (2013) 50(2) *Harvard Journal on Legislation* 331, 339–41, 368–9; Rachel Levitan, ‘Refugee Protection in Turkey’ (2009) 32 *Forced Migration Review* 56, 56; Andrew Schoenholtz and Jonathan Jacobs, ‘The State of Asylum Representation: Ideas for Change’ (2002) 16 *Georgetown Immigration Law Journal* 739, 742.

access to legal services.⁹⁴ The second constraint of this study is that I only examine decisions published in English or where an English translation is publicly available. Finally, I only include decisions handed down on or before 31 August 2017.

With respect to the project's scope, the question this thesis poses is *how* do decision-makers approach and determine protection from refugee claims? To answer this question, in each case study I identify the techniques judges and other decision-makers use in arbitrating protection from refugee claims. It is beyond this project's scope to investigate *why* decision-makers adopt particular approaches. As noted above, one of my findings is that there has been a shift in the ways decision-makers approach protection from refugee claims. This thesis offers speculations about what may have prompted these changes, but this is a question for future research projects and requires different methodologies from the ones this thesis employs. There are some studies on the reasons why judicial approaches to refugee law claims change,⁹⁵ but none specifically address protection from refugee scenarios.

With regard to the cases that lie outside the protection from refugee rubric, I do not consider cases that would otherwise fit within this framework but are brought by litigants who have claimed but been denied international protection.⁹⁶ This is because I want to explore the functions, nature, scope and threshold of refuge for those who are or may be entitled to some form of international protection. Therefore, the ways decision-makers conceptualise refuge for those otherwise not entitled to international protection is outside the scope of this thesis. Further, not included in the protection from refugee framework are cases that raise questions about where

⁹⁴ Jacqueline Bhabha, 'Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection' (2004) 42(1) *International Migration* 141, 143; Mary Anne Kenny, Nicholas Proctor and Carol Grech, 'Mental Health and Legal Representation for Asylum Seekers in the "Legacy Caseload"' (2016) 8(2) *Cosmopolitan Civil Societies Journal* 84; King (n 93) 368–9; Levitan (n 93) 56.

⁹⁵ See, eg, Chimni, 'Geopolitics' (n 29); Chimni, 'From Resettlement' (n 29); Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 25(1) *Sydney Law Review* 51; Tuitt, *False Images* (n 29).

⁹⁶ An example of such a case is *Sufi and Elmi v United Kingdom* [2012] 54 EHRR 9 ('*Sufi and Elmi*'). In this case, the European Court of Human Rights considered whether a Somali man whose application for refugee status had been refused and a Somali refugee who had lost the protection of the Refugee Convention (n 22) due to art 33(2) could be deported. The issue was whether deportation to Somalia presented a real risk of treatment contrary to art 3 of the ECHR (n 36). The European Court of Human Rights held that levels of violence in Mogadishu presented a real risk of treatment contrary to art 3: *Sufi and Elmi* [250]. The Court then considered the prospect of internal relocation to IDP camps in Somalia as well as to the Dadaab refugee camp in Kenya. It concluded that circumstances and conditions in both camp settings raised a real risk of treatment contrary to art 3: *Sufi and Elmi* [291]–[292].

refugees should be located within a state's territory, but do not involve a refugee litigant demanding to be rescued from or transferred to a specific place of refuge.⁹⁷ They do not come within the protection from refuge framework and usually do not involve a decision-maker addressing the discrepancies between refuge as a concept and place. Finally, I do not examine cases in which refugees are challenging detention and they are not detained pursuant to a bilateral or regional containment agreement.⁹⁸ These cases do not come within a protection from refuge framework because decision-makers are not determining whether the place of detention serves as an adequate site of refuge. Rather, in these cases, courts and other decision-making bodies are concerned with other issues such as whether detention is lawful or arbitrary.

I also have chosen not to include cases concerning safe third country rules in domestic legislation unconnected with a bilateral agreement. Some safe third country provisions do not come within the protection from refuge framework because they operate to deny eligibility for refugee protection and do not require a determination of rescue from or transfer to an alternative place of refuge.⁹⁹ Also, judicial review of safe third country decisions is heavily curtailed in some jurisdictions¹⁰⁰ and, in others, legislation significantly restricts the considerations courts and

⁹⁷ See, eg, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, 249/02, African Commission on Human and Peoples' Rights, December 2004; *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* (Court of Justice of the European Union, C-443/14 and C-444/14, 1 March 2016).

⁹⁸ See, eg, *Amuur v France* (1996) III Eur Court HR 850; *Plaintiff M76 2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322.

⁹⁹ For example, the relevant safe third country rules in Australia are contained in section 36(3) of the *Migration Act 1958* (Cth) which provides that:

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

Pursuant to this provision, the decision-maker is not required to determine whether or not the person can be sent to the relevant third country. In fact, in many situations the person cannot be sent to the relevant third country because they are not a national and there is no agreement between Australia and the relevant third country.

¹⁰⁰ Legislation in the United Kingdom allows for the removal of asylum seekers to a safe third country without substantive consideration of their asylum claim: *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* s 33, sch 3. If the Secretary of State certifies that a person is proposed to be removed to the safe third country, the asylum seeker cannot bring an appeal alleging that the transfer would breach the Refugee Convention (n 22): *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* sch 3, pts 2.5(3)(a), 3.10(3), 4.15(3). This may be incompatible with *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60-180/95 art 38 that permits European Union member states to apply the safe third country concept, but only if the asylum seeker will be treated in accordance with specified principles including that the asylum seeker can request and will receive protection in accordance with the Refugee Convention (n 22). Also, *Ilias and Ahmed v Hungary* (European Court of Human Rights, Fourth Section, Application No 47287/15, 14 March 2017) indicates that the European Court of Human Rights is willing to consider transfers via safe third country provisions to be in violation of article three of the ECHR (n 36).

other decision-making bodies can take into account when determining whether that third country is indeed safe.¹⁰¹ While there have been comparisons of safe third country legislation and practice,¹⁰² these restrictions make comparative assessments of judicial approaches difficult and ill-suited to the questions I pose in this thesis.

VII CONCLUSION

While scholars have investigated refugees' quests within and across borders and outlined various understandings of what refuge should be, there has been little work on judicial conceptualisations of refuge and how these may facilitate or impede refugees' searches for sanctuary. This is despite refugees and asylum seekers in a number of jurisdictions turning to courts and other decision-making bodies to either resist or seek transfer to an alternative place of refuge. This thesis is the first study to draw together these protection from refuge claims and examine how decision-makers approach and determine them. In doing so, it deepens our understanding of judicial ideas of refuge and the role adjudicative bodies play in refugees' journeys. In particular, this thesis identifies a pattern across the various jurisdictions in which protection from refuge claims are made. When such claims first come before adjudicative bodies, there is a period or moment in which decision-makers engage with the notion of refuge. They reflect on the nature of refugeehood and use the legal frameworks pleaded to address the predicaments faced by refugees and asylum seekers. Their notions of what refuge should be go beyond basic notions of safety and survival and advance ideas of refuge outlined by scholars and UN institutions. These judicial conceptualisations of refuge are also responsive to the particular needs of refugees of different genders, sexualities and ages as well as to the difficulties faced by refugees with care responsibilities and disabilities. In these jurisprudential moments, refuge becomes a potent concept and one that refugees can wield to disrupt the continuation of containment mechanisms and continue their searches for refuge within and across borders.

¹⁰¹ For example, sections 36(4)–36(5A) of Australia's *Migration Act 1958* (Cth) limit decision-makers' considerations as to whether the asylum seeker would have a well-founded fear of being persecuted for a Refugee Convention ground in the third country, would be at real risk of suffering significant harm in the third country, has a well-founded fear that the third country would return them to another country where they will be persecuted for a Refugee Convention ground, or has a well-founded fear of being returned to a country where there is a real risk they would suffer significant harm.

¹⁰² Hathaway and Foster, *The Law of Refugee Status* (n 40) 30–1; Moreno-Lax (n 64); Jane McAdam, 'Migrating Laws? The "Plagiaristic Dialogue" Between Europe and Australia' in H el ene Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press, 2013) 25, 28–35; Charlotte Mysen, *The Concept of Safe Third Countries: Legislation and National Practices* (2017) <https://www.udi.no/globalassets/global/forskning-fou_i/asyl/the-concept-of-safe-third-countries.pdf>.

However, these victories are ephemeral. Decision-makers reverse or dilute initial protection from refugee successes by reframing the legal issues in ways that excise consideration of refuge as a concept, of refuge as a place, or of both. While the reasons for this change must be assessed with respect to what is occurring in each particular jurisdiction, the common outcome of this reframing is that decision-makers shift from a purposive and comprehensive understanding of refuge to a rudimentary one. Once this occurs, the protection from refugee litigant must prove that they are exceptional in some way. Decision-makers' approaches to identifying the 'atypical' refugee often create additional hurdles for women, parents, children and those with disabilities to use courts to seek a safe place of refuge. This disengagement from the concept of refuge and search for the extraordinary refugee transforms these judgments from refugee protection to migration management decisions. These judicial approaches impede refugees' journeys in search of refuge, perpetuate the current injustices and global inequities in refugee responsibility and render refuge, as both a concept and a place, elusive.

CHAPTER TWO

REFUGE AS A CONCEPT AND PLACE

I INTRODUCTION

The word ‘refuge’ is widely used in refugee and forced migration scholarship,¹ but is ‘rarely distinctly defined’.² The purpose of this chapter is to outline how scholars, United Nations (‘UN’) institutions and refugees approach and understand the notion of refuge and highlight the discrepancies between these ideas of refuge and the reality. The analysis in this chapter provides the backdrop against which I assess how decision-makers envision refuge and navigate the disjunctures between refuge as a concept and place in the following case studies. In this chapter, I first explain why I use the word refuge as opposed to similar terms commonly employed in the literature. I then identify the five dominant ways scholars approach what refuge is or should be for those with (or seeking) international protection. Next, I draw on scholarship from the fields of law, anthropology, history, geography, international relations, economics, psychology and sociology as well as UN materials and refugee memoirs to build a picture of the objectives, nature, scope and threshold of refuge.³ Finally, I examine material that documents what life is like in a number of sites of refuge. I suggest that the notion of refuge is a robust and highly developed one with many overlapping views about its objectives and content across different

¹ See, eg, Catherine Besteman, *Making Refuge: Somali Bantu Refugees and Lewiston, Maine* (Duke University Press, 2016) (‘*Making Refuge*’); Catherine Besteman, ‘Refuge Fragments, Fragmentary Refuge’ (2014) 15(4) *Ethnography* 426 (‘Refuge Fragments’); Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017); Mary Crock, ‘Lonely Refuge: Judicial Responses to Separated Children Seeking Refugee Protection in Australia’ (2005) 22(2) *Law in Context* 120; Collette Daiute, ‘Narrating Refuge’ (2017) 13(1) *Europe’s Journal of Psychology* 1; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007); Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States and Canada* (University of California Press, 2006); Daniel Ghezelback, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018); Jennifer Hyndman and Alison Mountz, ‘Refuge or Refusal: The Geography of Control’ in Derek Gregory and Alan Pred (eds), *Violent Geographies: Fear, Terror and Political Violence* (Routledge, 2007) 77; Klaus Neumann, *Refuge Australia: Australia’s Humanitarian Record* (UNSW Press, 2005); Sarah Ogilvie and Scott Miller, *Refuge Denied: The St Louis Passengers and the Holocaust* (University of Wisconsin Press, 2006); Linda Rabben, *Give Refuge to the Stranger: The Past, Present, and Future of Sanctuary* (Left Coast Press, 2011); Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018); Susan Zimmermann, ‘Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge’ (2009) 22(1) *Journal of Refugee Studies* 74; Norman Zucker and Naomi Zucker, *Desperate Crossings: Seeking Refuge in America* (ME Sharpe, 1996).

² Ramsay (n 1) 156.

³ Because I am examining the concept of refuge with specific reference to those entitled to or seeking international protection, I do not consider more general theories of hospitality such as Jacques Derrida and Anne Dufourmantelle, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond*, tr Rachel Bowlby (Stanford University Press, 2000).

scholarly disciplines and the wider literature. However, there is often a stark disparity between ideas of what refuge should be and the conditions those seeking refuge endure.

II REFUGE, SANCTUARY, ASYLUM AND INTERNATIONAL PROTECTION: SYNONYMOUS TERMS?

The words ‘asylum’, ‘sanctuary’ and ‘refuge’ have similar etymologies. Asylum derives from the Latin form of the Greek word *asylos*,⁴ which means inviolability.⁵ It was first used to describe ‘some place or territory, large or small, where a person may not be seized by his [or her] pursuers’.⁶ The term sanctuary is closely linked to asylum and ‘comes from the Latin word for a sacred place’.⁷ Certain places of worship in ancient Egypt, Greece and Rome provided sanctuary to runaway slaves and those accused of crimes.⁸ Refuge originates from the Latin word *refugium*, which means a place to flee to.⁹ One of its earliest uses is in the Hebrew Bible in which there were six cities of refuge where those accused of manslaughter were protected from avengers.¹⁰

In more recent contexts, these terms are often used synonymously. The *Convention Relating to the Status of Refugees* (‘Refugee Convention’)¹¹ drafters considered these words to have congruity. The Peruvian delegate suggested that the word ‘asylum’ in the preamble should be changed to ‘refuge’, because in the Latin American context, ‘asylum’ was used for what he described as political refugees, whereas refuge was granted to ordinary refugees.¹² However, the French representative countered that in France there was no distinction between the concepts of asylum, refuge and sanctuary.¹³ The Chilean representative agreed that the word ‘asylum’ had the same meaning as ‘refuge’ even in a Latin American context.¹⁴ The United Nations

⁴ Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume 2* (AW Sijthoff-Leyden, 1966) 3; Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 70; Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, 2009) 26; Rabben (n 1) 18.

⁵ Price (n 4) 26; Rabben (n 1) 18.

⁶ Grahl-Madsen (n 4) 3.

⁷ Rabben (n 1) 18.

⁸ *Ibid.*

⁹ Daiute (n 1) 5.

¹⁰ Moshe Greenberg, ‘The Biblical Conception of Asylum’ (1959) 78(2) *Journal of Biblical Literature* 125, 125.

¹¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

¹² United Nations Economic and Social Council, *Ad Hoc Committee on Refugees and Stateless Persons, Summary Record of the One Hundred and Sixty-Seventh Meeting*, UN Doc E/AC.7/SR.167 (22 August 1950) 5.

¹³ *Ibid.* 6.

¹⁴ *Ibid.* 6.

High Commissioner for Refugees ('UNHCR') speaks of people seeking or being granted refuge,¹⁵ asylum,¹⁶ sanctuary¹⁷ or international protection.¹⁸ The authors surveyed in this chapter use one or all of these terms, and often interchangeably.

Nevertheless, I predominantly employ the word 'refuge' for two reasons. First, the term 'sanctuary' is more often associated with religious and community-based traditions of providing protection, whereas 'asylum' and 'international protection' are more likely to be used to refer to legal responses to people fleeing serious harm.¹⁹ 'Refuge' is more generic and can encompass both. While one of the aims of this project is to draw an outline of refuge as an enforceable legal concept, in doing so I do not want to overlook the similarities between legal understandings of refuge and those from outside the field of law. Due to the interdisciplinary nature of the analysis in this chapter, refuge is a more fitting and flexible term. Second, unlike the terms 'asylum', 'sanctuary' and 'international protection', there is a close linguistic connection between the words 'refuge' and 'refugee'. As noted in Chapter One, 'refugee' derives from the Old French *réfugié*, which means 'gone in search of refuge'.²⁰ In the discussion of the ways scholars conceptualise refuge, it will become apparent that the content of refuge is sometimes informed by the circumstances of those seeking it.

III CONCEPTUALISING REFUGE: WHERE TO BEGIN?

There are a number of starting points for imagining what refuge is or should be. A survey of scholarship on refuge, sanctuary and asylum indicates five dominant approaches, which I describe as historical and cultural, experiential, rights-based, philosophical and categorical. I outline each below, but it is important to emphasise that they are not mutually exclusive. Scholars often draw on more than one to outline their ideas of refuge. I identify these different inroads to theorising refuge so I can compare them to the ways decision-makers approach the concept

¹⁵ The UNHCR's mission statement speaks of the need for refugees to 'find safe *refuge* in another state': UNHCR, *Global Report 2017* (June 2018) 4 <http://reporting.unhcr.org/sites/default/files/gr2017/pdf/GR2017_English_Full_lowres.pdf> (emphasis added).

¹⁶ The UNHCR speaks of the importance of 'preserving the character of *asylum*': *ibid* 16 (emphasis added).

¹⁷ The UNHCR refers to an asylum seeker as 'someone whose request for *sanctuary* has yet to be processed': UNHCR, *Asylum-Seekers* <<http://www.unhcr.org/en-au/asylum-seekers.html>> (emphasis added) ('*Asylum-Seekers*'). Thomas Albrecht, the former UNHCR regional representative in Australia, stresses that, '[t]here is nothing illegal about seeking *sanctuary* from war and persecution': Thomas Albrecht, 'Australia's Refugee Policy is a Failure. This is Not the Time to Shirk Responsibility', *The Guardian* (online at 2 October 2017) <<https://www.theguardian.com/commentisfree/2017/oct/02/our-refugee-policy-is-a-failure-this-is-not-the-time-to-shirk-responsibility>> (emphasis added).

¹⁸ The UNHCR refers to a refugee as someone who 'seeks *international protection*': UNHCR, *Asylum-Seekers* (n 17) (emphasis added).

¹⁹ Rabben (n 1) 196.

²⁰ Glynnis Chantrill (ed), *The Oxford Dictionary of Word Histories* (Oxford University Press, 2002) 424.

of refuge. While an obvious hypothesis may be that courts and other decision-making bodies adopt rights-based thinking, there is potential for decision-makers to be influenced by other viewpoints.

A Historical and Cultural

One method for understanding the concept of refuge adopted by scholars across a number of disciplines is to refer to ancient, religious and cultural practices of providing safety. This is sometimes used to inform principles behind contemporary ideas of refuge. For example, legal scholars Mathew and Harley commence their discussion of the ‘moral and philosophical underpinnings of refugee protection’ by referring back to the ancient Greek tradition of granting refuge in temples²¹ and exploring the practices of refuge in Islam, Judaism, Christianity and Buddhism.²² They suggest that while sovereignty, as opposed to religion, is now the basis for asylum,²³ these ‘[p]rinciples of humanity and hospitality’ continue to be ‘important rationales for asylum’.²⁴ Gil-Bazo surveys historical and religious practices of granting asylum to build an argument that the right to asylum is a general principle of international law.²⁵

In other studies, historical practices of refuge are used to espouse the role refuge plays in international relations. For example, political scientist Price traces the practice of asylum in ancient Greece and early modern Europe to show that it was originally ‘a legal defense to extradition’ and, thus, ‘depended upon a judgment that another state targeted the asylum-seeker for harm in a manner inconsistent with its rightful authority’.²⁶ He draws on this history to argue that the current practice of asylum has a political dimension—it acts to condemn and reform persecutory regimes.²⁷

Studies of religious and cultural practices of refuge are also used to challenge and broaden dominant understandings of refugee protection. Anthropologist Chatty argues that in Middle Eastern countries, the Islamic notion of *karam* (which she translates as generosity and hospital-

²¹ Mathew and Harley (n 4) 70.

²² Ibid 70–3.

²³ S Prakash Sinha, *Asylum and International Law* (Martinus Nijhoff, 1971) 15, 16 cited in Mathew and Harley (n 4) 73. For a discussion of the shift from religious practices of refuge to the development of asylum in international law, see Rabben (n 1) ch 4.

²⁴ Mathew and Harley (n 4) 73.

²⁵ Maria-Teresa Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27(1) *International Journal of Refugee Law* 3, 17–23.

²⁶ Price (n 4) 14.

²⁷ Ibid 14, 70.

ity) ‘effectively operates to provide the asylum-seeker with sanctuary and refuge in an environment where international protection does not exist’.²⁸ She suggests that this duty-based approach to refuge should be melded with the ‘international rights-based protection approaches to refuge’.²⁹ Another example is geographer Zaman’s study of Islamic traditions of refuge, which he suggests are commensurate with and, in some circumstances, greater than the protection afforded in the Refugee Convention.³⁰

B *Experiential*

A different approach to understanding refuge is to explore what refugees themselves are searching and hoping for. This is most often seen in ethnographic work. For example, Zimmermann’s study of Somali refugees’ journeys across Africa and Europe evidences that these refugees are seeking safety ‘as well as quality of life and certainty in exile’.³¹ Ramsay investigates how female refugees from Central Africa experience and imagine displacement³² and argues that a crucial aspect of refuge for women is ‘connection to others and relationship building’.³³ Besteman’s work with Somali refugees resettled in the United States indicates that they want to create ‘meaning in their new context’.³⁴

There are examples of what I call an experiential approach to envisioning refuge outside anthropological studies. Some scholars take refugee testimony before courts and tribunals to assess the ways refugees conceptualise refuge.³⁵ For example, Paik examines legal testimony given by refugees in a well-known United States case³⁶ and argues that they wanted more than provision of enough food, water and shelter to survive.³⁷ They resisted being the mere objects

²⁸ Dawn Chatty, ‘The Duty to be Generous (Karam): Alternatives to Rights-Based Asylum in the Middle East’ (2017) 5 *Journal of the British Academy* 177, 196.

²⁹ *Ibid* 178.

³⁰ Tahir Zaman, *Islamic Traditions of Refuge in the Crises of Iraq and Syria* (Palgrave Macmillan, 2016) 26.

³¹ Zimmermann (n 1) 74.

³² Ramsay (n 1) 1.

³³ *Ibid* 207.

³⁴ Besteman, ‘Refuge Fragments’ (n 1) 426.

³⁵ Most of the scholarship on refugee testimony does not consider ideas of refuge but instead focuses on the ways refugees recount past experiences: see, eg, Toni Johnsen, ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’ (2011) 20 *Social and Legal Studies* 57; Anthea Vogl, ‘The Genres and Politics of Refugee Testimony’ (2018) 30(1) *Law and Literature* 81; Matthew Zagor, ‘Recognition and Narrative Identities: Is Refugee Law Redeemable’ in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311.

³⁶ *Sale v Haitian Centers Council Inc* 509 US 155, 133 (1993).

³⁷ A Naomi Paik, ‘Testifying to Rightlessness: Haitian Refugees Speaking from Guantánamo’ (2010) 28(3) *Social Text* 39, 53.

of humanitarian assistance³⁸ and sought ‘recognition as full human subjects’.³⁹ The use of refugee narratives is also present in psychological literature. For example, psychologist Daiute draws on stories from refugee children to argue that a crucial part of refuge is the ability to ‘imagine a beautiful future’.⁴⁰

C Rights-Based

Dominant in legal scholarship is the use of international human rights and refugee law to build a positivist picture of refuge. Hathaway draws on the rights in the Refugee Convention, as well as the *International Covenant on Civil and Political Rights* (‘ICCPR’)⁴¹ and the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’)⁴² to provide a comprehensive outline of the ‘common corpus of refugee rights which can be asserted by refugees in any state party to the Refugee Convention or Protocol’.⁴³ McAdam looks to the Refugee Convention as ‘a form of *lex specialis*’ and argues that it should be applied to those who do not meet the refugee definition, but are granted complementary protection.⁴⁴ Adding to these studies on rights available to all refugees, there is scholarship on the ways human rights law may respond to the protection needs of women refugees,⁴⁵ child refugees⁴⁶ and refugees with disabilities.⁴⁷

³⁸ Ibid 53–4.

³⁹ Ibid 41.

⁴⁰ Daiute (n 1) 2.

⁴¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁴³ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 8 (‘*The Rights of Refugees*’).

⁴⁴ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 1.

⁴⁵ See, eg, Chaloka Beyani, ‘The Needs of Refugee Women: A Human-Rights Perspective’ (1995) 3(2) *Gender and Development* 29; Jane Freedman, ‘Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection’ (2009) 48(1) *International Migration* 175; Malinda Schmiechen, ‘Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugees and Internally Displaced Women in Camps’ (2003) 22(2) *Saint Louis University Public Law Review* 473.

⁴⁶ See, eg, Christopher Bierwirth, ‘The Protection of Refugee and Asylum-Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child’ (2005) 24(2) *Refugee Survey Quarterly* 98; Mano Candappa, ‘The Right to Education and an Adequate Standard of Living’ (2000) 8(3) *The International Journal of Children’s Rights* 261; Mary Crock, ‘Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child’ in Said Mahmoudi et al (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill, 2015) 221 (‘Justice for the Migrant Child’); Mary Crock, ‘Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth’ in Mary Crock (ed), *Migrants and Rights* (Ashgate, 2015) 263 (‘Of Relative Rights’); Thoko Kaime, ‘From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and African Charter on the Rights and Welfare of the Child’ (2004) 13(3) *International Journal of Refugee Law* 336; Margaret McCallin, ‘The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children’ (1991) 3(1) *International Journal of Refugee Law* 82; Ciara Smyth, *European Asylum Law and the Rights of the Child* (Routledge, 2014).

⁴⁷ Mary Crock et al, *The Legal Protection of Refugees with Disabilities* (Edward Elgar, 2017) chs 9–12.

A positivist approach to refuge for Palestinian refugees can be seen in Takkenberg's study of the rights they are entitled to under the United Nations Relief and Works Agency for Palestine Refugees in the Near East's ('UNRWA') protection and assistance mandate, statelessness law, and international humanitarian and human rights law.⁴⁸ A rights-based approach to refuge also exists for putative refugees.⁴⁹ Hathaway and Foster and the Michigan Guidelines on the Internal Protection Alternative suggest that the rights in the Refugee Convention should serve as a guide to the type of protections that should be available in the internal protection alternative.⁵⁰ Mathew proposes a slightly broader enquiry: decision-makers should investigate whether the putative refugee would have their international human rights protected in the proposed place of relocation.⁵¹

D Philosophical

A further way of conceptualising refuge is to draw on ethics or philosophy. A number of scholars do this to justify providing refuge. For example, Goodwin-Gill's study of temporary refuge cites Rawls's idea of a natural duty of 'helping another when he [or she] is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself'.⁵² Noll draws on the Kantian right to hospitality as part of his explorations of why states, especially those in the Global North, have an obligation to offer refugee protection.⁵³

However, some scholars go further and use ideas in the fields of ethics and philosophy to articulate the *content* of what states should offer those in need of international protection. This is evident in Betts and Collier's study of refuge in which they refer to a 'famous moral thought experiment' regarding what a bystander should do when they discover a child in a pond asking

⁴⁸ Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford University Press, 1998).

⁴⁹ As noted in Chapter One, putative refugees are persons outside their country of origin or habitual residence whose circumstances indicate they satisfy one part of the refugee definition (a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion), but who have not yet established another aspect of the refugee definition (that they are unable or unwilling to avail themselves of the protection of their country of origin or habitual residence).

⁵⁰ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 358 ('*The Law of Refugee Status*'); First Colloquium on Challenges in International Refugee Law, 'Michigan Guidelines on the Internal Protection Alternative' (1999) 21 *Michigan Journal of International Law* 134 ('Michigan Guidelines on the IPA').

⁵¹ Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 189, 193–5.

⁵² John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 114 cited in Guy Goodwin-Gill, 'Nonrefoulement and the New Asylum Seekers' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer, 1988) 105, 110.

⁵³ Gregor Noll, 'Why Refugees Still Matter: A Response to James Hathaway' (2007) 8(2) *Melbourne Journal of International Law* 536, 544–7 ('Why Refugees Still Matter').

for help.⁵⁴ Building on this scenario, they argue that states not only have an ‘unambiguous duty of rescue’,⁵⁵ but an obligation to restore refugees’ ‘circumstances as near to normality as it is practically possible’.⁵⁶ Another example is Gibney, who draws on theorists such as Locke and Walzer to develop a principle of ‘humanitarianism’ that should guide liberal democratic nations in their asylum policies.⁵⁷ Humanitarianism provides that ‘states have an obligation to assist refugees when the costs of doing so are low’⁵⁸ and can also be used to determine ‘how refugees and asylum-seekers can be rightfully treated’.⁵⁹ Kritzman-Amir takes a different approach and refers to feminist ideas about ethics of care and theories of utilitarianism to frame refuge as a shared responsibility.⁶⁰ Rather than outlining what refuge entails by reference to what a single state should provide to refugees, she suggests that states’ varying capacities to provide refuge is a prime consideration in determining which state should be responsible for refugees.⁶¹

E *Categorical*

Another method is to unpack what refuge is or should be by reference to the categories of people seeking international protection or to the defining features of refugeehood. Durieux states that fixing the label of refugee on a person or group (whether or not they come within a legal definition of a refugee) requires a response from the international community.⁶² Therefore, it is necessary to clarify ‘the normative meaning of refugeehood’ to understand what response is appropriate.⁶³ Demonstrating what can be called a categorical approach to elucidating refuge, Durieux posits that those who have a well-founded fear of persecution (as opposed to, for example, those who flee natural disasters) are entitled to not only ‘protection against deportation’, but a ‘guarantee of admission and inclusion’.⁶⁴

A number of scholars also adopt a categorical approach by referring to the persecution aspect of refugee definitions to delineate the contours and content of refuge. For example, Hathaway

⁵⁴ Betts and Collier (n 1) 99.

⁵⁵ Ibid 99.

⁵⁶ Ibid 102.

⁵⁷ Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004) 231–3 (*The Ethics and Politics of Asylum*).

⁵⁸ Ibid 231.

⁵⁹ Ibid 249.

⁶⁰ Tally Kritzman-Amir, ‘Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law’ (2009) 34(2) *Brooklyn Journal of International Law* 355, 363–372.

⁶¹ Ibid 362, 372.

⁶² Jean-François Durieux, ‘Three Asylum Paradigms’ (2013) 20(2) *International Journal on Minority and Group Rights* 147, 148.

⁶³ Ibid 148.

⁶⁴ Ibid 156.

points to the persecution requirement to justify why those who come within the definition of a refugee in article 1A(2) of the Refugee Convention ('Convention refugees') are entitled to a special form of international protection.⁶⁵ Price argues that the requirement to establish a well-founded fear of persecution means that Convention refugees suffer 'a distinctive kind of harm that calls for confrontation and condemnation'. Thus, refuge has an 'expressive dimension [that] differentiates it from other modes of refugee assistance, which are focused exclusively on meeting refugees' need for protection'.⁶⁶ Conversely, McAdam highlights the similarities between Convention refugees and those who may not have a well-founded fear of persecution, but cannot otherwise avail themselves of the protection of their country, to argue that both should be entitled to 'privileged treatment'.⁶⁷

Some scholars look beyond legal definitions of refugees to understand the essence of refugeehood and the appropriate response. For example, Shacknove argues that the idea of refugeehood should be extended to those whose governments cannot meet their basic needs.⁶⁸ Accordingly, refuge encompasses 'international restitution of these needs'.⁶⁹ Taking an even broader viewpoint of what refuge should encompass, Gibney describes refugees as people who have not only lost state protection but have been deprived of their 'social world'.⁷⁰ Therefore, refuge is not only about restoring their basic needs, but should offer a place in which refugees can rebuild 'communities, associations, relationships'.⁷¹

IV WHAT ARE REFUGE'S FUNCTIONS?

While the notion of refuge may have originated from ancient practices of providing safety in sacred spaces, contemporary understandings of refuge have developed to encompass objectives beyond protection from serious harm. Descriptions of refuge's additional purposes range from restoration of 'social and economic independence',⁷² ensuring refugees can live a dignified

⁶⁵ James Hathaway, 'Is Refugee Status Really Elitist? An Answer to the Ethical Challenge' in Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer Law, 1997) 79.

⁶⁶ Price (n 4) 14.

⁶⁷ McAdam (n 44) 198.

⁶⁸ Andrew Shacknove, 'Who is a Refugee?' (1985) 95(2) *Ethics* 274.

⁶⁹ *Ibid* 284.

⁷⁰ Matthew Gibney, 'Refugees and Justice between States' (2015) 14(4) *European Journal of Political Theory* 448, 460 ('Refugees and Justice').

⁷¹ *Ibid* 460.

⁷² UNHCR Executive Committee, *Local Integration and Self-Reliance*, UN Doc EC/55/SC/CRP.15 (2 June 2005) [11] ('Local Integration').

life,⁷³ providing ‘a taste of the substance of the citizenship’,⁷⁴ and finding a ‘solution to refugeehood’.⁷⁵ However, there is no overarching theory of the objectives refuge should fulfil. As previously discussed, scholars have assembled examinations of refuge according to other concerns such as the rights in the Refugee Convention or the categories of people entitled to international protection.

I want to assess the extent to which decision-makers adopt a purposive approach to refuge and whether their perceptions of refuge’s objectives align with the understandings of scholars, the UN and refugees. Examining purposes and functions is one way of categorising and exploring remedies.⁷⁶ While there is no dedicated study of what refuge is designed to achieve, the pattern that emerges across the literature is that refuge has three functions, which can be described as restorative, regenerative and palliative. Further, there is a temporal dimension to refuge’s functions. Scholars, UN institutions and refugees speak of the need to live a rewarding life while displaced, have hope for the future and cope with traumatic experiences and memories. Below, I explore refuge’s objectives and temporality by outlining ideas about what it is designed to achieve with respect to refugees’ present, future and past.

A Being Reborn in Exile: Restoration of a Meaningful Life

The creation of a new life is a common motif for refuge in refugee memoirs. Passarlay, an Afghan refugee, speaks about being ‘born again’.⁷⁷ Ahmedi, also an Afghan refugee, writes about wanting ‘to have a life’.⁷⁸ Keitetsi, a Ugandan child soldier, describes resettlement in Denmark as being given ‘a new life’.⁷⁹ Hakakian, a Jewish woman born in Iran and now living and working in the United States, says that to be a refugee is to ‘begin anew’⁸⁰ and be ‘recast as a brand-new human engine’.⁸¹ This rebirth involves much more than being free from one’s

⁷³ Colin Harvey, ‘Is Humanity Enough? Refugees, Asylum Seekers and the Rights Regime’ in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar, 2013) 68, 74; Hathaway, *The Rights of Refugees* (n 43) 13; UNHCR Executive Committee, *Conclusion No 50 (XXXIX)*, UN Doc A/43/12/Add.1 (26 October 1988) [22](j); UNHCR Executive Committee, *Conclusion No 93 (LIII)*, UN Doc A/AC.96/973 (8 October 2002) preamble (‘Executive Committee Conclusion No 93’).

⁷⁴ Harvey (n 73) 72.

⁷⁵ Hathaway and Foster, *The Law of Refugee Status* (n 50) 1.

⁷⁶ See Burrows’ functional taxonomy of civil remedies: Andrew Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd ed, 2005).

⁷⁷ Gulwali Passarlay and Nadene Ghouri, *The Lightless Sky: An Afghan Refugee Boy’s Journey of Escape to a New Life* (Atlantic Books, 2015) 322.

⁷⁸ Farah Ahmedi and Tamim Ansary, *The Other Side of the Sky* (Simon and Schuster, 2005) 148.

⁷⁹ China Keitetsi, *Child Soldier* (Souvenir Press, 2004) 238.

⁸⁰ Roya Hakakian, *Journey from the Land of No: A Girlhood Caught in Revolutionary Iran* (Three Rivers Press, 2004) 14.

⁸¹ *Ibid* 15.

persecutors. Ahmedi explains that, '[y]ou might suppose that a person who has escaped from suffering and oppression and the threat of death will be grateful and content simply to exist after that and want nothing more. But the human heart easily grows restless ... I had come to long for something more than the mere absence of pain'.⁸²

Scholars across a number of disciplines share the idea that refuge is intended to provide refugees with a life worth living, as opposed to the mere preservation of life. Legal scholars Hathaway and Foster contend that the rights in the Refugee Convention 'have a restorative function, facilitating the re-establishment of *a life*'.⁸³ Political scientist Gibney argues that refuge involves rebuilding a 'meaningful social world'.⁸⁴ Betts and Collier, professors of international relations and economics respectively, state that refuge is about restoring 'basic features of a normal life'.⁸⁵ Anthropologist Zimmerman writes of refuge as being able to 'have a "life" rather than just to be alive'.⁸⁶ There is also an understanding that building a rewarding and meaningful life while displaced involves giving back what may have been lost through persecution and displacement but also providing conditions in which a refugee can grow and develop. Thus, we can see articulations of the restorative and regenerative functions of refuge during exile; I elaborate on both below.

1. Restoring refugees to a position where they can be alive and have a life

One restorative aspect of refuge widely discussed in the literature is the re-establishment of a safe, secure and free existence. The importance of immediately feeling safe in the country of refuge is reflected in refugee memoirs. Bashir, a Sudanese refugee, in writing about her escape to the United Kingdom recalls the moment of being 'inside this machine that would fly me away to safety'⁸⁷ and that '[m]y first priority had to be to get into England – for that meant I was safely out of Sudan ... [H]ow I would live, my future – all of that could wait'.⁸⁸ When Keitetsi was told that she could stay in South Africa, but would not receive housing or help in

⁸² Ahmedi and Ansary (n 78) 197.

⁸³ Hathaway and Foster, *The Law of Refugee Status* (n 50) 356 (emphasis added). Hathaway also states that the Refugee Convention (n 11) contains 'invigorating' and 'empowering' rights that allow refugees to 'begin their lives again': James Hathaway, 'The UN's "Comprehensive Refugee Response Framework": Actually a "Contingent Refugee Assistance Project"' (Speech delivered at the Refugee Law Initiative Eight International Refugee Law Seminar Series, Institute of Advanced Legal Studies, University of London, 21 May 2018) <<https://soundcloud.com/refugeelawinitiative/the-uns-crrf-actually-a-contingent-refugee-assistance-project>>.

⁸⁴ Gibney, 'Refugees and Justice' (n 70) 460.

⁸⁵ Betts and Collier (n 1) 102.

⁸⁶ Zimmerman (n 1) 88.

⁸⁷ Halima Bashir and Damien Lewis, *Tears of the Desert: A Memoir of Survival in Darfur* (Harper Collins Publishers, 2008) 313.

⁸⁸ *Ibid* 316–17.

finding employment, her response was, ‘I didn’t care, as long as I had escaped my pursuers’.⁸⁹ Ahmedi was overjoyed about the prospect of being resettled because in the United States: ‘[n]o one will attack me – the law won’t allow it’.⁹⁰

Restoration of a sense of security, safety and freedom as an important aspect of refuge is also evident in other sources. The UNHCR states that one of the aims of the Refugee Convention is achievement of a ‘peaceful life’⁹¹ and that ‘[r]efugees’ rights to security and personal safety underpin the entirety of the provisions of the [Refugee] Convention’.⁹² Similarly, Goodwin-Gill argues that refugee protection is concerned with ‘life, liberty and security of person’.⁹³ The importance of restoring safety, security and freedom in the context of displacement can be seen in the Refugee Convention’s *travaux préparatoires* with respect to the host state’s obligation to issue identity papers to any refugee in their territory who does not possess a valid travel document.⁹⁴ The representative from the International Refugee Organisation stated that ‘[a] person without papers was a pariah subject to arrest for that reason alone’.⁹⁵ The US representative emphasised the importance of identity papers to ensure that refugees ‘would be free from the extra hardships of a person in possession of no papers at all’.⁹⁶

Another restorative aspect of refuge is ensuring that refugees have the means to sustain life. The UNHCR states that refugees must have ‘an adequate and dignified means of subsistence’.⁹⁷ The UNHCR’s Executive Committee stresses the need for host states to ensure that refugees’ ‘basic support needs, including food, clothing, accommodation, and medical care ... are met’.⁹⁸ Supporting and reflecting these goals, Goodwin-Gill and McAdam highlight the importance of ‘provisions with respect to subsistence’,⁹⁹ and Hathaway emphasises that refugees are entitled

⁸⁹ Keitetsi (n 79) 251.

⁹⁰ Ahmedi and Ansary (n 78) 137.

⁹¹ UNHCR, ‘Statement by Prince Sadruddin Aga Khan, United Nations High Commissioner for Refugees, to the United Nations Economic and Social Council’ (Speech delivered to ECOSOC, 26 July 1976) <<http://www.unhcr.org/admin/hcspeeches/3ae68fb214/statement-prince-sadruddin-aga-khan-united-nations-high-commissioner-refugees.html>> (‘Statement by Prince Sadruddin Aga Khan’).

⁹² UNHCR Executive Committee, *Note on International Protection*, UN Doc A/AC.96/951 (13 September 2001) [15] (‘*Note on International Protection*’).

⁹³ Guy Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, 2nd ed, 1996) 16.

⁹⁴ Refugee Convention (n 11) art 27.

⁹⁵ United Nations Economic and Social Council, *Ad Hoc Committee on Refugees and Stateless Persons, Summary Record of the Thirty-Eighth Meeting*, UN Doc E/AC.32/SR.38 (26 September 1950).

⁹⁶ *Ibid.*

⁹⁷ UNHCR, ‘Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR, at the Fifty-Fifth Session of the Executive Committee of the High Commissioner’s Programme’ (7 October 2004) (‘Statement by Ms Erika Feller’).

⁹⁸ UNHCR Executive Committee, *Executive Committee Conclusion No 93* (n 73) (b)(ii).

⁹⁹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 396.

to ‘basic survival’ rights.¹⁰⁰ Crock et al start their discussion of refugees’ rights with ‘the rights to sustenance and other basic needs’.¹⁰¹

Further, the restorative function of refuge is understood to encompass refugees having choices about their lives’ directions. The Refugee Convention’s drafters stressed the importance of refugees being able to ‘perform the acts of civil life (marriage, divorce, adoption, settlement of succession, naturalization, acquisition of immovable property, constitution of associations, opening of bank accounts etc)’.¹⁰² The UNHCR understands that refugees should be integrated into the ‘framework of a community where they can recover the conditions of an active ... life’¹⁰³ and that the Refugee Convention is designed to ‘progressively restore the social and economic independence needed’ for refugees to ‘get on with their lives’.¹⁰⁴ Betts and Collier speak about refuge restoring the conditions in which refugees can exercise autonomy.¹⁰⁵ Further support for this position comes from Hathaway, who states that the rights in the Refugee Convention ‘afford refugees a real measure of autonomy and security to devise the solutions which *they* judge most suited to *their own* circumstances and ambitions’.¹⁰⁶ Reflecting on the relationship between refuge and choice, Keitetsi explains that once she was resettled as a refugee, ‘I no longer had to live my life for others, and no force makes me act against my will’.¹⁰⁷

Beyond the re-establishment of safety, sustenance and choice, Passarlay’s and Ahmedi’s memoirs provide insights on the restorative aspects of refuge for child refugees, in particular, the need to restore a sense of childhood. Both left Afghanistan as minors; Passarlay was unaccompanied and Ahmedi travelled with her mother, but often found herself effectively in the parental role due to her mother’s ill health. When Passarlay was finally able to start school in the United Kingdom after a long battle with immigration authorities, he felt ‘like a child again’.¹⁰⁸ Ahmedi explains that, in the process of leaving Afghanistan, seeking refuge in Pakistan and being resettled in the United States, ‘I was forced to grow up very suddenly’.¹⁰⁹ After being resettled, she

¹⁰⁰ Hathaway, *The Rights of Refugees* (n 43) 84.

¹⁰¹ Crock et al (n 47) 189.

¹⁰² United Nations Economic and Social Council, *Ad Hoc Committee on Statelessness and Related Problems, Memorandum by the Secretary-General*, UN Doc E/AC.32/2 (3 January 1950) (*Memorandum*). They introduced the right to administrative assistance in article 25 of the Refugee Convention (n 11).

¹⁰³ UNHCR, ‘Statement by Prince Sadruddin Aga Khan’ (n 91).

¹⁰⁴ UNHCR Executive Committee, *Local Integration* (n 72) [11].

¹⁰⁵ Betts and Collier (n 1) 7.

¹⁰⁶ James Hathaway, ‘Forced Migration Studies: Could We Agree Just to “Date”?’ (2007) 20 *Journal of Refugee Studies* 347, 364 (emphasis in original) (*Forced Migration Studies*).

¹⁰⁷ Keitetsi (n 79) 272.

¹⁰⁸ Passarlay and Ghouri (n 77) 342.

¹⁰⁹ Ahmedi and Ansary (n 78) 210.

befriends an older couple and explains that they ‘are letting me live a little of my childhood now, even though I am past the time for it. They let me behave in very childish ways sometimes – I make demands and act silly’.¹¹⁰

While there is a recognition that the prime concern of refuge is to meet refugees’ needs,¹¹¹ there is also consideration of the ways refuge may be restorative in a more global sense. Restorative justice involves addressing and reducing instances of injustice.¹¹² Some political theorists argue that refuge functions as a form of reparation for the harm and injustice done to refugees by individual states or the global community.¹¹³ This conceptualisation of refuge as reparation is particularly relevant in contexts where the host country may have, directly or indirectly, contributed to the refugee being unable to return to their homeland.¹¹⁴

2. Not just surviving, but thriving in exile

Beyond restoring refugees to a position where they can lead a liveable life, scholars, UN institutions and refugees understand refuge to be a rejuvenating process allowing refugees to develop and grow. For example, Ramsay’s work with refugees in Uganda and Australia shows that they want to ‘live lives of regenerative possibility’.¹¹⁵ Zimmermann’s study of Somali refugees indicates that they travel across Africa and Europe searching for a place where they can ‘achieve something in exile’.¹¹⁶ UNRWA states that part of its mission is ‘to help Palestinian refugees achieve their full potential in human development terms under the difficult circumstances in which they live’.¹¹⁷ Betts and Collier argue that the international community should adopt a human development approach for all refugees.¹¹⁸ This means that ‘[f]or the period refugees are in limbo, we should be creating an enabling environment that nurtures rather than

¹¹⁰ Ibid 210.

¹¹¹ Goodwin-Gill and McAdam (n 99) 10; Mathew and Harley (n 4) 80.

¹¹² John Braithwaite, ‘Principles of Restorative Justice’ in Andrew Hirsch, Julian Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing, 2003) 1, 1.

¹¹³ Gibney, ‘Refugees and Justice’ (n 70) 460; James Souter, ‘Towards a Theory of Asylum as Reparation for Past Injustice’ (2014) 62(2) *Political Studies* 326 (‘Towards a Theory of Asylum’); James Souter, ‘Durable Solutions as Reparation for the Unjust Harms of Displacement: Who Owes What To Refugees?’ (2014) 27(2) *Journal of Refugee Studies* 171; Michael Walzer, *Spheres of Justice* (Basic Books, 1983).

¹¹⁴ Gibney, ‘Refugees and Justice’ (n 70) 460. An example may be a person of Iraqi nationality claiming refugee protection in the United States after its invasion of Iraq: Souter, ‘Towards a Theory of Asylum’ (n 113) 339.

¹¹⁵ Ramsay (n 1) 81.

¹¹⁶ Zimmermann (n 1) 83.

¹¹⁷ UNRWA, *Report of the Commissioner-General of (UNRWA), Programme Budget, 2008–2009*, UN GAOR, 62nd sess, Supp No 13A, UN Doc A/62/13/Add.1 (6 August 2007) [2] (‘*Report of the Commissioner-General*’).

¹¹⁸ Betts and Collier (n 1) 144.

debilitates'.¹¹⁹ Accordingly, refuge should encompass 'all of the things that allow people to thrive and contribute rather than merely survive'.¹²⁰

Legal scholars highlight the ways the Refugee Convention and other international instruments give refugees the opportunity to develop, as opposed to merely survive, in the host country. Edwards reminds us that refugees have the right not just to seek, but to enjoy, asylum.¹²¹ This means that refugees should benefit in some way from their experience of refuge.¹²² Edwards gives as an example the right to work contained in the Refugee Convention, which provides refugees with an opportunity to improve 'language and other skills'.¹²³ Another indication of the idea that refuge is intended to be a time of growth and creativity is the Refugee Convention drafters' insistence on protection of refugees' artistic rights and industrial property.¹²⁴ They recognised that such outputs are 'the creation of the human mind and recognition is not a favour'.¹²⁵

When discussing refuge's regenerative function, there is a tendency to describe it in economic terms. This is most readily seen in UNHCR materials. For example, the UNHCR stresses that the rights in the Refugee Convention 'are essential to establishing refugees' self-sufficiency and allowing them to contribute to, rather than depend upon, the country of asylum'.¹²⁶ With reference to the right to education in the Refugee Convention, the UNHCR says that it helps refugees 'garner the necessary skills to become self-reliant and increase their chances of employment'.¹²⁷ Further, the UNHCR encourages host states to implement assistance programs that 'integrate strategies for self-reliance and empowerment'.¹²⁸ Some scholars also suggest that economic independence is one objective of refugee protection. For example, Hathaway and

¹¹⁹ Ibid 144.

¹²⁰ Ibid 144.

¹²¹ Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17(2) *International Journal of Refugee Law* 293 ('Human Rights'). The *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14(1) ('UDHR') provides that everyone 'has the right to seek *and to enjoy* in other countries asylum from persecution' (emphasis added).

¹²² Edwards, 'Human Rights' (n 121) 302.

¹²³ Ibid 320.

¹²⁴ Refugee Convention (n 11) art 14.

¹²⁵ United Nations Economic and Social Council, *Memorandum* (n 102).

¹²⁶ UNHCR, *Note on International Protection* (n 92) [57].

¹²⁷ UNHCR, *Ensuring Access to Education: Operational Guidance on Refugee Protection and Solutions in Urban Areas* (2011) 4.

¹²⁸ UNHCR, *Agenda for Protection* (3rd ed, October 2003) <<http://www.unhcr.org/protection/globalconsult/3e637b194/agenda-protection-third-edition.html>>.

Cusick state that the socio-economic rights in the Refugee Convention are designed to ‘ensure that refugees are able quickly to become self-sufficient in their country of refuge’.¹²⁹

There is no doubt that gaining employment and being able to contribute to the host country as employees, business owners or taxpayers is an important facet of refuge for many refugees. This comes through strongly in Bashir’s memoir. She writes that, once she was safely in the United Kingdom, she ‘wanted to contribute to this society. I was a trained medical doctor, and I knew this country needed doctors’.¹³⁰ However, it is important not to overemphasise the economic aspect of refuge’s regenerative objectives. Providing an insight into what female refugees resettled in Australia want to achieve, Ramsay observes that their prime objective is to become pregnant and build a family.¹³¹ By doing this, these women are ‘actualising ... the regenerative potentiality of finally being secure and safe enough to bear and rear children’.¹³² Inhorn’s ethnographic work with Arab refugees in Detroit indicates that creating a family is a priority for both male and female refugees.¹³³ These broader ideas about the ways refuge can be rejuvenating are also reflected in refugee memoirs. While Bashir wanted to contribute to her host country through employing her medical skills, she was not allowed to work. Rather, it was the birth of her son that gave her ‘the spirit and the will to live’.¹³⁴ Providing an adolescent’s perspective of the regenerative aspect of refuge, Ahmedi writes that ‘I had come to crave some activity that would interest my mind. I wanted some fun’.¹³⁵

Not only is refuge supposed to be rejuvenating for the refugee, it is also understood to be regenerative for host countries. Mathew and Harley argue that one reason for providing refuge is that ‘refugees are not just a short-term “burden” but are likely to make valuable contributions to their host countries’.¹³⁶ Supporting this are a number of studies that highlight the ways in

¹²⁹ James Hathaway and Anne Cusick, ‘Refugee Rights Are Not Negotiable’ (1999–2000) 14(2) *Georgetown Immigration Law Journal* 481, 485.

¹³⁰ Bashir and Lewis (n 87) 341.

¹³¹ Ramsay (n 1) 157.

¹³² *Ibid* 157.

¹³³ Marcia Inhorn, *America’s Arab Refugees: Vulnerability and Health on the Margins* (Stanford University Press, 2018) ch 3.

¹³⁴ Bashir and Lewis (n 87) 4.

¹³⁵ Ahmedi and Ansary (n 78) 197.

¹³⁶ Mathew and Harley (n 4) 83. Mathew and Harley (n 4) stress that while this is an important reason to offer refugee protection, it is a supplementary one—the ‘primary justification for taking responsibility for refugees rests on the necessitous circumstances of the refugee and the desire to avoid becoming complicit with the persecutors’: at 78–9, 80.

which refugees enhance the social, civic and economic life of the countries in which they are granted refuge.¹³⁷

B *Dreaming of and Creating a Tomorrow*

While one of the functions of refuge is to create a rewarding and meaningful life during refugeehood, a person is not expected to be a refugee forever. Refuge's rejuvenating function is not limited to refugees' experience of displacement; it also flows over into generating aspirations for the future. Haines' history of refugees in the United States argues that if refuge 'fails to provide a basis for hope for the future, then it is a poor refuge indeed'.¹³⁸ This is also a central theme in refugee memoirs. Reflecting on her refugee journey, Ahmedi explains that when she was living as a refugee in Pakistan, 'I had no source of hope out of which to nourish my struggle. When you see some possibility of getting out getting out of a pit, you can draw strength from the idea of where you will be once you get out: You see a goal worth fighting for. If the best you can hope for is to sink more slowly, struggle comes to feel pointless'.¹³⁹

For Ahmedi, hope came when she had the chance of resettlement in the United States, where she could 'build a future'.¹⁴⁰ Wek, a Sudanese refugee, recalls that when she left for the United Kingdom she 'carried almost nothing, other than our family's hopes for the future'.¹⁴¹ Later, when she was working as a model in New York, the US Committee for Refugees and Immigrants contacted Wek asking for her assistance in a campaign for Sudanese refugees. She explains that the letter was 'heaven sent' because '[t]hey were offering hope. They too believed in the possibilities for the future'.¹⁴² Boochani, a Kurdish refugee on Manus Island, writes that even in moments of despair it is crucial to be able to 'erase all the sinking feelings of weakness, of demoralisation, of inferiority' and 'replace them with hope and joy'.¹⁴³

Scholars who take an experiential approach to understanding refuge speak of the importance of imagining and working towards a future. Ramsay says that refugees want to 'actively create a

¹³⁷ See, eg, Graeme Hugo, Department of Immigration and Citizenship, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants* (2011) <https://www.dss.gov.au/sites/default/files/documents/01_2014/economic-social-civic-contributions-book-let2011.pdf>; International Monetary Fund, *The Refugee Surge in Europe: Economic Challenges* (January 2016) <<https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf>>; Ramsay (n 1) 207.

¹³⁸ David Haines, *Safe Haven? A History of Refugees in America* (Stylus Publishing, 2010) 48.

¹³⁹ Ahmedi and Ansary (n 78) 123.

¹⁴⁰ Ibid 137.

¹⁴¹ Alek Wek, *Alek: The Extraordinary Life of a Sudanese Refugee* (Virago Press, 2007) 152.

¹⁴² Ibid 232.

¹⁴³ Behrouz Boochani, *No Friend But the Mountains: Writing from Manus Prison* (Pan Macmillan Australia, 2018) 100.

future' as opposed to 'simply surviving in asylum'.¹⁴⁴ Their everyday existence is organised to achieve 'a future in which their lives [will] be "better"'.¹⁴⁵ Reflecting on her experience in counselling refugee children, Daiute writes about the ways they narrate their aspirations and imagine different futures.¹⁴⁶ She argues that through this process child refugees create a sense of refuge.¹⁴⁷

Discussions of solutions to refugeehood are another way of expressing this aspect of refuge's functions. Betts and Collier posit that refugees are 'entitled to expect' not only rescue and restoration of autonomy, but 'an eventual route out of limbo'.¹⁴⁸ Stevens argues that the 'ultimate goal of refugee protection must be to achieve a satisfactory solution for the refugee'.¹⁴⁹ Similarly, Hathaway explains that an important role of the refugee protection regime is to 'find a way to bring refugee status to an end – whether by means of return to the country of origin, resettlement elsewhere, or naturalization in the host country'.¹⁵⁰ He also emphasises that refugee law allows refugees to take the lead in creating their futures: 'the Refugee Convention gives priority to allowing refugees to make their own decisions ... to take the time they need to decide when and if they wish to pursue a durable solution'.¹⁵¹ One of the UNHCR's objectives is to find durable solutions for refugees.¹⁵² Bartholomeusz and Takkenberg argue that, similar to Convention refugees, Palestinian refugees are entitled to durable solutions.¹⁵³ Takkenberg suggests that these include Palestinian refugees' voluntary repatriation to their original homes, establishment of a Palestinian state and local integration in Arab host countries.¹⁵⁴

Refuge may also operate to engender hope, not just for refugees but for the future of the international community. While granting refugee protection is most commonly understood to be an

¹⁴⁴ Ramsay (n 1) 81.

¹⁴⁵ Ibid 38.

¹⁴⁶ Daiute (n 1) 7.

¹⁴⁷ Ibid 8.

¹⁴⁸ Betts and Collier (n 1) 7.

¹⁴⁹ Dallal Stevens, 'What do We Mean by "Protection"?' (2013) 20(2) *International Journal of Minority and Group Rights* 233, 241.

¹⁵⁰ Hathaway, *The Rights of Refugees* (n 43) 913.

¹⁵¹ Ibid 914.

¹⁵² *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UN Doc A/RES/428(V) (adopted 14 December 1950) ch I, para 1, ch II, paras 8(c), 9 ('UNHCR Statute').

¹⁵³ Lance Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28(2–3) *Refugee Survey Quarterly* 452, 469–73; Takkenberg (n 48) ch IX.

¹⁵⁴ Takkenberg (n 48) 327. However, the realisation of the first two is unlikely in the near future: Rashid Khalidi, 'Observations on the Right of Return' (1992) 21(2) *Journal of Palestine Studies* 29, 38; Rosemary Sayigh, 'Palestinians in Lebanon: Harsh Present, Uncertain Future' (1995) 25(1) *Journal of Palestinian Studies* 37, 57. On the right to return, see also Susan Akram and Terry Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees' (2004) 22(1) *Boston University International Law Journal* 1; John Quigley, 'Displaced Palestinians and the Right to Return' (1998) 39(1) *Harvard International Law Journal* 171.

apolitical act,¹⁵⁵ Price argues that by providing refuge, nation-states are not just caring for refugees, but condemning the country of origin's laws, policies and actions.¹⁵⁶ Thus, refuge is part of a 'broader political program designed to reform the abusive state'.¹⁵⁷ It is one way the international community can address the 'root causes of refugee flows' and promote 'the rule of law and human rights'.¹⁵⁸

C Living With the Past

While inspiring hope for the future is an essential function of refuge, refugees do not let go of the past and, sometimes, their past cannot be separated from their experience of exile and aspirations for the future. Many refugee memoirs address the tension between looking to the future in their place of refuge and not being able to leave their past behind them. When Ahmedi was resettled in the United States, she writes that it was like 'flying into my future – and yet – the past won't let me go. Not completely. Not yet'.¹⁵⁹ Some refugees write about the importance of taking the past with them into exile. For example, Bashir says that when boarding the plane that would take her to the United Kingdom, '[a]ll I had were my memories'.¹⁶⁰ Hakakian explains that:

When you become a refugee, abandon all your loves and belongings, your memories become your belongings. Images of the past, snippets of old conversations, furnish the world within your mind. When you have nothing left to guard, you guard your memories ... Remembering becomes not simply a preoccupation but a full-time occupation.¹⁶¹

Others speak of being unable to escape memories of the past. Keitetsi, a former child soldier and now a refugee in Denmark, writes, '[b]ut even with all of this freedom, I still have the fear that I had to carry every day of the desperation that I saw in almost any soldier ... I was there, and I don't need to imagine their pain. I know it, and still feel the abuse, and humiliation, scars which my body and soul will carry forever'.¹⁶²

¹⁵⁵ *Declaration of Territorial Asylum*, GA Res 2312, UN GAOR, 22nd sess, 1631st plen mtg, Supp No 16, UN Doc A/RES/2312(XXII) (14 December 1976) preamble; Deborah Anker, 'Refugee Law, Gender and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 146; Grahl-Madsen (n 4) 27.

¹⁵⁶ Price (n 4) 167.

¹⁵⁷ *Ibid* 75.

¹⁵⁸ *Ibid* 70.

¹⁵⁹ Ahmedi and Ansary (n 78) 123.

¹⁶⁰ Bashir and Lewis (n 87) 312.

¹⁶¹ Hakakian (n 80) 14.

¹⁶² Keitetsi (n 79) 272.

Refugees' previous experiences and their connections to understandings of the present and future are also themes in historical, psychological and anthropological scholarship. Historian Stråth posits that refugees' reflections on their experiences are 'always made from a changing present, constantly provoking new views of the past and new outlines of future horizons'.¹⁶³ Psychologist Daiute argues that making sense of their past is 'a dimension of refuge' for refugee children.¹⁶⁴ She explains that when doing this, her clients often engage in 'future narrating' which is 'a means of describing what may be past but re-cast toward the future'.¹⁶⁵ Gemignani's research with refugees from the Former Yugoslavia indicates that many avoid talking about the past 'not as an attempt to erase the past', but to 'build a stronger future by still using the past'.¹⁶⁶ However, some refugees also actively engage with their memories because it gives them hope for the future.¹⁶⁷ Gemignani suggests that some find 'comfort in bringing to the present selected aspects and episodes of their past', because the past is 'a reminder that they might be able to recreate ... the "good life [they] once enjoyed"'.¹⁶⁸ In her anthropological work with Hutu refugees in a refugee camp and urban setting, Malkki observes different approaches to history and memory.¹⁶⁹ For refugees living in a camp setting, a 'shared body of knowledge about their past in Burundi' informed 'virtually all aspects of contemporary social life'.¹⁷⁰ The past 'was seen as a source of power, knowledge, and purity'.¹⁷¹ It enabled them to make sense of past violent events¹⁷² and imagine their future.¹⁷³ However, urban refugees saw their past as 'a problem that had to be erased or subdued' and they did not want it to 'define the present'.¹⁷⁴

In legal scholarship, there is much less focus on how refuge may address the past than on the ways it protects refugees while in exile and creates hopes for a secure future. Nevertheless, there is some indication in legal literature that healing from past trauma may be one aspect of refuge. There is some recognition of the need to consider past suffering in material addressing

¹⁶³ Bo Stråth, 'Constructionist Themes in the Historiography of the Nation' in James Holstein and Jaber Gubrium (eds), *Handbook of Constructionist Research* (Guilford Press, 2008) 627, 629.

¹⁶⁴ Daiute (n 1) 8.

¹⁶⁵ Ibid 9.

¹⁶⁶ Marco Gemignani, 'The Past if Past: The Use of Memories and Self-Healing Narratives in Refugees from the Former Yugoslavia' (2011) 24(1) *Journal of Refugee Studies* 132, 142.

¹⁶⁷ Ibid 145.

¹⁶⁸ Ibid 145.

¹⁶⁹ Liisa Malkki, *Purity and Exile: Violence, Memory, and National Cosmology Among Hutu Refugees in Tanzania* (University of Chicago Press, 1995) 153, 233–4.

¹⁷⁰ Ibid 53.

¹⁷¹ Ibid 233.

¹⁷² Ibid 97.

¹⁷³ Ibid 59.

¹⁷⁴ Ibid 233.

putative refugees. The UNHCR suggests that in judging the appropriateness of an internal protection alternative, ‘past persecution and its psychological effects’ must be taken into account.¹⁷⁵ Mathew argues that ‘it should be accepted that a putative refugee has the right to special consideration with respect to human rights violations ... because of the fact that she has already been displaced by persecution’.¹⁷⁶

Further, there is also consideration of the healing dimensions of refuge in situations where refugee status may have ceased,¹⁷⁷ but where there are ‘compelling reasons’¹⁷⁸ against returning a refugee to their country of origin due to previous experiences of persecution. Some of the Refugee Convention’s drafters were of the view that states need to ‘take particular account of the psychological hardship that might be faced by the victims of persecution were they returned to the country responsible for their maltreatment’.¹⁷⁹ While there is debate about whether the compelling reasons exception to cessation of refugee status still applies,¹⁸⁰ some jurisdictions have chosen to adopt it.¹⁸¹ The UNHCR’s view is that the compelling reasons exception should apply to those who ‘have suffered grave persecution, including at the hands of elements of the local population’ and, in particular, children’s experiences of persecution should be given special consideration.¹⁸²

¹⁷⁵ UNHCR, *Guidelines on International Protection No 4: ‘Internal Flight or Relocation Alternative’ Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/03/04 (23 July 2003) [25] (*‘Guidelines on International Protection No 4’*).

¹⁷⁶ Mathew (n 51) 204.

¹⁷⁷ Article 1C(5) of the Refugee Convention (n 11) provides that the ‘Convention shall cease to apply to any person under the terms of Section A if he [or she] can no longer, because the circumstances in connection with which he [or she] has been recognised as a refugee have ceased to exist, continue to refuse to avail himself [or herself] of the protection of the country of his [or her] nationality’.

¹⁷⁸ Refugee Convention (n 11) art 1C(5).

¹⁷⁹ Hathaway and Foster, *The Law of Refugee Status* (n 50) 493–4.

¹⁸⁰ Hathaway and Foster explain that the compelling reasons consideration only applies to those who were given refugee status pursuant to prior agreements: Hathaway and Foster, *The Law of Refugee Status* (n 50) 490. This was ‘an explicit compromise between the majority of the drafters who favoured a purely objective test of risk for the continuation of refugee status and the minority that wished to allow refugees from the Holocaust to retain their status despite changed circumstances’: Hathaway and Foster (n 50) 490. Hathaway and Foster (n 50) also argue that there is no customary obligation to apply the compelling reasons exception to contemporary refugees: at 491. However, Goodwin-Gill and McAdam argue that the compelling reasons exception can apply to contemporary refugees: Goodwin-Gill and McAdam (n 99) 148–9.

¹⁸¹ See, eg, *Immigration and Refugee Protection Act*, SC 2001 (Canada), c 27 s108; *Asylverfahrensgesetz, AsylVfG* [Asylum Procedure Act] (Germany) 27 July 1993, FLG I, 1993, 1361, s 73(1); *Directive 2011/95/EU of the European Parliament and of the Council of 13 December on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* [2011] OJ L 337/9-337/26, art 11(3) cited in Hathaway and Foster, *The Law of Refugee Status* (n 50) 492.

¹⁸² UNHCR, *Guidelines on International Protection No 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the ‘Ceased Circumstances’ Clauses)*, UN Doc HCR/GIP/03/03 (10 February 2003) [20].

Drawing on the above material, I suggest that refuge has a palliative function. Hathaway also contends that refugee protection is palliative; by this he is referring to the provision of surrogate state protection¹⁸³ and the fact that refugee protection is apolitical.¹⁸⁴ I am using palliative in a different and more literal sense—one of the aims of refuge is to provide a space in which refugees can heal from or address past trauma.

V WHAT IS THE NATURE OF REFUGE?

Hathaway posits that the refugee regime ‘establishes a situation-specific human rights remedy’.¹⁸⁵ However, the term ‘remedy’ is used in a variety of different contexts and does not have a single, settled meaning.¹⁸⁶ Remedies scholars highlight that it can refer to a procedure, the assertion of a right, insistence on performance of a duty, relief sought or outcome given.¹⁸⁷ With respect to refugee and forced migration scholarship, we can similarly see that refuge as a remedy is characterised in a variety of ways and I outline these below. The purpose of this discussion is to provide a starting point for investigating the ways decision-makers understand the nature of refuge.

One meaning of the term ‘remedy’ is the way in which the law addresses a problem or injustice.¹⁸⁸ Hathaway uses the term in this sense when he describes the rights in the Refugee Convention as a human rights remedy. He explains that the Refugee Convention provides a ‘deliberate and coherent system of rights’ specifically designed to address the predicament of refugeehood.¹⁸⁹ Similarly, McAdam stresses that the rights in the Refugee Convention are specially ‘tailored to the precarious legal position of non-citizens whose own country of origin is unable or unwilling to protect them’.¹⁹⁰ The idea of surrogate or substitute state protection, endemic in legal understandings of refugee protection,¹⁹¹ is also a characterisation of refuge as a response

¹⁸³ Hathaway, *The Rights of Refugees* (n 43) 5; James Hathaway, ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4(2) *Journal of Refugee Studies* 113, 117 (‘Reconceiving Refugee Law’).

¹⁸⁴ Hathaway, ‘Reconceiving Refugee Law’ (n 183) 117.

¹⁸⁵ Hathaway, *The Rights of Refugees* (n 43) 1000. See also Hathaway, ‘Forced Migration Studies’ (n 106) 353.

¹⁸⁶ Peter Birks, ‘Personal Property: Proprietary Rights and Remedies’ (2000) 11(1) *Kings College Law Journal* 1; Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 7.

¹⁸⁷ For example, Birks highlights that there are three stages involved in realising a right or cause of action (the assertion of the right, the court order that realises the right and the enforcement of the order) and each one can legitimately be described as a remedy: Birks (n 186) 3. Zakrzewski explains that the word remedy is used to describe a procedural mechanism for dispute resolution, a court order or the nature of relief a litigant is seeking: Zakrzewski (n 186) 7.

¹⁸⁸ *Attorney General v Blake* [2001] AC 268, 284 (Lord Nicholls).

¹⁸⁹ Hathaway, *The Rights of Refugees* (n 43) 4.

¹⁹⁰ McAdam (n 44) 5–6.

¹⁹¹ Goodwin-Gill and McAdam (n 99) 10; Hathaway, *The Rights of Refugees* (n 43) 5; McAdam (n 44) 199. Courts have also adopted this language. See, eg, *Attorney General v Ward* [1993] 2 SCR 689, 692; *Horvath v SSHD*

to a wrong. Surrogate protection requires host countries to provide ‘the protection which the refugee’s own state, by definition, cannot or will not provide’.¹⁹² In essence, it gives refugees the status and political membership they have lost.¹⁹³ Harvey argues that the provision of surrogate state protection is necessary to insert refugees back into the nation-state system.¹⁹⁴ Thus, refuge as a legal remedy is not a ‘radical departure from statist logic or a direct challenge to it’, but, rather, ‘sketches a story of human displacement that neatly aligns with seeing the world like a state’.¹⁹⁵

Another way in which scholars characterise the remedial nature of refuge is as the provision of legal status.¹⁹⁶ Harvey explains that refugee law is distinct from other areas of human rights law, because of the ‘centrality it attaches to a legally endorsed status’.¹⁹⁷ Whereas human rights are founded on the belief in the ‘inherent dignity and of the equal and inalienable rights of all members of the human family’,¹⁹⁸ the provision of a legal status for refugees is a reminder that rights are often only realised through citizenship.¹⁹⁹ Thus, refugee status is the ‘internationalized vehicle for carrying elements of the ghostly substance of citizenship elsewhere (until normality is restored, wherever that may be)’.²⁰⁰ McAdam also stresses that it is through the provision of legal status that refuge is realisable.²⁰¹ Scholarship on refugees’ perspectives on refuge also indicate the importance of legal status. For example, in Odhiambo-Abuya’s study of refugees in Kenya, one of her interviewees states, ‘[i]t is better if you have status; status is everything. Without status you have nothing ... With status, it is good. You can move freely with confidence and even go to school’.²⁰²

[2000] 3 All ER 577, 583. However, see Goodwin-Gill and McAdam (n 99) 10 for a critical discussion of the ways courts have used the notion of surrogate protection.

¹⁹² Goodwin-Gill and McAdam (n 99) 10.

¹⁹³ Harvey (n 73) 88.

¹⁹⁴ Ibid 88.

¹⁹⁵ Ibid 73.

¹⁹⁶ Goodwin-Gill and McAdam (n 99) 456; Grahl-Madsen (n 4); Harvey (n 73) 74; Hathaway and Foster, *The Law of Refugee Status* (n 50) 17; McAdam (n 44) 1, 198; Felix Schnyder, Foreword in Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume 1* (AW Sijthoff-Leyden, 1966).

¹⁹⁷ Harvey (n 73) 72.

¹⁹⁸ UDHR (n 121) preamble.

¹⁹⁹ Harvey (n 73) 72.

²⁰⁰ Ibid 88.

²⁰¹ McAdam (n 44) 456.

²⁰² Edwin Odhiambo-Abuya, ‘United Nations High Commissioner for Refugees and Status Determination Imta-xaan in Kenya: An Empirical Survey’ (2004) 48(2) *Journal of African Law* 187, 196. See also Joëlle Moret, Simone Baglioni and Denise Efonayi-Mäder, ‘The Path of Somali Refugees into Exile: A Comparative Analysis of Secondary Movements and Policy Responses’ (Paper No 46, Swiss Forum for Migration and Population Studies, 2006) 9.

The remedial nature of refuge can also be characterised as a right, duty or responsibility. Asylum or refuge has traditionally been conceived as a right of states to grant, but whether it is a right of individuals ‘remains one of the most controversial matters in refugee studies’.²⁰³ While the *Universal Declaration of Human Rights*²⁰⁴ only provides a right to *seek* asylum,²⁰⁵ Moreno-Lax argues that, at least in the European context, refugees have a right to access international protection.²⁰⁶ Gil-Bazo’s analysis of asylum as a general principle of international law indicates that ‘the right to asylum is enshrined in most constitutions of countries across different legal traditions’.²⁰⁷ She suggests that ‘the long historical tradition of asylum as an expression of sovereignty has now been coupled with a right of individuals to be granted asylum of constitutional rank’.²⁰⁸ More generally, Edwards characterises asylum as a *right* to be enjoyed.²⁰⁹ Perhaps describing the other side of the coin, Betts and Collier describe refuge as a duty to rescue.²¹⁰ Durieux insists that admission of refugees is ‘a positive duty’.²¹¹ Mathew and Harley speak of ‘taking responsibility for refugees’²¹² and, specifically, the ‘responsibility of states to protect refugees’.²¹³ Providing a historical and cultural perspective, Rabben highlights that in some contexts, offering refuge is understood to be a religious duty.²¹⁴ She refers to Stowe’s *Uncle Tom’s Cabin*, in which the character Mary justifies harbouring a runaway slave to her husband on religious grounds: ‘Now, John, I don’t know anything about politics, but I can read my Bible; and there I see that I must feed the hungry, clothe the naked, and comfort the desolate; and that Bible I mean to follow’.²¹⁵

There is also a sense that refuge should be a shared duty or responsibility. There is a large literature on ideas of global solidarity and international cooperation in delivering refugee protection.²¹⁶ For example, Hathaway and Neve describe refugee protection as a ‘human rights

²⁰³ Gil-Bazo (n 25) 10.

²⁰⁴ UDHR (n 121).

²⁰⁵ Ibid art 14(1).

²⁰⁶ Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press, 2017) ch 9.

²⁰⁷ Gil-Bazo (n 25) 23.

²⁰⁸ Ibid 28.

²⁰⁹ Edwards, ‘Human Rights’ (n 121).

²¹⁰ Betts and Collier (n 1) 97.

²¹¹ Durieux (n 62) 155.

²¹² Mathew and Harley (n 4) 70.

²¹³ Ibid 67.

²¹⁴ Rabben (n 1) ch 5.

²¹⁵ Harriet Stowe, *Uncle Tom’s Cabin* (John P Jewett and Company, 1852) quoted in Rabben (n 1) 94.

²¹⁶ See, eg, Rebecca Dowd and Jane McAdam, ‘International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How?’ (2017) 66(4) *International and Comparative Law Quarterly* 863; Alice Edwards, ‘A Numbers Game: Counting Refugees and International Burden-Sharing’ (2013) 32(1) *University of Tasmania Law Review* 1; JPL Fonteyne, ‘Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx and Refugees’ (1980) 8 *Australian Yearbook of International Law* 16; Agnès Hurwitz,

remedy' that states have 'a shared commitment ... to provide'.²¹⁷ They advocate for common but differentiated duties (for example, wealthier countries providing aid to states hosting large numbers of refugees).²¹⁸ Mathew and Harley investigate the potential for regional responses to give rise to responsibility sharing among states.²¹⁹ Kritzman-Amir suggests that the prime consideration in determining responsibility for a refugee or group of refugees is a state's 'absorption capacity', which is its 'ability to endure additional responsibility in a way that, from a functionality point of view, will not dramatically affect the State or will not radically influence its economy'.²²⁰ Applying this criterion would mean that countries such as Australia and Canada should be responsible for a large portion of the world's refugees.²²¹

In anthropological scholarship, refuge is often characterised as a process. As part of her ethnographic study of Somali refugees resettled in the United States, Besteman argues that refuge is not bestowed, but gradually made through efforts of both refugees and the host society.²²² Ramsay's observations of refugees resettled in Australia also leads her to characterise refuge as a journey that involves actions on behalf of refugees and the wider community.²²³ Both scholars caution against understanding refuge as a goal or end point. Besteman seeks to 'challenge the conception of refuge as relief or resolution, the end of the journey'.²²⁴ Ramsay explains that 'when refuge is taken to be a process rather than a distinct "solution," it becomes a possibility'.²²⁵

VI SCOPE OF REFUGE

The scope of refuge is understood to be broad, but indeterminate, and context specific. In particular, its content varies depending on factors such as age, gender, sexuality and disability as well as the host state's circumstances and the length of time the refugee is in the host state.

The Collective Responsibility of States to Protect Refugees (Oxford University Press, 2009); Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press, 1996); Gregor Noll, 'Risky Games? A Theoretical Approach to Burden Sharing in the Asylum Field' (2003) 16(3) *Journal of Refugee Studies* 236; Phil Orchard, *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge University Press, 2014); Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' (2016) 4(3) *Journal on Migration and Human Security* 45.

²¹⁷ James Hathaway and Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115, 117.

²¹⁸ Ibid 118. See also James Hathaway, 'Why Refugee Law Still Matters' (2007) 8(1) *Melbourne Journal of International Law* 89. For a critical assessment, see Noll, 'Why Refugees Still Matter' (n 53).

²¹⁹ Mathew and Harley (n 4) ch 3.

²²⁰ Kritzman-Amir (n 60) 372.

²²¹ Ibid 372–3.

²²² Besteman, *Making Refuge* (n 1).

²²³ Ramsay (n 1) 157.

²²⁴ Besteman, 'Refuge Fragments' (n 1) 426.

²²⁵ Ramsay (n 1) 207.

Below, I outline scholars' and the UNHCR's ideas about the contours of refuge and throughout the case studies I use these to guide my assessment of decision-makers' approaches to what refuge encompasses.

A Scope of Refuge for Convention Refugees

Anthropological studies of what refugees are searching for in exile indicate that personal safety is only one motivating factor.²²⁶ They also want socio-economic security,²²⁷ education and work prospects,²²⁸ freedoms and tolerance,²²⁹ homes and stability,²³⁰ the ability to build a family,²³¹ and a sense of community.²³² They are not only escaping serious harm, but are trying to recreate a feeling of 'wholeness'.²³³ Similarly, Betts and Collier explain that, '[e]xternal provision of food, clothing, and shelter is absolutely essential in the aftermath of having to run for your life. But over time, if it is provided as a substitute for access to jobs, education, and other opportunities, humanitarian aid soon undermines human dignity and autonomy'.²³⁴

Legal scholarship on the content of refugee protection maps onto these studies of refugees' wants and needs. The Refugee Convention provides rights to, for example, education,²³⁵ work,²³⁶ welfare²³⁷ and housing,²³⁸ and scholars highlight that these rights are framed in a way specifically moulded to respond to refugees' predicaments.²³⁹ Nevertheless, the Refugee Con-

²²⁶ See, eg, Zimmermann (n 1) 74.

²²⁷ Moret, Baglioni and Efonayi-Mäder (n 202) 10.

²²⁸ Katrine Bang Nielsen, 'Next Stop Britain: The Influence of Transnational Networks on the Secondary Movement of Danish Somalis' (Working Paper No 22, Sussex Centre for Migration Research, 2004) 10; Zimmermann (n 1) 88.

²²⁹ Besteman, *Making Refuge* (n 1) 30; Nielsen (n 228) 10.

²³⁰ Nadya Hajj, *Protection amid Chaos: The Creation of Property Rights in Palestinian Refugee Camps* (Columbia University Press, 2016); Zimmermann (n 1) 88.

²³¹ Inhorn (n 133) ch 3; Ramsay (n 1) 157–9.

²³² Ramsay (n 1) 207.

²³³ Besteman, 'Refuge Fragments' (n 1) 426.

²³⁴ Betts and Collier (n 1) 136.

²³⁵ Refugee Convention (n 11) art 22.

²³⁶ *Ibid* arts 17, 18, 19, 24.

²³⁷ *Ibid* art 23.

²³⁸ *Ibid* art 21.

²³⁹ Hathaway highlights that many of the special protections in the Refugee Convention (n 11) are not reflected in subsequent human rights instruments, such as 'recognition of personal status, access to naturalization, immunity from penalization for illegal entry, the need for travel and other identity documents, and especially protection from *refoulement*': Hathaway, *The Rights of Refugees* (n 43) 121. Also, the socio-economic rights in the Refugee Convention (n 11), unlike most of the rights in the ICESCR (n 42), are not to be progressively realised but are immediately enforceable: James Hathaway, 'Refugees and Asylum' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 177, 188–90. Art 2(1) of the ICESCR (n 42) states: 'Each State Party to the present Covenant undertakes to take steps,

vention is not the only source of refugee rights and is inadequate on its own. McAdam highlights that ‘the conceptualization of protection [the Refugee Convention] embodies has necessarily been extended by developments in human rights law’.²⁴⁰ Scholars and the UNHCR invoke rights in subsequent human rights treaties to articulate a comprehensive protection regime for refugees. For example, Hathaway argues that rights to physical security in the ICCPR can be imported to address gaps in the Refugee Convention.²⁴¹ Additionally, there is no positive right to family unity in the Refugee Convention, but both Hathaway and Edwards highlight that refugees can claim rights to family unity under the ICCPR, ICESCR and *Convention on the Rights of the Child* (‘CRC’).²⁴²

There is also a well-developed understanding that certain refugees have particular protection risks and needs and the scope of refuge needs to be flexible and accommodate this. There are many UNHCR publications and studies on the protection risks for women in refugee camps and other protection settings.²⁴³ There are also discussions of refugee children’s special protection needs and studies on the protections provided to child refugees through the CRC and other human rights instruments.²⁴⁴ The UNHCR’s Executive Committee calls on states to improve

individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’. However, some rights have immediate effect. For example, the duty to take steps in art 2(1) of the ICESCR (n 42) has immediate effect as is the duty in art 2(2) to undertake to guarantee that the rights will be exercised without discrimination. McAdam highlights that the Refugee Convention’s (n 11) ‘provision of identity and travel documents does not have a parallel in general human rights law’: McAdam (n 44) 203.

²⁴⁰ McAdam (n 44) 5.

²⁴¹ Hathaway, *The Rights of Refugees* (n 43) 448–50.

²⁴² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’). Hathaway makes reference to family rights in articles 17, 23(1)–(2) and 24 of the ICCPR (n 41) and article 10 of ICESCR (n 42): Hathaway, *The Rights of Refugees* (n 43) 540–60. Edwards adds articles 10 and 22 of the CRC: Alice Edwards, ‘Human Rights’ (n 121) 311.

²⁴³ See, eg, Beyani (n 45); Dale Buscher, ‘Refugee Women: Twenty Years On’ (2010) 29(2) *Refugee Survey Quarterly* 4; Freedman, ‘Protecting Women Asylum Seekers’ (n 45); Jane Freedman, ‘Mainstreaming Gender in Refugee Protection’ (2010) 23(4) *Cambridge Review of International Affairs* 589; Susan Martin, ‘Refugee and Displaced Women: 60 Years of Progress and Setbacks’ (2011) 3(2) *Amsterdam Law Forum* 72; Helene Moussa, ‘Violence Against Refugee Women: Gender Oppression, Canadian Policy and the International Struggle for Human Rights’ (1998) 26(3/4) *Resources for Feminist Research* 79; Schmiechen (n 45); UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (1st ed, January 2008) <<http://www.unhcr.org/47cfa9fe2.pdf>>; UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* (May 2003).

²⁴⁴ See, eg, Bierwirth (n 46); Candappa (n 46); Crock, ‘Justice for the Migrant Child’ (n 46) 221; Crock, ‘Of Relative Rights’ (n 46) 263; Guy Goodwin-Gill, ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’ in Jaap Doek, Hans van Loon and Paul Vlaardingerbroek (eds), *Children on the Move: How to Implement Their Right to Family Life* (Martinus Nijhoff Publishers, 1996) 97; Kate Halvorsen, ‘Alone and Far From Home: Are Separated Refugee Children Adequately Protected?’ (2005) 7(1) *Human Rights Review* 76; Kaime (n 46); McCallin (n 46); Ben Saul, ‘Indefinite Security Detention and Refugee Children and Families in Australia International Human Rights Law Dimensions’ (2013) 20 *Australian International Law Journal* 55; Smyth (n 46).

existing protection programs by taking women, children and elderly refugees' distinctive needs into account.²⁴⁵ The UNHCR and scholars also consider the risks faced by refugees with disabilities and the interrelationship between the Refugee Convention and the *Convention of the Rights of Persons with Disabilities* ('CRPD')²⁴⁶ in addressing their protection needs.²⁴⁷ In particular, Crock et al highlight the importance of healthcare and rehabilitation services for refugees with disabilities.²⁴⁸ There have also been examinations of the particular risks for lesbian, gay, bisexual, transgender, queer and intersex refugees and the protections that may be provided to them by refugee and international law.²⁴⁹

The scope of refuge for Convention refugees reflects ideas of the temporality of refuge. With respect to refugees being able to build a future, there is agreement that refuge must include rights of solution (ways refugees can 'respond to their predicament').²⁵⁰ However, there is debate about what these rights are. The UNHCR's three durable solutions are voluntary repatriation (where a refugee chooses to return to their country of origin and can do so safely and with dignity), local integration (the refugee remains in the host country and goes through process of legal, economic and social integration) and resettlement (a refugee is transferred from their current place of refuge to a third country and usually granted permanent residency).²⁵¹ Based on the provisions of the Refugee Convention, Hathaway argues that the rights to solution are

²⁴⁵ UNHCR, *Executive Committee Conclusion No 93* (n 73) (b)(iii).

²⁴⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

²⁴⁷ Crock et al (n 47); UNHCR Executive Committee, Standing Committee, *The Protection of Older Persons and Persons with Disabilities*, UN Doc EC/58/SC/CRP.14 (6 June 2007); UNHCR Executive Committee, *Conclusion No 110 (LXI)*, UN Doc A/AC.96/1095 (12 October 2010); UNHCR, *Resettlement Assessment Tool: Refugees with Disabilities* (April 2013); CRPD (n 246); *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 69/88, UN GAOR, 69th sess, Agenda Item 50, UN Doc A/Res/69/88 (16 December 2014) [14].

²⁴⁸ Crock et al (n 47) 201–7.

²⁴⁹ Volker Türk, 'Ensuring Protection to LGBTI Persons of Concern' (2013) 25(1) *International Journal of Refugee Law* 120; UNHCR, *The Protection of Lesbian, Gay, Bisexual, and Intersex Asylum-Seekers and Refugees* (22 September 2010) <<http://www.refworld.org/pdfid/4cff9a8f2.pdf>>; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, and Intersex Asylum-Seekers and Refugees* (December 2015) <<http://www.refworld.org/docid/566140454.html>>.

²⁵⁰ James Hathaway, 'Refugee Solutions, or Solutions to Refugeehood?' (2007) 24(2) *Refugee* 3, 4.

²⁵¹ UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003) [12]. The UNHCR is mandated to seek 'permanent solutions for the problem of refugees': UNHCR Statute (n 152) 1. In implementing these durable solutions, the UNHCR and states have been criticised for prioritising their own interests over refugees' rights and wishes: Michael Barutciski, 'Involuntary Repatriation when Refugee Protection is no Longer Necessary: Moving Forward after the 48th Session of the Executive Committee' (1998) 10(1/2) *International Journal of Refugee Law* 236; BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) *Refugee Survey Quarterly* 55; Hathaway, *The Rights of Refugees* (n 43) ch 7; Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Nijhoff, 1997). For critical evaluations of UNHCR's approach to durable solutions, see Hathaway, *The Rights of Refugees* (n 43) ch 7.

voluntary re-establishment in the country of origin,²⁵² voluntary repatriation after a fundamental change of circumstances in the country of origin,²⁵³ resettlement²⁵⁴ and naturalisation.²⁵⁵ Perhaps less well developed in legal scholarship is how the content of refuge may enable refugees to address their past. Nevertheless, there is some acknowledgement that refuge must encompass healing from trauma. For example, article 25 of the European Union's Directive on the *Standards for the Reception of Applicants for International Protection*²⁵⁶ specifies, '[m]ember States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care'. A similar sentiment is reflected in the *Convention Governing the Specific Aspects of the Refugee Problems in Africa*'s²⁵⁷ preamble, which notes that the signatory states are 'desirous of finding ways and means of alleviating [refugees'] misery and suffering'.

While refuge is understood to address a wide range of refugees' needs and includes a broad sweep of rights, there is also recognition that the content of refuge must correspond with the host country's circumstances and length of time the refugee remains there. Comparing the content of refuge to the duty to rescue a drowning child, Betts and Collier argue that the extent of any additional obligations 'depends on what it is feasible for us to do'.²⁵⁸ They posit that host states should 'restore ... basic features of normal life' such as a home, employment and community to the extent they are able to.²⁵⁹ Gibney acknowledges that there are 'limits [on] what one can reasonably demand of states in their response to refugees and asylum-seekers'.²⁶⁰ He suggests that states may, in some situations and on a case-by-case basis, curtail certain refugee rights if in doing so they will 'preserve the integrity of asylum or ... increase the number of refugees who receive protection'.²⁶¹ The Refugee Convention has a complex method of determining the content of refuge with respect to host states' resources and the strength of the refugee's bond with the host state. There are only a few absolute rights in the Refugee Convention;

²⁵² Hathaway, *The Rights of Refugees* (n 43) 918.

²⁵³ *Ibid* 953-4.

²⁵⁴ *Ibid* 963.

²⁵⁵ *Ibid* 977.

²⁵⁶ *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)* [2013] OJ L 180/96-105/32.

²⁵⁷ Organization of African Unity, *Convention Governing the Specific Aspects of the Refugee Problems in Africa*, adopted 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

²⁵⁸ Betts and Collier (n 1) 101.

²⁵⁹ *Ibid* 102.

²⁶⁰ Gibney, *The Ethics and Politics of Asylum* (n 57) 249.

²⁶¹ *Ibid* 252.

most are granted on the same terms as nationals, favoured non-citizens or other non-citizens generally in the same circumstances. Also, the rights refugees are entitled to increase the longer the refugee is in the host state. Hathaway provides a detailed analysis of how this rights regime operates.²⁶²

B Scope of Refuge for Palestinian Refugees

There is far less written on the content of refuge for Palestinian refugees, but there is an understanding that it is similarly broad. With respect to UNRWA's protection mandate, Bartholomeusz²⁶³ draws on United Nations General Assembly ('UNGA') resolutions to suggest that it covers the provision of 'basic subsistence support',²⁶⁴ food aid,²⁶⁵ healthcare,²⁶⁶ education²⁶⁷ and housing for Palestinians whose homes were demolished or razed by Israeli forces;²⁶⁸ improving 'the quality of life' for Palestinians living in camp environments²⁶⁹ and health conditions in camps (in particular safe water and sanitation systems);²⁷⁰ and addressing the needs of poor Palestinian refugees who do not have access to the banking sector.²⁷¹ While UNRWA's protection mandate is usually seen in terms of protection of economic and social rights, scholars highlight that it also extends to protection of civil and political rights such as physical security.²⁷² In particular, while UNRWA is not responsible for security and law and order in camp

²⁶² Hathaway, *The Rights of Refugees* (n 43).

²⁶³ Bartholomeusz (n 153).

²⁶⁴ Reference to basic subsistence support is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a United Nations General Assembly ('UNGA') resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [72]. UNGA's approval of the budget specifically mandates all activities contained in the budget: Bartholomeusz (n 153) 462.

²⁶⁵ Reference to food aid is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [79]. As noted above (n 264), UNGA's approval of the budget specifically mandates all activities contained in the budget.

²⁶⁶ United Nations Secretariat, *Secretary-General's Bulletin, Organization of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UN Doc ST/SGB/2000/6 (17 February 2000) note 1.

²⁶⁷ *Ibid.*

²⁶⁸ *Protection of Palestine Refugees*, GA Res 38/83A, UN GAOR, 38th sess, 98th plen mtg, Agenda Item 73, UN Doc A/Res/38/83 A (15 December 1983) (I)[6]; *Protection of Palestine Refugees*, GA Res 44/47A, UN GAOR, 44th sess, 78th plen mtg, Agenda Item 76, UN Doc A/Res/44/47A (8 December 1989) (I)[6].

²⁶⁹ Reference to improving the quality of life is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [90]. As noted above (n 264), UNGA's approval of the budget specifically mandates all activities contained in the budget.

²⁷⁰ Reference to improving health conditions in camps is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [67]. As noted above (n 264), UNGA's approval of the budget specifically mandates all activities contained in the budget.

²⁷¹ Reference to addressing the needs of poor refugees is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [79]. As noted above (n 264), UNGA's approval of the budget specifically mandates all activities contained in the budget.

²⁷² Bartholomeusz (n 153) 469; Takkenberg (n 48) 301.

settings,²⁷³ the UNGA has resolved that UNRWA ‘undertake effective measures to guarantee the safety and security and the legal and human rights of the Palestinian refugees in the occupied territories’.²⁷⁴ Scholars also discuss UNRWA’s human development mandate.²⁷⁵ UNGA resolutions confirm UNRWA’s role in the ‘provision of services for the well-being and human development of the Palestine refugees’.²⁷⁶ The UN defines human development as ‘a process of enlarging people’s choices’ which requires ‘political, economic and social freedom [and] opportunities for being creative and productive, and enjoying personal self-respect and guaranteed human rights’.²⁷⁷ As part of its human development mandate, UNRWA engages in provision of credit for enterprise and income-generating opportunities.²⁷⁸

Another important aspect of the scope of refuge for Palestinian refugees is the recognition that it differs according to factors such as gender, age and disability. Bartholomeusz²⁷⁹ highlights that UNRWA’s protection mandate extends to addressing the needs and rights of women and children in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’)²⁸⁰ and CRC.²⁸¹ The UNGA has extended UNRWA’s mandate to encompass the rights of Palestinian refugees with disabilities in line with the CRPD.²⁸²

These studies of the scope of refuge for Palestinian refugees reflect the temporal nature of refuge and, in particular, the idea that it must allow refugees to look towards the future. This is

²⁷³ The host country remains responsible for these issues. See UNRWA, *Frequently Asked Questions* <<http://www.unrwa.org/who-we-are/frequently-asked-questions>>.

²⁷⁴ *Special Identification Cards to All Palestine Refugees*, GA Res 37/120J, UN GAOR, 37th sess, 108th plen mtg, Agenda Item 65, UN Doc A/Res/37/120J (16 December 1982) [1].

²⁷⁵ Bartholomeusz (n 153) 452, 464; Takkenberg (n 48) 301.

²⁷⁶ See, eg, *Assistance to Palestine Refugees*, GA Res 63/91, UN GAOR, 63rd sess, 64th plen mtg, Agenda Item 29, UN Doc A/Res/63/91 (5 December 2008) [3]; *Assistance to Palestine Refugees*, GA Res 62/102, 62nd sess, 75th plen mtg, Agenda Item 32, UN Doc A/Res/62/102 (17 December 2007) [3]. UNRWA describes its mission as, ‘to help Palestinian refugees achieve their full potential in human development terms under the difficult circumstances in which they live’: UNRWA, *Report of the Commissioner-General* (n 117) [2].

²⁷⁷ UN Development Programme, *Human Development Report 1990* (Oxford University Press, 1990) 10.

²⁷⁸ Reference to credit provision is made in UNRWA’s 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General* (n 117) [82]. As noted above (n 264), UNGA’s approval of the budget specifically mandates all activities contained in the budget.

²⁷⁹ Bartholomeusz (n 153) 466.

²⁸⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

²⁸¹ *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 59/119, UN GAOR, 59th sess, 71st plen mtg, Agenda Item 75, UN Doc A/Res/59/119 (10 December 2004) [7]; *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 62/104, UN GAOR, 62nd sess, 75th plen mtg, Agenda Item 32, UN Doc A/Res/62/104 (17 December 2007) [8]; *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 63/93, UN GAOR, 63rd sess, 64th plen mtg, Agenda Item 29, UN Doc A/Res/63/93 (5 December 2008) [9].

²⁸² *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 69/88, UN GAOR, 69th sess, 64th plen mtg, Agenda Item 50, UN Doc A/Res/69/88 (16 December 2014).

evident in UNRWA's human development mandate, its mandate to provide education and business development opportunities and the recognition that Palestinian refugees are entitled to durable solutions.²⁸³

C Scope of Refuge for Putative Refugees and Internally Displaced Persons

With respect to putative refugees, there is debate about the appropriate way to discern the scope of refuge, but agreement that it must be much broader than negating the risk of persecution.²⁸⁴ Mathew argues that international human rights law should inform the question as to whether the putative refugee would have the requisite protection in the internal protection alternative.²⁸⁵ Hathaway and Foster contend that this approach may be 'over-inclusive' and 'unwieldy',²⁸⁶ and suggest that the scope of protection can be determined with reference to the rights outlined in Refugee Convention.²⁸⁷ This is also the position put forward in the Michigan Guidelines on the Internal Protection Alternative.²⁸⁸ Pursuant to these approaches, refuge includes the rights and protections necessary to rebuild lives²⁸⁹ including access to 'employment, public welfare, and education'.²⁹⁰ However, the UNHCR sets a narrower scope for what constitutes refuge in internal protection alternative cases: 'basic human rights standards, including in particular, non-derogable rights'.²⁹¹ The UNHCR elaborates that 'a person should not be expected to face economic destitution or existence below at least an adequate level of subsistence'²⁹² or 'live in conditions of severe hardship'.²⁹³

The putative refugees considered in this thesis are also prospective internally displaced persons ('IDPs').²⁹⁴ The international community has recognised that IDPs have specific protection

²⁸³ As noted above, Bartholomeusz and Takkenberg highlight that Palestinian refugees are entitled to durable solutions: Bartholomeusz (n 153) 469–73; Takkenberg (n 48) ch IX.

²⁸⁴ Hathaway and Foster, *The Law of Refugee Status* (n 50) 344–50; Michigan Guidelines on the IPA (n 50).

²⁸⁵ Mathew (n 51) 193–5.

²⁸⁶ Hathaway and Foster, *The Law of Refugee Status* (n 50) 354; James Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erica Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 406.

²⁸⁷ Hathaway and Foster, *The Law of Refugee Status* (n 50) 356.

²⁸⁸ Michigan Guidelines on the IPA (n 50).

²⁸⁹ Hathaway and Foster, *The Law of Refugee Status* (n 50) 356.

²⁹⁰ Michigan Guidelines on the IPA (n 50) [22].

²⁹¹ UNHCR, *Guidelines on International Protection No 4* (n 175) [28].

²⁹² *Ibid* [29].

²⁹³ *Ibid* [30].

²⁹⁴ IDPs are defined as, 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border': *Guiding Principles on Internal Displacement*, UN ESCOR, 54th sess, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998) ('Guiding Principles').

needs through the development of the *Guiding Principles on Internal Displacement* ('Guiding Principles').²⁹⁵ There is some support for reference to the Guiding Principles in international protection alternative cases.²⁹⁶ Additionally, in Africa there is the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* ('Kampala Convention').²⁹⁷ These two instruments indicate that the scope of refuge for IDPs is wide-ranging and differs depending on factors such as gender, age and disability. For example, the Guiding Principles confirm rights to life,²⁹⁸ liberty and security of person,²⁹⁹ freedom of movement,³⁰⁰ an adequate standard of living,³⁰¹ medical care³⁰² and education³⁰³ for IDPs during displacement. It also outlines rights specifically tailored to the situation of IDPs such the right to move freely in and out of camps³⁰⁴ and right to be free from forced return or resettlement.³⁰⁵ The Kampala Convention stresses that states have a number of obligations with respect to IDPs including preventing sexual and gender-based violence against IDPs³⁰⁶ and providing special protection to unaccompanied children, female heads of households, the elderly and persons with disabilities.³⁰⁷

The scope of refuge for IDPs also includes solutions to displacement.³⁰⁸ Section V of the Guiding Principles outlines solutions of return, resettlement and reintegration. There is no strong legal basis for IDPs being entitled to such rights,³⁰⁹ but, nevertheless, their inclusion in the Guiding Principles indicates that internal displacement should not be a permanent state of affairs. Rather, states and other actors have a responsibility to assist IDPs to voluntarily return to their homes or resettle permanently in another part of the country. The Kampala Convention

²⁹⁵ Ibid. The Guiding Principles, 'consolidate into one document the legal standards relevant to the internally displaced drawn from international human rights law, humanitarian law and refugee law by analogy': Francis Deng, 'Preface' in Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (Paper No 32, American Society of International Law Studies in Transnational Legal Policy, 2008) v.

²⁹⁶ Elizabeth Ferris, 'Internal Displacement and the Right to Seek Asylum' (2008) 27(3) *Refugee Survey Quarterly* 76, 88; Bríd Ní Ghráinne, 'The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?' (2015) 27(1) *International Journal of Refugee Law* 29, 37.

²⁹⁷ *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, opened for signature 23 October 2009 (entered into force 16 December 2012).

²⁹⁸ Guiding Principles (n 294) principle 10.

²⁹⁹ Ibid principle 12.

³⁰⁰ Ibid principle 14.

³⁰¹ Ibid principle 18.

³⁰² Ibid principle 19.

³⁰³ Ibid principle 23.

³⁰⁴ Ibid principle 14(2).

³⁰⁵ Ibid principle 15(d).

³⁰⁶ Kampala Convention (n 297) art 9(1)(d).

³⁰⁷ Ibid art 9(2)(c).

³⁰⁸ For a discussion of the right to return for IDPs, see Megan Bradley, 'Durable Solutions and the Right of Return for IDPs: Evolving Interpretations' (2018) 30(2) *International Journal of Refugee Law* 218.

³⁰⁹ Walter Kälin, 'Guiding Principles on Internal Displacement: Annotations' (Paper No 32, American Society of International Law Studies in Transnational Legal Policy, 2008) 69.

obliges states to ‘seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity’.³¹⁰ The inclusion of durable solutions in the Guiding Principles and the Kampala Convention reflects ideas of refuge’s temporality; in particular, that it must encompass hope for a different and better future.

Overall, scholarship and UN materials indicate that the scope of refuge for Convention refugees, Palestinian refugees, putative refugees and IDPs is broad, but cannot be definitively drawn. Writing in 1966, United Nations High Commissioner for Refugees Felix Schnyder explained that ‘the sum total of the rights, benefits and obligations due to refugees by virtue of rules of international law – cannot be reduced to a single, let alone simple, formula’.³¹¹ Schnyder was writing in relation to the different statuses granted to refugees from the Russian revolution and post-World War II refugees. However, his statement is perhaps even more accurate today with the entry into force of the ICCPR, ICESCR, regional refugee and human rights treaties and specialised international human rights instruments such as the CEDAW, CRC and CRPD, which all contain rights relevant to refugee protection and, for Palestinian refugees, UNRWA’s evolving mandate.

VII WHAT IS THE THRESHOLD FOR ADEQUATE REFUGE?

While refuge is understood to have a broad scope, one issue that has arisen is whether there is a minimum standard of refuge that can be considered sufficient. In this thesis, I examine where decision-makers set the bar for adequate refuge. The idea that there is a minimal threshold for adequate refuge is addressed in legal scholarship with respect to Convention refugees. Scholars argue that the rights in the Refugee Convention are not aspirational, but represent the minimum threshold of rights protection that a host country owes refugees in its jurisdiction or territory.³¹² Providing historical context, McAdam explains that the Refugee Convention’s drafters settled on a ‘middle course’ in the sense that the rights in the Refugee Convention are ‘beyond the

³¹⁰ Kampala Convention (n 297) art 11(1).

³¹¹ Schnyder (n 196).

³¹² *The Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* confirms that the Refugee Convention and its amending Protocol (n 11) provide the ‘minimum standards of treatment that apply to persons falling within its scope’: UNHCR, *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 (16 January 2002) preamble [2]. This position is also supported by Goodwin-Gill and McAdam who describe the Refugee Convention (n 11) as offering ‘the most basic guarantees’: Goodwin-Gill and McAdam (n 99) 506. Hathaway also emphasises that the rights in the Refugee Convention (n 11) are ‘the core minimum judged necessary’ because they ‘restore to refugees the basic ability to function within a new national community’: Hathaway, *The Rights of Refugees* (n 43) 107.

lowest common denominator’, but standards more favourable to refugees were avoided due to concerns that ‘fewer states would ratify it’.³¹³ By taking this approach, the drafters believed that the Refugee Convention would ‘give refugees a minimum number of advantages which would permit them to lead a tolerable life in the country of reception’.³¹⁴

In support of this position, the Michigan Guidelines on Protection Elsewhere³¹⁵ stipulate that a host state can only transfer a refugee to a third country³¹⁶ if, ‘in practice’, she or he will be treated in accordance with articles 2 to 34 of the Refugee Convention.³¹⁷ This position is premised on the principle that a state cannot ‘contract out’ of its international legal obligations.³¹⁸ Hathaway and Foster also argue that the requirements of the Refugee Convention must be met in the third country based on the relative standards in the Refugee Convention.³¹⁹ This position preserves refugee’s future focus, because many of the provisions in the Refugee Convention, such as the rights to work,³²⁰ education³²¹ and durable solutions,³²² enable refugees to imagine and plan the future directions of their lives.

The UNHCR’s understanding of effective protection has been inconsistent. Its 2003 conclusion states that effective protection requires ‘accession to and compliance with the 1951 Convention

³¹³ McAdam (n 44) 30.

³¹⁴ United Nations Economic and Social Council, *Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twenty-Second Meeting*, UN Doc E/AC.32/SR.22 (14 February 1950) comment of the Chairman [14].

³¹⁵ Fourth Colloquium on Challenges in Refugee Law, ‘The Michigan Guidelines on Protection Elsewhere’ (2007) 28(2) *Michigan Journal of International Law* 207.

³¹⁶ The Refugee Convention (n 11) neither explicitly condones or prohibits such transfers and, therefore, their legality cannot be excluded: Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) 28 *Michigan Journal of International Law* 223, 237 (‘Protection Elsewhere’). Therefore, the predominant view is that such transfers are lawful under the Refugee Convention (n 11) as long as the asylum seeker or refugee is protected: Michigan Guidelines on the IPA (n 50) [1]; UNHCR, *Summary Conclusions on the Concept of ‘Effective Protection’ in the Context of Secondary Movements of Refugees and Asylum Seekers (Lisbon Expert Roundtable, 9–10 December 2002)* (February 2003) [12] <<http://www.refworld.org/docid/3fe9981e4.html>> (‘*Summary Conclusions on the Concept of “Effective Protection”*’); UNHCR Executive Committee, *Conclusion No 85 (XLIX)*, UN Doc A/53/12/Add.1 (9 October 1998) [aa]; UNHCR, *UNHCR’s Position on a Harmonized Approach to Questions Concerning Host Third Countries* (1 December 1992) (‘*UNHCR’s Position on a Harmonized Approach*’). For an argument against the legality of such transfers under international law, see Violeta Moreno-Lax, ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’ in Guy Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff, 2015) 665.

³¹⁷ Michigan Guidelines on the IPA (n 50) [2], [8].

³¹⁸ Foster, ‘Protection Elsewhere’ (n 316) 268.

³¹⁹ Hathaway and Foster, *The Law of Refugee Status* (n 50) 47.

³²⁰ Refugee Convention (n 11) arts 17, 18, 19, 24.

³²¹ *Ibid* art 22.

³²² As discussed above, Hathaway argues that the Refugee Convention (n 11) provides for durable solutions—voluntary establishment in the country of origin, voluntary repatriation after a fundamental change of circumstances in the country of origin, resettlement and naturalisation: Hathaway, *The Rights of Refugees* (n 43) 918, 953–4, 963, 977.

and/or 1967 Protocol ... unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol'.³²³ However, in a 2004 statement on effective protection and 2013 guidance on refugee transfers the UNHCR does not specify that the third country must comply with the rights in the Refugee Convention.³²⁴ Stevens criticises the UNHCR's approach to effective protection because it does not contain all the rights in the Refugee Convention and 'suggests that a lesser form of protection exists, which, though imperfect, is, nonetheless, in some way permissible'.³²⁵

VIII THE REALITY OF REFUGE

While the scholarship on refuge projects ideas about what refuge should look like, studies of and testimonies about places of refuge provide a different picture. To highlight the disjunctures between refuge as a concept and place, I outline evidence about life in different sites of refuge and the ways states curtail refugees' ability to seek other places of sanctuary within and across borders. The scholarship on this issue is extensive and wide-ranging, so I focus only on the locales of refuge that arise in the case studies and expose the main concerns. This provides the background for the following chapters in which I explore the ways decision-makers respond to the incongruities between ideas and realities of refuge.

A Refuge in a Refugee Camp

Most of the world's refugees do not live in a camp setting,³²⁶ but in some regions (such as Africa and Asia) encampment is a common method of accommodating refugees.³²⁷ The UNHCR recognises that camps create and compound protection risks and are, at best, a 'compromise'.³²⁸ One of the manifest problems with encampment is that it significantly restricts refugees' freedom of movement, which can inhibit family reunification and limit access to vital services, education and employment.³²⁹ Studies of life in a refugee camp show that there are

³²³ UNHCR, *Summary Conclusions on the Concept of 'Effective Protection'* (n 316) [15(e)].

³²⁴ UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (May 2013) <<http://www.refworld.org/pdfid/51af82794.pdf>>; UNHCR, Statement by Ms Erika Feller (n 97).

³²⁵ Stevens (n 149) 248.

³²⁶ Guglielmo Verdirame and Jason Pobjoy, 'The End of Refugee Camps?' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 471, 471.

³²⁷ *Ibid* 471.

³²⁸ UNHCR, *UNHCR Policy on Alternatives to Camps*, UN Doc UNHCR/HCP/2014/9 (22 July 2014) 4.

³²⁹ Cathryn Costello, Yulia Ioffe and Teresa Büchsel, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (UNHCR Legal and protection Policy Series Paper No PPLA/2017/01, 2017); Hathaway, *The Rights of Refugees* (n 43) 696–701; Nicholas Maple, 'Rights at Risk: A Thematic Investigation into How States Restrict the Freedom of Movement of Refugees on the African Continent' (New Issues in Refugee Research No 281, UNHCR, 2016) 2; Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39(1) *Michigan Journal of International Law* 21, 116.

often threats to physical security³³⁰ (especially for female refugees),³³¹ lack of access to education and employment,³³² few healthcare services,³³³ and inadequate shelter, sanitation, food and water.³³⁴ Further, many refugees who live in camps are in what the UNHCR calls a protracted refugee situation—a ‘long-lasting and intractable state of limbo’ where refugees’ ‘lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile’.³³⁵ Betts and Collier explain that ‘if camp life endures for too long it may lead to long-term reliance upon aid, exacerbate vulnerability, and erode people’s capacities for independence’.³³⁶

States employ a variety of methods to confine refugees to camps.³³⁷ One of the main objectives is to segregate refugees from citizens and other residents in the host country through locating camps in remote border regions, requiring all refugees in their territory to reside there and heavily restricting the circumstances in which they can leave and travel to other areas.³³⁸ The prospect of life in a refugee camp and states’ powers to force refugees to reside in a camp arise in the cases I examine in Chapter Four.

³³⁰ Goodwin-Gill and McAdam (n 99) 472; Barbara Harrell-Bond, ‘Are Refugee Camps Good for Children?’ (New Issues in Refugee Research Working Paper No 29, UNHCR, 2000) 7; Barbara Harrell-Bond and Guglielmo Verdirame, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn Books, 2005); Arafat Jamal, ‘Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya’ (Report 2000/05, Evaluation and Policy Analysis Unit, UNHCR, 2000) 18; Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (Martinus Nijhoff Publishers, 2014); Merrill Smith, *Warehousing Refugees: A Denial of Rights, A Waste of Humanity* (US Committee for Refugees and Migrants, 2009) 41.

³³¹ Buscher (n 243) 16; Sharon Carlson, ‘Contesting and Reinforcing Patriarchy: An Analysis of Domestic Violence in the Dzaleka Refugee Camp’ (Working Paper No 23, Refugee Studies Centre, University of Oxford, 2005) 27–33; Goodwin-Gill and McAdam (n 99) 473; Amy Lewis, ‘Gender-Based Violence Among Refugee and Internally Displaced Women in Africa’ (2005–2006) 20 *Georgetown Immigration Law Journal* 269.

³³² Harrell-Bond (n 330) 8–9; Harrell-Bond and Verdirame (n 330) 215, 253–9; Jamal (n 330) 8, 21–2; Simon Turner, ‘Angry Young Men in Camps: Gender, Age and Class Relations Among Burundian Refugees in Tanzania’ (Working Paper No 9, UNHCR, New Issues in Refugee Research, June 1999).

³³³ Jamal (n 330) 21; Harrell-Bond and Verdirame (n 330) 241–52.

³³⁴ Harrell-Bond (n 330) 1; Harrell-Bond and Verdirame (n 330) 225–40; Jamal (n 330) 19–20.

³³⁵ UNHCR Executive Committee, *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14 (10 June 2004) [3].

³³⁶ Betts and Collier (n 1) 137.

³³⁷ For a discussion see Oliver Bakewell, ‘Encampment and Self-Settlement’ in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 127; Jeff Crisp, ‘Africa’s Refugees: Patterns, Problems and Policy Challenges’ (New Issues in Refugee Research No 28, UNHCR, 2000); Hathaway, *The Rights of Refugees* (n 43) 696–701; Gil Loescher and James Milner, ‘The Long Road Home: Protracted Refugee Situations in Africa’ (2006) 47(2) *Survival: Global Politics and Strategy* 153; Maple (n 329) ch 2.

³³⁸ Betts and Collier (n 1) 137.

B Refuge in the Global North

Each year, hundreds of thousands (and in some recent years over a million) people lodge applications for international protection in European countries.³³⁹ Europe as a place of refuge arises in the case studies in Chapters Three and Five. While there are a number of stories evidencing the generosity shown by some Europeans towards refugees,³⁴⁰ there are serious concerns about the conditions in which many live. A particular country of concern is Greece. The UNHCR describes the conditions for refugees in Greece as ‘dire’.³⁴¹ Reports on conditions in Greece expose blanket detention policies and significant restrictions on freedom of movement,³⁴² high levels of violence,³⁴³ lack of adequate sanitation,³⁴⁴ little or no access to healthcare,³⁴⁵ inadequate provision of food and water,³⁴⁶ overcrowded conditions,³⁴⁷ no services for pregnant

³³⁹ Applications for international protection from people outside the European Union started to rise in 2013 with 431,000 applications. In 2015 and 2016, there were approximately 1.3 million applications. These numbers dropped in 2017, which saw approximately 650,000 applications. See Eurostat, *Asylum Statistics* (2018) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Number_of_asylum_applicants:_drop_in_2017>.

³⁴⁰ For example, Passarlay writes that when he arrived in Greece, ‘a group of townspeople who had heard we had been brought ashore ... stood waiting with blankets and food’: Passarlay and Ghouri (n 77) 226. After an infamous shipwreck in October 2013 in which 366 asylum seekers died, the mayor of Sutera (a small town in Sicily, Italy) announced that the town would open its doors to refugees and each refugee that arrived was entrusted to a local family. See Patrick Browne, ‘How this Tiny Italian Town Opened its Homes to Refugees’, *The Local* (online at 15 February 2016) <<https://www.thelocal.it/20160212/how-this-small-italian-town-has-opened-its-homes-to-refugees>>; Lorenzo Tondo, ‘They are our Salvation: The Sicilian Town Revived by Refugees’, *The Guardian* (online at 19 March 2018) <<https://www.theguardian.com/world/2018/mar/19/sutera-italy-the-sicilian-town-revived-by-refugees>>.

³⁴¹ UNHCR, ‘Refugee Women and Children Face Heightened Risk of Sexual Violence amid Tensions and Overcrowding at Reception Facilities on Greek Islands’ (Press Briefing, 9 February 2018) <<http://www.unhcr.org/en-au/news/briefing/2018/2/5a7d67c4b/refugee-women-children-face-heightened-risk-sexual-violence-amid-tensions.html>> (‘Refugee Women and Children Face Heightened Risk’).

³⁴² Human Rights Watch, *Greece: Inhumane Conditions at Land Border* (27 July 2018) <https://www.hrw.org/news/2018/07/27/greece-inhumane-conditions-land-border?mc_cid=0e50786a23&mc_eid=677b225ed4> (‘Greece: Inhumane Conditions’); Human Rights Watch, *Greece: Asylum Seekers Locked Up* (14 April 2016) <<https://www.hrw.org/news/2016/04/14/greece-asylum-seekers-locked>> (‘Greece: Asylum Seekers’).

³⁴³ Amnesty International, *EU: Asylum-Seekers Must be Moved from Appalling Conditions* (14 December 2016) <<https://www.amnesty.org.au/eu-asylum-seekers-must-be-moved-from-appalling-conditions/>> (‘EU: Asylum-Seekers Must be Moved’); Human Rights Watch, *Greece: Inhumane Conditions* (n 342); UNHCR, ‘Refugee Women and Children Face Heightened Risk’ (n 341).

³⁴⁴ Amnesty International, *EU: Asylum-Seekers Must be Moved* (n 343); Human Rights Watch, *Greece: Inhumane Conditions* (n 342); Human Rights Watch, *Greece: Asylum Seekers* (n 342).

³⁴⁵ Human Rights Watch, *Greece: Inhumane Conditions* (n 342); Human Rights Watch, *Greece: Asylum Seekers* (n 342).

³⁴⁶ Human Rights Watch, *Greece: Asylum Seekers* (n 342).

³⁴⁷ Human Rights Watch, *Greece: Inhumane Conditions* (n 342); UNHCR, ‘Refugee Women and Children Face Heightened Risk’ (n 341).

women and new mothers³⁴⁸ or refugees with disabilities,³⁴⁹ and high levels of police abuse.³⁵⁰ In particular, there have been safety concerns for female refugees, with the UNHCR reporting that hundreds have experienced sexual assault.³⁵¹ Human Rights Watch has observed that refugees in Greece reported feeling ‘less than human’.³⁵² Amnesty International reports that conditions in some parts of Greece are so bad that many asylum seekers have ‘chosen to return “voluntarily” ... to escape the conditions in which they are held and the uncertainty over their fate’.³⁵³

Another country of concern that arises in the case studies in the thesis is Italy. Médecins Sans Frontières reports that many asylum seekers and refugees in Italy are socially marginalised³⁵⁴ and living in ‘inhumane conditions’ without access to food, water, shelter or healthcare.³⁵⁵ While the Italian government offers housing to some refugees, many are eventually forcibly evicted without provision of alternative accommodation.³⁵⁶ Studies of refugees’ integration in Italy indicate that the Italian government provides little support and refugees are left to their own resources.³⁵⁷ The UNHCR has claimed that in many Italian cities, refugees are ‘deprived of the dignity that the right to asylum should return them’.³⁵⁸

The refugee settlement in Calais, France known as the ‘Jungle’ is also a place that arises in protection from refugee decisions. A 2015 study indicates that refugees living in the Jungle have inadequate food, water, shelter and sanitation³⁵⁹ and are subject to violence and police abuse.³⁶⁰ In 2018, three UN Special Rapporteurs reported that asylum seekers and refugees are living in

³⁴⁸ Human Rights Watch, *Greece: Inhumane Conditions* (n 342); Human Rights Watch, *Greece: Asylum Seekers* (n 342).

³⁴⁹ Human Rights Watch, *Greece: Inhumane Conditions* (n 342); Human Rights Watch, *Greece: Asylum Seekers* (n 342).

³⁵⁰ Human Rights Watch, *Greece: Inhumane Conditions* (n 342).

³⁵¹ UNHCR, ‘Refugee Women and Children Face Heightened Risk’ (n 341).

³⁵² Human Rights Watch, *Greece: Inhumane Conditions* (n 342).

³⁵³ Amnesty International, *EU: Asylum-Seekers Must be Moved* (n 343).

³⁵⁴ Médecins Sans Frontières, *Informal Settlements: Social Marginality, Obstacles to Access to Healthcare and Basic Needs for Migrants, Asylum Seekers and Refugees* (2018) 6–7 <https://www.msf.org/sites/msf.org/files/out_of_sight_def.pdf>.

³⁵⁵ Ibid 14.

³⁵⁶ Ibid 10–11.

³⁵⁷ Maurizio Ambrosini, ‘Better Than Our Fears? Refugees in Italy: Between Rhetorics of Exclusion and Local Projects of Inclusion’ in Susanne Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014) 235, 241; Zimmermann (n 1) 90.

³⁵⁸ UNHCR, ‘Rechiedenti Asilo e Rifugiati Nel Mondo e in Italia’ on Caritas-migrantes, *Immigrazione Dossier Statistico 2012* (Idos, 2012) cited in Ambrosini (n 357) 242.

³⁵⁹ Surindar Dhesi, Arshad Isakjee and Thom Davies, *An Environmental Health Assessment of the New Migrant Camp in Calais* (2015) 1 <<https://www.birmingham.ac.uk/Documents/college-les/gees/research/calais-report-oct-2015.pdf>>.

³⁶⁰ Ibid 2.

inhumane and substandard conditions.³⁶¹ There have also been allegations of sexual abuse perpetrated against refugees (including children) by volunteers working in the refugee settlement.³⁶² While the French government officially closed the Jungle in October 2016,³⁶³ asylum seekers and refugees started re-entering the region in the months afterwards, and by 2018, up to 1,000 refugees were living in the Calais region.³⁶⁴

European Union member states seek to control refugees' movement through the Dublin Regulation,³⁶⁵ with one of its objectives being to prevent refugees moving between European Union countries.³⁶⁶ While some refugees have been able to resist the constraints the Dublin Regulation imposes,³⁶⁷ it precludes many asylum seekers and refugees from travelling within the European Union to find a safe place of refuge.³⁶⁸ The Dublin Regulation allocates responsibility between member states for hearing an asylum seeker's claim, but in practice it also 'determines in which Member State the refugee will have to make her home'.³⁶⁹ Further, the Dublin Regulation produces 'the most severe imbalances in the distribution of protection seekers'.³⁷⁰ This is because

³⁶¹ Office of the High Commissioner for Human Rights, 'France Urged by UN Experts to Take Effective Measures to Bring Water and Sanitation Services to Migrants' (Media Release, 4 April 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22917>>.

³⁶² May Bulman, 'Calais Jungle Volunteers Accused of "Sexually Exploiting" Camp's Refugees', *Independent* (online at 22 September 2016) <<https://www.independent.co.uk/news/world/europe/calais-jungle-volunteers-sex-refugees-allegations-facebook-care4calais-a7312066.html>>.

³⁶³ UNHCR, 'UNHCR: France Decision to Close Calais "Jungle" Camp Welcome; Proper Care in Next Steps Crucial' (Media Release, 14 October 2016) <<http://www.unhcr.org/en-au/news/briefing/2016/10/5800a2024/unhcr-france-decision-close-calais-jungle-camp-welcome-proper-care-next.html>> ('France Decision').

³⁶⁴ May Bulman, 'More Than a Thousand Refugees Suffer "Inhumane" Living Conditions in Calais and Dunkirk, Warns UN', *Independent* (online at 4 April 2018) <<https://www.independent.co.uk/news/world/europe/calais-refugees-living-conditions-france-dunkirk-un-warning-jungle-migrant-crisis-latest-a8288516.html>>; UNHCR, France Decision (n 363).

³⁶⁵ *Regulation (EC) No 604/2013 of the European Parliament and of the Council of 29 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* [2013] OJ L180/31-180/59. There is currently a proposal for its reform: European Commission, 'Proposal for a Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), COM (2016) 270 Final' (4 May 2016).

³⁶⁶ Vincent Chetail, 'Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System' (2016) 5 *European Journal of Human Rights* 584, 598; Susan Fratzke, 'Not Adding Up: The Fading Promise of Europe's Dublin System' (Report, Migration Policy Institute Europe, 2015) 1 <<https://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>>.

³⁶⁷ Martina Tazzioli, 'Containment through Mobility: Migrants' Spatial Disobediences and the Reshaping of Control through the Hotspot System' (2018) 44(16) *Journal of Ethnic and Migration Studies* 2764.

³⁶⁸ Jan-Paul Brekke and Grete Brochmann, 'Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation' (2015) 28(2) *Journal of Refugee Studies* 145.

³⁶⁹ Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) *Human Rights Law Review* 287, 314.

³⁷⁰ Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill, 2016) 101, 112. Note that there is debate about whether the Dublin Regulation results in southern border states having to take greater numbers of refugees: Fratzke (n 366) 9; Madeline Garlick, 'The Dublin System, Solidarity and Individual Rights' in Vincent Chetail, Philippe De Bruycker and

it is not designed to be a responsibility sharing mechanism. In determining the state that must hear and determine a person's claim for asylum, it does not take into account member states' varying capacities to provide protection and its very structure and design effectively allocates responsibility to border states.³⁷¹ This has resulted in some European Union member states that have limited capacity hosting disproportionate numbers of refugees.³⁷²

Another Global North country that is the subject of scrutiny in protection from refugee decisions is the United States. While there are numerous stories of refugees finding true sanctuary in the United States,³⁷³ for others the situation is bleaker. There are concerns about *refoulement* due to the United States taking stricter approaches to the refugee definition than other states.³⁷⁴ In 2018, United States Attorney-General Jeff Sessions announced that refugee protection would not be available to those who face a real risk of domestic violence in their country of nationality or habitual residence.³⁷⁵ Also, the United States practices immigration detention³⁷⁶ and some asylum seekers 'languish in detention for long periods of time'.³⁷⁷ Immigration detention functions akin to a prison, with detainees having little privacy and being subject to abuse by guards.³⁷⁸ Psychiatrists have found that asylum seekers in immigration detention in the United

Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill, 2016) 156, 165.

³⁷¹ Fratzke (n 366) 10; Garlick (n 370) 165–6. The Dublin Regulation determines the state that has responsibility for hearing an asylum seeker's application. The first factors to be considered are family unity and the best interests of children: Dublin Regulation (n 365) arts 8–11. If these criteria are not applicable, the responsible state will be the state that granted the asylum seeker residence or gave them permission to enter the European Union legally or, if not applicable, the state where the asylum seeker first entered the European Union: Dublin Regulation (n 365) arts 1, 12.

³⁷² Fratzke (n 366) 9; Garlick (n 370) 165.

³⁷³ Haines (n 138) 174.

³⁷⁴ For example, the United States excludes people who may have been involved in criminal acts from refugee status on grounds much broader than those outlined in article 1F of the Refugee Convention (n 11): Kate Ogg, 'Separating the Persecutors from the Persecuted: A Feminist and Comparative Examination of Exclusion from the Refugee Regime' (2014) 26(1) *International Journal of Refugee Law* 82, 85–7; Charlotte Simon, 'Change is Coming: Rethinking the Material Support Bar Following the Supreme Court's Holding in *Negusie v Holder*' (2010) 47 *Houston Law Review* 707. Also, the approach of United States courts to the test for particular social group present challenges for those basing a claim on gender-based violence: Deborah Anker, 'Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 46; Hathaway and Foster, *The Law of Refugee Status* (n 50) 439–42.

³⁷⁵ Katie Benner and Caitlin Dickerson, 'Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum', *New York Times* (online at 11 June 2018) <<https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>>. It is accepted in other jurisdictions and by leading refugee law scholars that domestic violence can be the basis of a claim for refugee protection: *Islam v Secretary of State for the Home Department*; *R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; Goodwin-Gill and McAdam (n 99) 81; Hathaway and Foster, *The Law of Refugee Status* (n 50) 226–7.

³⁷⁶ Daniel Hartoum, 'America's Modern Day Internment Camps: The Law of War and Refugees of Central America's Drug Conflict' (2015) 21(1) *Texas Journal on Civil Liberties & Civil Rights* 61, 65.

³⁷⁷ *Ibid* 66.

³⁷⁸ *Ibid* 67–8.

States have exceptionally high rates of anxiety, depression and suicidal ideation.³⁷⁹ For refugees who live in the community, many exist near or below the poverty line³⁸⁰ and are subject to discrimination,³⁸¹ which affects their access to housing, education and healthcare.³⁸² While some United States citizens also face these dilemmas, refugees experience them differently and more acutely.³⁸³ For instance, while government agencies encourage refugees to be self-sufficient, refugees are not provided with adequate and appropriate assistance to gain employment.³⁸⁴ Besteman explains that government support is ‘provided for only a few months, and only limited support is available for English language classes, job skills programs, or mental health support for managing trauma or [post-traumatic stress disorder]’.³⁸⁵

Many refugees who believe that they do not have proper protection in the United States cross the border to Canada.³⁸⁶ However, Canada and the United States have entered into an agreement pursuant to which an asylum seeker trying to cross from one country to the other via the land border can be summarily turned back, subject to some exceptions.³⁸⁷ A refugee living in the United States who wanted to find refuge in Canada was one of the plaintiffs who challenged this agreement in the Canadian Federal Court (discussed in Chapter Five).

C Refuge in Remote Islands

Australia sends people seeking international protection to Nauru and Manus Island, Papua New Guinea, pursuant to separate agreements with both nations. There has been scathing criticism of the conditions that asylum seekers and refugees are subject to in these countries.³⁸⁸ Most of

³⁷⁹ Katy Robjant, Rita Hassan and Cornelius Katona, ‘Mental Health Implications of Detaining Asylum Seekers: Systematic Review’ (2009) 194 *British Journal of Psychiatry* 306, 306.

³⁸⁰ Inhorn (n 133) 105.

³⁸¹ Haines (n 138) 85; Inhorn (n 133) 158.

³⁸² Inhorn (n 133) 106.

³⁸³ Haines (n 138); Inhorn (n 133) ch 3.

³⁸⁴ Besteman, *Making Refuge* (n 1); Haines (n 138); Inhorn (n 133) 82.

³⁸⁵ Besteman, ‘Refuge Fragments’ (n 1) 433.

³⁸⁶ Austin Grabish, ‘Frostbitten Refugee Will Lose Fingers, Toe After 7-Hour Trek to Cross US-Canada Border’, *CBC News* (online at 12 January 2017) <<http://www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146>>; David Cochrane and Lisa Laventure, ‘Waves of Asylum Seekers Keep Coming at Illegal Border Crossing in Quebec’, *CBC News* (online at 3 August 2017) <<https://www.cbc.ca/news/politics/asylum-seekers-quebec-roxham-1.4232608>>.

³⁸⁷ The exceptions relate to family reunification, unaccompanied minors and document holders and there is also a public interest exception: *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, signed 5 December 2002, TIAS 04-1229 (entered into force 29 December 2004) arts 4(2), 6.

³⁸⁸ UNHCR, Submission No 43 to the Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre*, 12 November 2016, [33], [41].

the asylum seekers and refugees on Manus Island and Nauru have been detained for significant periods.³⁸⁹ Many asylum seekers and refugees have been the victims of grave acts of violence both within these detention centres and after release into the community.³⁹⁰ In particular, there is evidence that refugees have endured sexual violence in Nauru and Manus Island.³⁹¹ Most infamously, in a series of violent incidents at the Manus Island detention centre in February 2014, staff assaulted numerous detainees and one asylum seeker was killed.³⁹² Detainees are separated from family members,³⁹³ have limited access to healthcare and education,³⁹⁴ live in overcrowded conditions with inadequate sanitation³⁹⁵ and often do not have sufficient food and water.³⁹⁶ There have been concerns about the ways these conditions are affecting refugees' mental health, and the UNHCR confirms that over 80 per cent of the refugees in Nauru and Manus Island are suffering from depression or post-traumatic stress disorder.³⁹⁷ Boochani, a refugee on Manus Island, reflects on many of these issues, but also documents the boredom and frustration experienced by those transferred to Manus Island. He writes that they have to endure

³⁸⁹ Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (Second Edition)* (2017) 35 ('*Snapshot Report*').

³⁹⁰ A refugee was raped after being released from immigration detention in Nauru and placed into shared housing arranged and paid for by the Australian government: *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [82] ('*Plaintiff S99*'). There have been a number of reports of refugees on Manus Island being attacked after release from immigration detention: Ben Doherty, 'Manus Island Refugees Seriously Injured in Machete Attacks', *The Guardian* (online at 31 July 2017) <<https://www.theguardian.com/australia-news/2017/jul/31/manus-island-refugees-seriously-injured-in-machete-attacks>>; Human Rights Watch, 'Australia/PNG: Refugees Face Unchecked Violence' (25 October 2017) <<https://www.hrw.org/news/2017/10/25/australia/png-refugees-face-unchecked-violence>>.

³⁹¹ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, 1602nd and 1603rd mtgs, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018) [53] ('*Concluding Observations on the Eighth Periodic Report*'); Philip Moss, *Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (Department of Immigration and Border Protection, 6 February 2015) 23–51; *Plaintiff S99* (n 390); Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015).

³⁹² Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (December 2014) ch 5; Robert Cornall, *Review into the Events of 16–18 February 2014 at the Manus Regional Processing Centre* (Department of Immigration and Border Protection, 23 May 2014) 62–3.

³⁹³ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report* (n 391) [53].

³⁹⁴ Australian Human Rights Commission, *Snapshot Report* (n 389) 37; Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report* (n 391) [53].

³⁹⁵ Australian Human Rights Commission, *Snapshot Report* (n 389), 35.

³⁹⁶ *Ibid.*

³⁹⁷ UNHCR, 'Transcript: UNHCR's Top Asia Official Briefs Press on Australian Offshore Processing on Nauru, and UNHCR Talks with Bangladesh and Myanmar' (Press Briefing, 4 April 2018) <<http://www.unhcr.org/news/press/2018/4/5ac60a074/transcript-unhcrs-top-asia-official-briefs-press-australian-offshore-processing.html>>.

‘[d]ays without any plans’³⁹⁸ and there is ‘nothing to occupy our time’. As a consequence, the Manus Island detainees have a ‘dismal and obscure future’.³⁹⁹

Australia’s transfer of asylum seekers and refugees to Nauru and Manus Island is the current iteration of what successive governments have called the Pacific Solution or Pacific Strategy. The Pacific Solution commenced in 2001 and there have been different phases,⁴⁰⁰ but the overarching objective is to deter asylum seekers from coming to Australia⁴⁰¹ and shift responsibility for refugees to other countries in the region.⁴⁰² In announcing Australia’s agreement with Papua New Guinea in 2015, Australian Prime Minister Kevin Rudd said that the purpose of the deal was to ensure that ‘any asylum seeker who arrives in Australia by boat will have no chance of being settled in Australia as a refugee’.⁴⁰³ In Chapter Five, I consider decision-makers’ approaches to the legality of Australia’s various bilateral agreements with countries in the region.

D Places of Refuge for Palestinian Refugees

UNRWA provides protection and assistance to over five million Palestinian refugees in Jordan, Lebanon, Syria, the Gaza Strip, the West Bank and East Jerusalem.⁴⁰⁴ Palestinian refugees’ legal status and the rights and benefits they are entitled to differ depending on the country in which they live.⁴⁰⁵ While Palestinian refugees have been resilient and employed various means to re-establish their communities after displacement,⁴⁰⁶ the situation for many is one of despair. One-third of Palestinian refugees in Gaza live in extreme poverty.⁴⁰⁷ Many Palestinian refugee

³⁹⁸ Boochani (n 143) 121.

³⁹⁹ Ibid 96.

⁴⁰⁰ Mary Crock, ‘Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific’ (2014) 63 *International and Comparative Law Quarterly* 247, 249.

⁴⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001 (Phillip Ruddock), 30871; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 2011 (Chris Bowen), 10945.

⁴⁰² Mathew and Harley (n 4) 9–10; Savitri Taylor, ‘Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing’ (2005) 6(1) *Asian-Pacific Law and Policy Journal* 1, 7.

⁴⁰³ ‘Aust Will Never Accept Boat People: Rudd’, *SBS News* (online at 28 February 2015) <<https://www.sbs.com.au/news/aust-will-never-accept-boat-people-rudd>>.

⁴⁰⁴ UNRWA, *Where We Work* <<https://www.unrwa.org/where-we-work>>.

⁴⁰⁵ Jordan is the only Arab country that has granted citizenship to refugees, but this legal status is not secure: Susan Akram, ‘Palestinian Refugees and their Legal Status: Rights, Politics and Implications for a Just Solution’ (2002) 31 *Journal of Palestine Studies* 36, 51; Human Rights Watch, *Stateless Again: Palestinian Origin Jordanians Deprived of their Nationality* (1 February 2010) <<https://www.hrw.org/report/2010/02/01/stateless-again/palestinian-origin-jordanians-deprived-their-nationality>>. Other Arab countries under UNRWA’s mandate ‘grant Palestinians very few benefits as a matter of right; whatever benefits they might grant are best understood as privileges for Palestinians—and thus revocable at any time and for any reason’: Akram, *ibid* 44.

⁴⁰⁶ See Hajj (n 230).

⁴⁰⁷ United Nations International Children’s Emergency Fund (‘UNICEF’), *The Situation of Palestinian Children in the Occupied Palestinian Territory, Jordan, Syria and Lebanon* (2010) <https://www.unicef.org/oPt/PALESTINIAN_SITAN-final.pdf> (‘*The Situation of Palestinian Children*’).

camps resemble slum conditions,⁴⁰⁸ are overcrowded and lack adequate infrastructure and sanitation,⁴⁰⁹ and residents experience high levels of violence.⁴¹⁰ Palestinian refugees living in and outside of camps are often subject to detention and arbitrary arrest⁴¹¹ and restrictions on their freedom of movement.⁴¹² Many Palestinian refugees do not have access to adequate and appropriate healthcare.⁴¹³ Availability of work and education vary,⁴¹⁴ but many Palestinian refugees feel that they have no future because of a dearth of study and employment opportunities.⁴¹⁵

When Palestinian refugees leave an UNRWA region and seek refugee protection, they confront article 1D of the Refugee Convention. Article 1D excludes Palestinian refugees from the Refugee Convention, but grants *ipso facto* refugee protection if their protection and assistance ceases for any reason. In Chapter Six, I discuss the extent to which article 1D can be considered a containment mechanism. I then explore decision-makers' approaches to Palestinian refugees' protection from refugee claims and whether they enable or inhibit Palestinian refugees in their searches for refuge outside the UNRWA region.

E Refuge in an Internally Displaced Persons' Camp

People displaced from their homes due to factors such as conflict or human rights violations sometimes cannot or do not wish to cross an international border in search of refuge. They must look for safety within their own country and some seek sanctuary in IDP camps.⁴¹⁶ These camps

⁴⁰⁸ J Zabeneh, G Watt and C O'Donell, 'Living and Health Conditions of Palestinian Refugees in an Unofficial Camp in the Lebanon: A Cross-Sectional Survey' (2008) 62(1) *Journal of Epidemiology and Community Health* 91.

⁴⁰⁹ Henri Rueff and Alain Viaro, 'Palestinian Refugee Camps: From Shelter to Habitat' (2010) 28(2–3) *Refugee Survey Quarterly* 339, 356.

⁴¹⁰ UNRWA, 'Jenin Camp' <<https://www.unrwa.org/where-we-work/west-bank/jenin-camp>>. Including domestic violence: UNICEF, *The Situation of Palestinian Children* (n 407).

⁴¹¹ UNHCR, *The Situation of Palestinian Refugees in Lebanon* (February 2016) <<http://www.refworld.org/pdfid/56cc95484.pdf>> ('*The Situation of Palestinian Refugees*').

⁴¹² *Ibid.*

⁴¹³ *Ibid.*; UNICEF, *The Situation of Palestinian Children* (n 407).

⁴¹⁴ Susan Akram, 'Palestinian Refugees and their Legal Status: Rights, Politics and Implications for a Just Solution' (2002) 31 *Journal of Palestine Studies* 36, 44–5.

⁴¹⁵ UNHCR, *The Situation of Palestinian Refugees* (n 411); UNICEF, *The Situation of Palestinian Children* (n 407); Clancy Chassay and Duncan Campbell, 'We Have No Rights and No Future', *The Guardian* (online at 30 May 2007) <<https://www.theguardian.com/world/2007/may/29/syria.israelandthepalestinians>>.

⁴¹⁶ Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring: Monitoring and Protection the Human Rights of Refugees and/or Internally Displaced Persons Living in Camps*, 168 <<https://www.ohchr.org/Documents/Publications/training7part10en.pdf>> ('*Training Manual on Human Rights Monitoring*'). In some instances, these camps are planned. For example, the Kenyan government set up IDP camps after the post-election violence in 2007, 'to receive and to provide assistance to those who had been forced to flee their homes': Edwin Abuya and Charles Ikobe, 'Wasted Lives: Internally Displaced Persons Living in Camps in Kenya' (2010) 1 *International Humanitarian Legal Studies* 233, 235. At other times they are formed 'spontaneously' with the arrival of large numbers of IDPs: Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (n 416) 169.

can be considered an ostensible site of refuge, not only because they are intended to enable IDPs to escape the danger from which they are fleeing, but because of the presence of many international organisations authorised to provide protection to IDPs.⁴¹⁷ However, these camps are often targeted for attack,⁴¹⁸ there is a risk of abduction by militant groups,⁴¹⁹ women face high levels of violence including domestic and sexual violence,⁴²⁰ there are restrictions on the extent to which IDPs can move within and outside the camps⁴²¹ and there is often a lack of adequate food⁴²² and shelter.⁴²³ A representative from the International Organization for Migration says of an IDP camp in Sudan that ‘the effects of continued displacement can be seen in the eyes of the women – a sense of stagnancy and lack of hope and dreams is felt as they become accustomed to camp life’.⁴²⁴ In her work with women in Kenyan IDP camps, Njiru witnesses the ‘continuing violence that women face in their everyday lives in the camps that are supposed to protect and provide for people fleeing violence’.⁴²⁵

Whether a person can have adequate protection in an IDP camp is an issue I investigate in Chapter Seven. These cases have occurred in the United Kingdom and New Zealand and decision-makers must determine whether an IDP camp is an acceptable internal protection alternative. If not, the person will be able to enjoy refugee protection in the United Kingdom and New Zealand respectively. The relevant restriction on refugee movement in these decisions is the

⁴¹⁷ The UNGA has authorised the UNHCR to provide protection and humanitarian assistance under certain circumstances. The International Committee of the Red Cross considers that IDPs affected by armed conflict to be at the core of its mandate: International Committee of the Red Cross, *Internally Displaced Persons: The Mandate and Role of the International Committee of the Red Cross* (February 2000) <<https://www.icrc.org/eng/resources/documents/article/other/57jqhr.htm>>.

⁴¹⁸ Lynn Amowitz et al, ‘Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone’ (2002) 287(4) *Journal of the American Medical Association* 513, 517; UNHCR, ‘UNHCR’s Grandi: Failures Behind Nigeria IDP Camp Tragedy Must Be Identified’ (18 January 2017) <<http://www.unhcr.org/en-au/news/press/2017/1/587f6a734/unhcrs-grandis-failures-behind-nigeria-idp-camp-tragedy-must-identified.html>>.

⁴¹⁹ *End of Mission Statement by the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons, Mr. Chaloka Beyani, on His Visit to Nigeria, 23 to 26 August 2016* (22 January 2016) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20427&LangID=E>> (‘*End of Mission Statement by Mr Chaloka Beyani*’).

⁴²⁰ Abuya and Ikobe (n 416) 244–5; Amowitz et al (n 418) 517; Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (n 416); Roseanne Njiru, ‘Political Battles on Women’s Bodies: Post-Election Conflicts and Violence Against Women in Internally Displaced Persons Camps in Kenya’ (2014) 9(1) *Societies Without Borders* 48, 55–6; *End of Mission Statement by Mr Chaloka Beyani* (n 419).

⁴²¹ Faith Olanrewaju, Femi Omotoso and Joshua Alabi, ‘Datasets on the Challenges of Forced Displacement and Coping Strategies Among Displaced Women in Selected Internally Displaced Persons (IDPs) Camps in Nigeria’ (2018) 20 *Data in Brief* 152, 154–5; *End of Mission Statement by Mr Chaloka Beyani* (n 419).

⁴²² Abuya and Ikobe (n 416) 235; Olanrewaju et al (n 421) 154; Mary Olwedo et al, ‘Factors Associated with Malnutrition Among Children in Internally Displaced Person’s Camps, Northern Uganda’ (2008) 8(4) *African Health Science* 244.

⁴²³ Abuya and Ikobe (n 416) 246–7; Olanrewaju et al (n 421) 154.

⁴²⁴ Amani Osman, ‘From a Home to a Camp: Life as an IDP in Sudan’ (IOM, 14 October 2015) <<http://web-log.iom.int/home-camp-life-idp-sudan>>.

⁴²⁵ Njiru (n 420) 50.

use of the Refugee Convention to contain people in need of protection in the Global South.⁴²⁶ Chimni, Shacknove and Tuitt all highlight that after the Cold War ended, refugees were no longer politically convenient for Western liberal democracies.⁴²⁷ The increase in the processes around and technicality of refugee status assessment in Global North countries since then is indicative of their attempts to keep out what they see as the ‘new’ asylum seekers from the developing world.⁴²⁸ This tension is evident in the cases I examine in Chapter Seven, where decision-makers explicitly reference concerns about the Refugee Convention being used by refugees from the Global South to relocate to the Global North.

IX CONCLUSION

In this chapter, I have argued that the concept of refuge is a robust one. There are different approaches to theorising refuge, but there is a shared understanding that it has restorative, regenerative and palliative functions that address refugees’ past, present and future. Refuge operates as a response to the particular dilemmas of those in need of protection and is variously expressed as a remedy, right, duty, process and status. It has a broad and flexible scope that responds to the specific needs of women, children and refugees with disabilities. The threshold for adequate refuge is a high one, encompassing much more than mere survival. However, many people who seek protection find themselves in places where the conditions may be comparable to or worse than the places they fled, and states implement a plethora of mechanisms to hamper their ability to travel in search of a genuine place of refuge. In protection from refugee claims, the ideal and reality of refuge both enter the judicial domain. In the following case studies, I draw on the ideas of refuge outlined in this chapter to examine how decision-makers conceptualise refuge and navigate the discrepancies between refuge as a concept and place. I assess the implications these judicial approaches to protection from refugee claims have for refugees’ (or particular refugees’) ability to move within and across borders to find sanctuary.

⁴²⁶ BS Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350; Andrew Shacknove, ‘From Asylum to Containment’ (1993) 5(4) *International Journal of Refugee Law* 516; Patricia Tuitt, ‘Defining the Refugee by Race: The European Response to “New” Asylum-Seekers’ in Paddy Ireland and Per Laleng (eds), *The Critical Lawyers’ Handbook 2* (Pluto Press, 1997) 96.

⁴²⁷ Chimni (n 426) 350; Shacknove (n 426) 520–1; Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press, 1996) 69–71.

⁴²⁸ Chimni (n 426) 350–1; Shacknove (n 426) 522; Tuitt (n 426) 103–4; Tuitt (n 427) 69–71.

CHAPTER THREE

USING HUMAN RIGHTS LAW TO TRAVEL IN SEARCH OF REFUGE IN EUROPE

I INTRODUCTION

‘The conditions are so bad that describing them ... cannot capture the squalor. You have to smell conditions like these and feel the squelch of mud mixed with urine and much else through your boots to appreciate the horror’.¹ This is evidence given to a United Kingdom tribunal about the refugee settlement in Calais, known as ‘the Jungle’. The Jungle is one of the sites of ostensible ‘sanctuary’ that decision-makers confront in European protection from refugee claims. When seeking protection from these places, the asylum seeker and refugee litigants cannot directly plead that the respective host state does not comply with the rights in the *Convention Relating to the Status of Refugees* (‘Refugee Convention’)² or the European Union’s Directive on the *Standards for the Reception of Applicants for International Protection*.³ Rather, they invoke the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’)⁴ and *International Covenant on Civil and Political Rights* (‘ICCPR’).⁵ These human rights claims only address individual transfers and do not directly challenge the validity of containment agreements. Nevertheless, they have potential to set precedents that jeopardise containment agreements’ continued operation.

The purpose of this chapter is to examine how decision-makers approach and determine protection from refugee cases grounded in human rights instruments. I assess the ways decision-makers use human rights law to conceptualise refuge, in particular, its functions and nature. I examine whether, when doing so, they tailor their ideas about the functions and nature of refuge to take into account factors such as gender, age, family responsibilities and disability. I also

¹ *R v Secretary of State for the Home Department* IJR [2016] UKUT 00061 (IAC) [5] (‘*R v SSHD*’).

² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

³ *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)* [2013] OJ L 180/96-105/32 (‘Directive 2013/33/EU’).

⁴ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

consider the extent to which these notions of refuge, when filtered through human rights instruments, can disrupt containment policies and facilitate refugees' journeys in search of refuge.

I commence this exploration by outlining debates about the utility of using human rights law (in particular, human rights litigation) to thwart state policies. These theories provide the backdrop for my investigation of the ways decision-makers approach human rights arguments in their determination of protection from refuge challenges. Next, I move to an analysis of the jurisprudence and argue that decision-makers in the European context initially approached refuge as a remedy addressing refugees' needs, but now see it as a scarce commodity that must be distributed on a needs basis to the refugees deemed most vulnerable. These changes to judicial approaches mean that while human rights litigation at first showed potential to obstruct containment agreements, human rights arguments have lost their potency. I then discuss the implications of this judicial shift for refugees of different genders and ages and those with care responsibilities and disabilities. I suggest that while the focus on additional vulnerabilities could have provided grounds to facilitate journeys for those who face the greatest challenges in travelling across borders to find sanctuary, this has not occurred due to decision-makers' notional consideration of factors such as gender and disability.

II THE INDIVIDUAL V THE STATE: THE FORCE OF HUMAN RIGHTS LAW

To what extent can individuals use human rights law to counter state law and policy? What role do adjudicative bodies play in this process? These questions address a tension between contemporary human rights law's framing and operation: human rights derive from personhood and not citizenship of a nation-state,⁶ but are often enforced through state machinery. This quandary has particular significance in refugee and migration contexts. Refugees and migrants make human rights arguments against a state in which they are not a citizen and usually in a way that clashes with that state's perception of its national interests.

One of the main contributors to this topic is Soysal, whose view is that the normative claim of human rights has the potential to eclipse state interests⁷ and transgress 'the national order of things'.⁸ She argues that there is a model of citizenship based on nationality and one derived

⁶ The preamble to the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) describes human rights as 'inherent' and 'inalienable'. See also Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 2–3.

⁷ Yasemin Soysal, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1995) 155.

⁸ *Ibid* 159.

from universal personhood that is increasingly contesting the national model.⁹ Soysal's study is based on foreign guest workers, but to build her claim she refers to the power plays between states and domestic and supranational courts with respect to the refugee definition.¹⁰ She highlights that while states place restrictions on who can seek asylum, courts are broadening the definition of a refugee and this is one example of how human rights litigation can permeate national interests.¹¹

Drawing on Soysal's work, Jacobson argues that human rights have transcended the state.¹² His study of transnational migration highlights the devaluation of citizenship and individuals' ability to make a claim on foreign states through the vehicle of human rights law.¹³ Jacobson highlights the role that the judiciary plays in this process, arguing that courts are staging a 'quiet revolution' and are often the 'judicial tail wagging the legislative dog'.¹⁴ He suggests that if this trend continues, the territorial state will become an administration unit for a global order based on human rights.¹⁵

Other voices are more pessimistic about the efficacy of using human rights to challenge state policies. For example, Douzinas argues that human rights 'de-politicize conflict and remove the possibility of radical change'.¹⁶ His position is that human rights can only lead to 'a marginal re-arrangement of the social edifice'.¹⁷ Individuals cannot rely on courts to uphold human rights arguments in a way that eclipses state interests, because courts are an arm of the state¹⁸ and human rights, initially conceived as transcendent grounds of critique,¹⁹ are designed to defend people against state institutions.²⁰ Similarly, Koskenniemi argues that human rights lose their 'transformative effect' once they are institutionalised through the bureaucracy or judiciary.²¹

⁹ Ibid 8.

¹⁰ Ibid 158.

¹¹ Ibid 158.

¹² David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press, 1997) 3.

¹³ Ibid 9.

¹⁴ Ibid 13.

¹⁵ Ibid 133.

¹⁶ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge, 2007) 108.

¹⁷ Ibid 109–110.

¹⁸ Ibid 12.

¹⁹ Ibid 7.

²⁰ Ibid 12.

²¹ Martii Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 133.

He explains that through this process, rights arguments lose the ability to convey ‘a sense of pain and injustice’ and are ‘constantly deferring to political priorities’.²²

Protection from refugee claims grounded in human rights law fall within this debate. In all of the cases considered in this chapter and Chapter Four, asylum seekers and refugees are drawing on human rights law in an attempt to resist being sent to or trapped in a particular place of refuge pursuant to a containment policy. In doing so, they initiate a contest between their human rights and states’ interests. I consider the ways decision-makers approach these disputes and whether particular methods of judicial reasoning strengthen or diminish human rights claims when pitted against states’ desires to constrain refugees’ movements.

III HUMAN RIGHTS AS A PRISM TO ENGAGE WITH THE CONCEPT OF REFUGEE

In early or initial European protection from refugee cases, decision-makers adopt what I described in Chapter Two as a categorical approach to conceptualising refugee. They start their analysis by identifying what it means to be a refugee and, in particular, common experiences of refugeehood. They then use the right to be free from inhuman or degrading treatment or the right to family life as a vehicle to respond to refugees’ needs and predicaments. This categorical approach to refugee is evident across various international, supranational and domestic decision-making bodies. I highlight the ways it allows decision-makers to engage with the concept of refugee and lends strength to refugees’ human rights arguments in the face of state interests.

A Identifying Irreducible Experiences of Refugeehood

A categorical approach to refugee is evident in the European Court of Human Rights’ 2011 decision of *M S S v Belgium and Greece*.²³ In this case, an Afghani asylum seeker challenged his transfer from Belgium to Greece made pursuant to the Dublin Regulation.²⁴ One of his submissions was that his experience of homelessness and poverty in Greece constituted inhuman and degrading treatment within the meaning of article 3 of the ECHR. There is no doubt as to the veracity of the applicant’s claims with respect to his living conditions. The Court observed that

²² Ibid 134.

²³ [2011] I Eur Court HR 255 (*M S S v Belgium and Greece*). The conditions in Greece were also raised in an earlier case, but were not considered by the European Court of Human Rights on the grounds that any claim with respect to the reception conditions and/or conditions of detention in Greece would first have to be pursued in the Greek domestic authorities: *K R S v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 32733/08, 2 December 2008) 18.

²⁴ *Regulation (EC) 604/2013 of 29 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast)* [2013] OJ L180/31-180/59.

the applicant ‘spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live’.²⁵

However, difficult living conditions alone cannot constitute a breach of the ECHR’s article 3. The Court referred to a previous decision in which it ruled that the ECHR does not oblige states to provide everyone in their jurisdiction with a home.²⁶ The Greek government’s submissions stressed that to decide otherwise would ‘open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy’.²⁷ Accordingly, the Court had to determine whether homelessness and extreme poverty amounted to a breach of article 3 for the particular applicant, recalling that the minimum level of severity for inhuman and degrading treatment is relative.²⁸

In answering this question, the Court specifically focussed on the applicant’s position as an asylum seeker. It stated that it attached ‘considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population’.²⁹ In doing so, the Court invoked an emerging concept of ‘group vulnerability’³⁰ that it has used for not only refugees and asylum seekers but also other groups.³¹ In explaining why being an asylum seeker made the applicant ‘particularly vulnerable’, the Court referred to ‘everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’.³² Thus, the European Court of Human Rights did not consider legal definitions of a refugee, but identified aspects of refugeehood most likely experienced by the majority of refugees.

²⁵ *M S S v Belgium and Greece* (n 23) [254].

²⁶ *Chapman v United Kingdom* [2001] I Eur Court HR 41 cited in *M S S v Belgium and Greece* (n 23) [249].

²⁷ *M S S v Belgium and Greece* (n 23) [243].

²⁸ *Kuldla v Poland* [2000] XI Eur Court HR 197 cited in *M S S v Belgium and Greece* (n 23) [219].

²⁹ *M S S v Belgium and Greece* (n 23) [251].

³⁰ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1057. See also Oddný Mjöll Arnardóttir, ‘Vulnerability under Article 14 of the European Convention of Human Rights: Innovation or Business as Usual’ (2017) 3 *Oslo Law Review* 250; Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147; Ivona Truscan, ‘Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights’ (2013) 142(3) *Retfærd: Nordic Journal of Law and Justice* 64.

³¹ For example, the European Court of Human Rights has described people of Roma origin as a vulnerable minority: *D H and Others v the Czech Republic* [2007] IV Eur Court HR 241 [182]. It has also described people living with human immunodeficiency virus as a vulnerable minority: *Kiyutin v Russia* [2011] II Eur Court HR 29 [63].

³² *M S S v Belgium and Greece* (n 23) [232].

Similar reasoning is apparent in relation to the applicant's submission that detention in Greece amounted to inhuman and degrading treatment. In relation to the conditions of detention, the Court emphasised that the cells were overcrowded (145 detainees per 110 square metres), there was a lack of adequate ventilation and water (detainees drink from toilets) and sanitation (access to toilets was restricted and there was no soap or toilet paper).³³ The Court then stressed that the applicant's distress in relation to these abhorrent conditions was 'accentuated by the vulnerability inherent in his situation as an asylum-seeker'.³⁴

The European Court of Human Rights continued its categorical approach in *Hirsi Jamaa v Italy*,³⁵ handed down just over 12 months later. This case was brought by 24 Somalian and Eritrean asylum seekers who had been part of a group of approximately 200 people who left Libya by boat with the aim of reaching the Italian coast. Italy intercepted the vessel and returned it to Libya pursuant to an agreement between the two countries. After confirming that the applicants were under Italy's jurisdiction and, therefore, entitled to the rights and freedoms in the ECHR,³⁶ one of the issues was whether Italy breached article 3 by transferring the applicants to Libya.

In determining the above issue, the Court placed particular emphasis on the fact that the applicants were seeking international protection and considered situations commonly experienced by asylum seekers in Libya. For example, the Court highlighted that 'no rule governing the protection of refugees was complied with by Libya' and that 'no distinction was made between irregular migrants and asylum-seekers'.³⁷ It also emphasised that the United Nations High Commissioner for Refugees ('UNHCR') activities in Libya were not 'recognised in any way by the Libyan government' and the identity documents the UNHCR provided did not 'guarantee the persons concerned any kind of protection'.³⁸ This meant that refugees in Libya were 'subjected to particularly precarious living conditions' and 'vulnerable to xenophobic and racist acts'.³⁹ The Court found that because Libya's lack of protection of refugees and asylum seekers was well known and verified by a number of reputable organisations, Italy knew or should have

³³ Ibid [230].

³⁴ Ibid [233].

³⁵ [2012] II Eur Court HR 97 (*Hirsi Jamaa*).

³⁶ Ibid [82].

³⁷ Ibid [125].

³⁸ Ibid [130].

³⁹ Ibid [125].

known that the applicants would be exposed to torture or inhuman or degrading treatment in Libya and that they ‘would not be given any kind of protection’.⁴⁰

A categorical approach is also evident in some Human Rights Committee views. In a 2015 view, the Committee considered a communication made by Jasin, a Somalian refugee, and her children (*Jasin v Denmark*).⁴¹ Jasin arrived in Italy in 2008 when her first child was a year old and Italy granted her subsidiary protection. The Italian government initially gave her accommodation in an asylum seeker reception centre, but later evicted her and did not offer any assistance in finding housing or work. She had no option but to live on the street with her daughter. She became pregnant with her second child and the Italian government did not provide any medical care during the pregnancy and birth. Jasin travelled to Denmark, but Denmark attempted to return her to Italy pursuant to the Dublin Regulation. Jasin and her children argued before the Committee that this would be a breach of article 7 of the ICCPR (no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment). Similar to the categorical reasoning adopted by the European Court of Human Rights, the Human Rights Committee focussed on the authors’ need for complementary protection. It explained that its view with respect to a breach of article 7 of the ICCPR must be informed by ‘the unique status of the author and her children as asylum seekers entitled to subsidiary protection’.⁴²

The use of a categorical approach to inform the right to family life is evident in a 2015 decision by the United Kingdom Upper Tribunal.⁴³ The first four applicants in this case were living in the ‘Jungle’ outside Calais. Three were unaccompanied minors and one was a 26-year-old who suffered significant mental health disorders. The other three applicants were their family members who were seeking asylum in the United Kingdom. Pursuant to the Dublin Regulation, the first four applicants were required to lodge their protection applications in France. However, they relied on the right to family life in article 8 of the ECHR to petition to be transferred to the United Kingdom to be reunited with the last three applicants. The Tribunal approached the dispute on the premise that the Dublin Regulation and ECHR operate alongside each other.⁴⁴

⁴⁰ Ibid [131].

⁴¹ Human Rights Committee, *Views: Communication No 2360/2014*, 114th sess, UN Doc CCPR/C/114/D/2360/2014 (25 September 2015) (*Jasin v Denmark*).

⁴² Ibid [1].

⁴³ *R v SSHD* (n 1).

⁴⁴ Ibid [49].

Due to the fact that article 8 is a qualified right (meaning that it is subject to permissible interferences)⁴⁵ the Tribunal reasoned that the question to be determined was whether there is a disproportionate interference with the asylum seekers' right to family life.⁴⁶

The applicants' asylum-seeking experience was central to the Tribunal's proportionality reasoning. The Tribunal listed a number of 'factors in the proportionality equation' that 'tip the balance in favour of the [a]pplicants'.⁴⁷ In addition to youth, one factor was the psychological damage they experienced as refugees: the Tribunal stressed that the applicants had 'all fled the war in Syria, claiming to have suffered extreme trauma there'.⁴⁸ Other determinants were the disruption and difficulties of displacement, especially with respect to family unity.⁴⁹ Also, the Tribunal placed weight on the fact that the first four applicants mistrusted the French authorities due to deficiencies in the French asylum system and would suffer 'mentally painful and debilitating fear, anxiety and uncertainty' if 'swift entry to the United Kingdom cannot be achieved'.⁵⁰

The centrality of the refugee experience to these decisions has links to what Mégret describes as one of 'one of the most interesting and least studied puzzles of the contemporary development of international human rights'.⁵¹ That is, human rights law is founded on 'the *sameness and unity* of human beings', but the existence of group-specific human rights treaties is 'at least partly making a point about *difference and pluralism*'.⁵² In the context of writing about the *Convention of the Rights of Persons with Disabilities* ('CRPD'),⁵³ Mégret suggests that the CRPD takes 'one further step in the direction of recognizing that there are, within humanity, a number of groups of human beings whose distinct claims to human rights are based on irreducible experiences that require a tailoring of the general rights regime'.⁵⁴ Applying Mégret's ideas

⁴⁵ Article 8(2) of the ECHR (n 4) states that, '[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. For a discussion of the permissible interferences on article 8 of the ECHR see European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights* (31 December 2016, updated 31 August 2018) 10–11.

⁴⁶ *R v SSHD* (n 1) [51].

⁴⁷ *Ibid* [55].

⁴⁸ *Ibid* [17].

⁴⁹ *Ibid* [55].

⁵⁰ *Ibid* [55].

⁵¹ Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30(2) *Human Rights Quarterly* 494, 515.

⁵² *Ibid* 496 (emphasis in original).

⁵³ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁵⁴ Mégret (n 51) 514.

to the refugee context, in these cases decision-makers identify experiences common to most refugees and asylum seekers such as trauma, precarious conditions due to not being a citizen of the host state, family separation and mistrust of state authorities.

B Using a Categorical Approach to Delineate Refuge's Objectives and Remedial Nature

By focussing on the irreducible aspects of refugeehood, decision-makers adapt general human rights instruments to respond to refugees' specific needs. They use the right to be free from inhuman and degrading treatment and the right to family life (rights not in the Refugee Convention and generic, abstract rights not specifically designed to address refugeehood) as a prism to develop a purposive understanding of refuge and give effect to its remedial nature.

For example, the European Court of Human Rights' judgment in *M S S v Belgium and Greece* reflected an understanding of the restorative and regenerative functions of refuge as well as the ways these relate to refuge's temporality. A key aspect of the Court's finding that Greece was in violation of article 3 was that the Greek government demonstrated complete indifference towards the applicant.⁵⁵ By having no regard for the applicant's plight, the Greek government showed 'a lack of respect for [the asylum seeker's] dignity',⁵⁶ caused him 'feelings of fear, anguish or inferiority capable of inducing desperation'⁵⁷ and placed him in a state of 'prolonged uncertainty'.⁵⁸ It was the applicant's abysmal living and detention conditions, coupled with the Greek government's indifference, which meant the applicant had a 'total lack of any prospects of his situation improving' that 'attained the level of severity required to fall within the scope of Article 3 of the [ECHR]'.⁵⁹ This reasoning manifests an appreciation that one of the functions of refuge is to restore a person's bond with a nation-state and that this cannot occur if the host state treats the refugee or asylum seeker with complete apathy. Also reflected in this reasoning is the idea that asylum seekers and refugees need to be able to imagine and generate a future. This is evident in the Court's emphasis on the applicant's state of uncertainty and lack of any prospect of his situation improving.

Further, the European Court of Human Rights' reasoning gives character to the nature of refuge. While article 3 of the ECHR confers a right, the Court used it in a similar way to which a remedy

⁵⁵ *M S S v Belgium and Greece* (n 23) [263].

⁵⁶ *Ibid* [263].

⁵⁷ *Ibid* [263].

⁵⁸ *Ibid* [263].

⁵⁹ *Ibid* [263].

is often understood: a response to a wrong or harm. The Court conceptualised the relevant injustice as asylum seekers' vulnerability.⁶⁰ It recognised that, due to this acute and specific vulnerability, asylum seekers and refugees are 'in need of special protection'.⁶¹ In particular, it referred to 'the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the [Refugee] Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive'.⁶² The Court did not go as far as to bring all of these standards for special protection into the realm of article 3 of the ECHR. Rather, through the medium of article 3 of the ECHR, the Court reasoned that host states cannot be apathetic or indifferent towards asylum seekers on their territories, but must respond with 'due regard' to their specific vulnerabilities.⁶³ Thus, the Court used article 3 of the ECHR not only as a right, but to facilitate a legal remedy being a state's obligation to respond appropriately to refugees on its territory or in its jurisdiction.

The European Court of Human Rights deepened its understanding of refuge's restorative objectives in *Hirsi Jamaa v Italy*. In particular, its reasoning reflects an understanding that the restorative aspect of refuge is not only about re-establishing the bond between a refugee and a nation-state; it also should enable refugees the ability to lead a normal life in the host community. This is seen in the Court's observation that the applicants were 'destined to occupy a marginal and isolated position in Libyan society', because they were not given any form of special protection.⁶⁴ Further, the Court extended its thinking with respect to nature of refuge; a host state not only must take action with respect to asylum seekers and refugees within its territory, but this response or remedy must manifest in some form of legal status. The Court conveyed this idea through its emphasis on Libya's lack of special protection for refugees and its refusal to recognise the UNHCR's activities with respect to designation of refugee status.⁶⁵

There is danger in conceptualising refuge with reference to refugees' irreducible experiences. Ramsay warns that the refugee label 'renders the personal lives of peoples who have fled their homes dissolvable into easily recognised tropes' and 'serves to homogenise and generalise what

⁶⁰ Ibid [251].

⁶¹ Ibid [251].

⁶² Ibid [251].

⁶³ Ibid [263].

⁶⁴ *Hirsi Jamaa* (n 35) [125].

⁶⁵ Ibid [130].

are the diverse experiences of peoples who have been forced to flee their homes and seek asylum'.⁶⁶ However, in these early or initial cases, decision-makers tread a fine line between recognising that there are experiences common to all refugees, such as displacement and loss of political membership, but that the ways these are experienced differ with respect to factors such as age, gender, disability and family responsibilities. For example, in its 2015 decision of *Jasin v Denmark*, the Human Rights Committee used the right to be free from inhuman and degrading treatment to tailor the functions and nature of refuge to accommodate factors such as gender, family responsibilities and age. In particular, the Committee stressed that Denmark did not have assurances that Italy would receive 'the author and her children in conditions adapted to the children's age and the family's vulnerable status, which would enable them to remain in Italy'.⁶⁷ This reflects the restorative objectives (that a host state must establish a bond with the refugee) and temporality of refuge (that this must lead to an enduring relationship between the refugee and the host state), but also indicates that refuge must be adapted in an appropriate way for young children and a single female-headed family.

The United Kingdom Upper Tribunal employed the right to family life in the ECHR to invoke the restorative, regenerative and palliative functions of refuge with particular sensitivity to age and disability. Most of the applicants were unaccompanied minors and one of the adult applicants had a number of serious mental health conditions and, therefore, could be considered to have a disability.⁶⁸ The Tribunal demonstrated an understanding that family reunification is an important aspect of restoring a normal life, in particular for unaccompanied minors and those who suffer from mental health conditions.⁶⁹ Also, it recognised that being able to have security in a brighter future is an essential component of refuge with its emphasis on the need to prevent further 'fear, anxiety and uncertainty' caused by the first four applicants' mistrust of the French asylum system.⁷⁰ Finally, the Tribunal's focus on the pain and trauma suffered by the asylum seekers⁷¹ has resonance with the idea that one role of refuge is to treat the suffering associated with persecution. Overall, the judgment displays an awareness of the particular and acute ways

⁶⁶ Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018) 62.

⁶⁷ *Jasin v Denmark* (n 41) [8.9] (emphasis added).

⁶⁸ There are many different definitions of disability, but article 1 of the CRPD (n 53) provides that disability includes 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

⁶⁹ *R v SSHD* (n 1) [55].

⁷⁰ *Ibid* [55].

⁷¹ *Ibid* [17].

children and those with mental health conditions experience the trauma of persecution and the need to be with family to be able to cope with and heal from these experiences.

In summary, while McAdam⁷² and Hathaway⁷³ correctly highlight that general human rights instruments do not address refugee-specific concerns, when decision-makers employ categorical reasoning they shape these rights in a way that sees them respond to refugees' predicaments. In particular, by identifying irreducible experiences of refugeehood, decision-makers use rights in generic human rights instruments to conceptualise the objectives and nature of refuge and tailor this to take into account factors such as age, gender, family responsibilities and disability.

C Consequential Protection from Refugee Victories

A categorical approach to determining protection from refugee claims not only delivers victories for the individual claimants, but has the potential to disrupt or jeopardise the continuation of containment agreements. After the European Court of Human Rights' judgment in *M S S v Belgium and Greece*, states stopped transferring asylum seekers to Greece even if Greece was the responsible member state pursuant to the Dublin Regulation.⁷⁴ European refugee law scholars hail the case as a landmark judgment⁷⁵ and suggest that it has the potential to dismantle the Dublin Regulation or, at the very least, significantly compromise its operation.⁷⁶ After the Court's decision in *Hirsi Jamaa v Italy*, Italy suspended its interception and push back agreement with Libya.⁷⁷

⁷² Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 5–6.

⁷³ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 121, 186 ('*The Rights of Refugees*').

⁷⁴ The European Commission recommended on 8 December 2016 that, due to improvements in reception conditions for asylum seekers in Greece, transfers could resume from 15 March 2017: European Commission, 'Recommendation on the Conditions For Resuming Dublin Transfers of Asylum-Seekers of Greece' (Press Release, Memo/16/4250, 8 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4253_en.htm>. There have been some reports that European states are resuming transfers to Greece: Lorne Cook and Costas Kantouris, 'EU Nations Move to Resume Returning Migrants to Greece', *US News* (online at 8 August 2017) <https://www.usnews.com/news/world/articles/2017-08-08/eu-nations-start-process-of-returning-migrants-to-greece?mc_cid=de8fd67d31&mc_eid=677b225ed4>.

⁷⁵ Gina Clayton, 'Asylum Seekers in Europe: *M S S v Belgium and Greece*' (2011) 11(4) *Human Rights Law Review* 758, 758; Patricia Mallia, 'Case of *M S S v Belgium and Greece*: A Catalyst in the Re-Thinking of Dublin II Regulation' (2011) 30(3) *Refugee Survey Quarterly* 107, 107; Violeta Moreno-Lax, 'Dismantling the Dublin System: *M S S v Belgium and Greece*' (2012) 14(1) *European Journal of Migration and Law* 1, 6.

⁷⁶ Clayton (n 75) 761; Mallia (n 75) 108; Moreno-Lax (n 75) 29.

⁷⁷ Andre Vogt, 'Italy Violated Human Rights by Returning Migrants to Libya, Court Rules', *The Guardian* (online at 23 February 2012) <<https://www.theguardian.com/world/2012/feb/23/italy-human-rights-migrants-libya>>. However, Italy has been providing assistance to the Libyan coastguard and there are allegations that this may be breach of article 3 of the ECHR (n 4): Violeta Moreno-Lax and Mariagiulia Giuffrè, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming). A case challenging the legality of this practice was filed in the European Court of Human Rights in May 2018.

The approach taken by the Human Rights Committee also has significance for the Dublin Regulation's operation, although it has received less attention due to it not being binding a decision by an ultimate appellate court. The Committee's view was that states have to seek assurances that any transferees will be treated in accordance with their status as refugees or recipients of complementary protection.⁷⁸ Only the dissenting member expressed concerns about the decision's effect on the Dublin Regulation.⁷⁹

Accordingly, these decisions lend support to Soysal's and Jacobson's theories about the potency of human rights claims and the role of courts in arbitrating disputes between states and non-citizens. In determining these protection from refuge challenges, the decision-makers explicitly recognised the tension between human rights claims and the national interest and explained why refugees' human rights triumph. In *M S S v Belgium and Greece*, the European Court of Human Rights acknowledged that Greece was confronted with 'considerable difficulties in coping with the increasing influx of migrants and asylum seekers' and that the situation was 'exacerbated by the transfers of asylum-seekers by other member States in application of the Dublin Regulation'.⁸⁰ However, it confirmed that this does not excuse Greece from its obligations under article 3 of the ECHR.⁸¹ In Mallia's assessment of the decision, she argues that the Court 'makes clear that human rights supersede the interest – or necessity – of States in controlling irregular immigration'.⁸²

Similarly, in *Hirsi Jamaa v Italy*, the Court noted that 'states which form the external borders of the European Union are currently experiencing difficulties in coping with the increasing influx of migrants and asylum-seekers'.⁸³ It also stressed that it does 'not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of the economic crisis'.⁸⁴ Nevertheless, the Court ruled that these concerns 'cannot absolve a state of its obligations' under article 3 of the ECHR.⁸⁵ Thus, human rights

⁷⁸ *Jasin v Denmark* (n 41) [8.9].

⁷⁹ The dissenting member said that finding for the author and her children on the grounds outlined by the majority would 'unduly widen the ambit of article 7 and make it applicable to the situation of thousands of poor and destitute people in the world, especially those who want to move from the South to the North': *Jasin v Denmark* (n 41) Appendix I [1].

⁸⁰ *M S S v Belgium and Greece* (n 23) [223].

⁸¹ *Ibid* [223].

⁸² Mallia (n 75) 126–7.

⁸³ *Hirsi Jamaa* (n 35) [122].

⁸⁴ *Ibid* [122].

⁸⁵ *Ibid* [122].

prevailed over interception practices that have historically given states ‘the lethal luxury of a maritime Berlin wall’.⁸⁶

While article 3 of the ECHR is an absolute right in the sense that it is not subject to any exceptions and states cannot derogate from it,⁸⁷ the United Kingdom Upper Tribunal’s decision indicates that qualified rights can also override state interests. The Tribunal acknowledged that the Dublin Regulation and ECHR ‘sometimes tug in different directions’.⁸⁸ The Tribunal was careful to emphasise that neither ‘has any inherent value or status giving one precedence over the other’.⁸⁹ However, the asylum seeker applicants succeeded in establishing a disproportionate interference with their right to family life⁹⁰ and this enabled them to use court processes to continue their journey in search of refuge across the English Channel.

IV REFUGE AS A COMMODITY

The decisions discussed above may provide grounds for optimism with respect to the force of human rights arguments to enable refugees to continue their journey to find a genuine place of refuge and thwart containment agreements. However, the ways decision-makers approach protection from refuge challenges in the European context has shifted in subsequent decisions. While in early or initial cases, decision-makers adopt a categorical approach by identifying irreducible experiences of refugeehood, in later decisions the significance of being a person in need of international protection is lost and decision-makers look for an additional vulnerability beyond refugeehood. This obscures refuge’s remedial nature, promulgates impoverished understandings of refuge and renders human rights arguments less potent against states’ interests in restricting refugees’ movements.

A From Vulnerable Refugees to the ‘Peculiarly Vulnerable’ Refugee

The move away from a categorical approach to protection from refuge decisions in Council of Europe jurisprudence is evident in the seminal 2014 European Court of Human Rights’ decision

⁸⁶ Gregor Noll, ‘Why Refugees Still Matter: A Response to James Hathaway’ (2007) 8(2) *Melbourne Journal of International Law* 536, 537.

⁸⁷ *The Republic of Ireland v The United Kingdom* (1978) Eur Court HR (ser A) [163]; *Saadi v Italy* [2008] II Eur Court HR 207 [127]; Natasa Mavronicola and Francesco Messineo, ‘Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*’ (2013) 76(3) *Modern Law Review* 589, 592. Cf Steven Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’ (2015) 15(1) *Human Rights Law Review* 101.

⁸⁸ *R v SSHD* (n 1) [50].

⁸⁹ *Ibid* [50].

⁹⁰ *Ibid* [52].

of *Tarakhel v Switzerland*.⁹¹ This case concerned a family of Afghani asylum seekers (two parents and six children) who first sought asylum in Italy before travelling to Switzerland. The Swiss government attempted to return the family to Italy pursuant to the Dublin Regulation, but the family resisted on the ground they would be exposed to a real risk of inhuman and degrading treatment. In particular, their claim emphasised that they would be at risk of homelessness and they gave evidence that the number of asylum seekers in Italy far outstripped the number of places available in asylum seeker accommodation.⁹² Even when accommodation was available in reception centres, the evidence attested to ‘lack of privacy, insalubrious conditions and [widespread] violence’.⁹³

The Court’s decoupling of the relevance of refugees’ specific predicaments from the decision as to what constitutes inhuman and degrading treatment is apparent in its comparison of the conditions in Italy and Greece. While the Court noted that asylum seekers are a vulnerable group requiring special protection,⁹⁴ this did not inform its reasoning. Unlike its earlier decisions in *M S S v Belgium and Greece* and *Hirsi Jamaa v Italy*, the Court did not consider whether the risk of homelessness and insalubrious and unsafe conditions in reception centres would be inhuman and degrading for asylum seekers and refugees, recalling that the minimal severity is relative. Rather, the Court used the conditions in Greece (as described in *M S S v Belgium and Greece*) as a litmus test for conditions that act as a complete bar to all Dublin Regulation transfers. The Court reasoned that while the conditions in Italy are problematic, they did not compare to the situation in Greece where there were ‘fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale’.⁹⁵ On these grounds, the Court ruled that the conditions in Italy could not act as a bar to all transfers to that country and, therefore, transfers to Italy had to be considered on a case-by-case basis.⁹⁶

Another example of the waning relevance of refugeehood to what constitutes inhuman and degrading treatment can be found in the United Kingdom High Court of Justice’s 2014 decision of *R (Tabrizagh) v Secretary of State for the Home Department*.⁹⁷ This case concerned six male

⁹¹ *Tarakhel v Switzerland* [2014] VI Eur Court HR 195 (‘*Tarakhel v Switzerland*’).

⁹² *Ibid* [108]–[110].

⁹³ *Ibid* [111].

⁹⁴ *Ibid* [118].

⁹⁵ *Ibid* [114].

⁹⁶ *Ibid* [114]–[115].

⁹⁷ [2014] EWHC 1914 (‘*R v Tabrizagh v SSHD*’). This case was decided subsequent to *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, which concerned the transfer of asylum seekers to Italy. The case was an appeal from the Court of Appeal in which it was held that the asylum seeker applicants could only be

asylum seekers resisting a Dublin Regulation transfer to Italy. Two had experienced homelessness, destitution and violence in Italy. The Court did not take into account their situation as asylum seekers in its consideration as to whether the conditions in Italy presented a real risk of inhuman and degrading treatment. Rather, similar to the European Court of Human Rights in *Tarakhel v Switzerland*, the United Kingdom High Court of Justice used the conditions in Greece as the relevant threshold. While there was no up-to-date evidence given to the Court regarding the accommodation available to asylum seekers and refugees in Italy, the Court was satisfied that the numbers ‘exceed the 1000 spaces which were available in Greece for the “tens of thousands” of asylum seekers at the time of *MSS*’.⁹⁸

When the focus on refugeehood declines, decision-makers look for a vulnerability beyond refugeehood. In *Tarakhel v Switzerland*, the distinguishing factor was that the applicants were a family with six children. The Court ruled that Switzerland would be in breach of article 3 if it returned the family to Italy, because it did not have ‘sufficient assurances that ... the applicants would be taken charge of in a manner adapted to the age of the children’.⁹⁹ However, in *R (Tabrizagh) v SSHD*, the applicants could not point to any additional risk factors. The High Court of Justice ruled that a transfer to Italy did not present an article 3 risk and, in coming to this conclusion, a significant factor was that the claimants were young, single men¹⁰⁰ and none had any individual vulnerabilities that could create an article 3 risk.¹⁰¹ A similar approach was taken by the European Court of Human Rights in *A M E v The Netherlands*,¹⁰² which concerned the transfer of a Somali asylum seeker to Italy pursuant to the Dublin Regulation. The Court held that the transfer would not be in violation of article 3 because ‘[u]nlike the applicants in the case of *Tarakhel* ... who were a family with six minor children, the applicant is an able young man with no dependents’.¹⁰³

successful if they could establish that there was a systemic deficiency in the Italian asylum system. The United Kingdom Supreme Court held that there was no requirement to establish a systemic deficiency and remitted the claims back to the High Court for reconsideration. The Court of Justice of the European Union has now clarified that even when there are not systemic deficiencies in the asylum system of an EU member state, a transfer cannot occur if there is evidence that a transfer would result in a real risk that a particular asylum seeker would be subject to inhuman or degrading treatment: *C K v Supreme Court of the Republic of Slovenia* (Court of Justice of the European Union, C 578/16, 16 February 2017), [92], [96].

⁹⁸ *R (Tabrizagh) v SSHD* (n 97) [71].

⁹⁹ *Tarakhel v Switzerland* (n 91) [121].

¹⁰⁰ *R (Tabrizagh) v SSHD* (n 97) [179].

¹⁰¹ *Ibid* [179], [182], [184], [186], [187].

¹⁰² (European Court of Human Rights, Third Chamber, Application No 51428/10, 13 January 2015) (*A M E v The Netherlands*).

¹⁰³ *Ibid* [34].

This pattern of shifting focus from refugeehood to requiring some additional form of acute vulnerability is also evident in Human Rights Committee views. Just a year after the decision of *Jasin v Denmark*, the Committee considered a similar complaint in *R A A and Z M v Denmark*, but adopted different reasoning.¹⁰⁴ *R A A and Z M v Denmark* concerned two Syrian refugees—a married couple expecting a baby. Both had been granted refugee status in Bulgaria, but, due to fears for their safety, left Bulgaria and sought protection in Denmark. Denmark arranged for their return to Bulgaria pursuant to the Dublin Regulation. The Committee did not place any significance on the authors' refugee status. To trigger article 7 of the ICCPR they had to establish that their situation was exceptional in some way. The Committee concluded that 'in these particular circumstances',¹⁰⁵ returning the couple to Bulgaria would amount to a breach of article 7 of the ICCPR. Crucial to this decision was that the couple were 'in a particularly vulnerable situation', because they would soon have a child, would be victims of racially motivated violence, would not be able to provide for themselves and the male author had a heart condition for which he would not receive appropriate treatment in Bulgaria.¹⁰⁶

The reasons why the Human Rights Committee changed its approach may be gleaned from the dissenting members who were concerned that article 7 of the ICCPR was being extended 'beyond breaking point'.¹⁰⁷ They explained that:

With the possible exceptions of those individuals who face *special hardships* due to their *particular situation of vulnerability* which renders their plight *exceptionally harsh* and irreparable in nature, non-availability of social assistance or delays in access to medical services do not in themselves constitute grounds for non-refoulement.¹⁰⁸

While this is a dissenting opinion, the Human Rights Committee's switch from an expansive to a much narrower approach in just over a year perhaps indicates a realisation that its initial approach would apply to almost all asylum seekers and refugees resisting a Dublin Regulation transfer. Accordingly, they changed their emphasis in a way that prioritises refugees with 'special hardships' or in a 'particular situation of vulnerability'.

Similar concerns are evident in the United Kingdom Court of Appeal's reversal of the Upper Tribunal's decision regarding the use of the right to family life to petition for a transfer from

¹⁰⁴ Human Rights Committee, *Views: Communication No 2608/2015*, 118th sess, UN Doc CCPR/C/118/D/2608/2015 (29 December 2016) ('*R A A and Z M v Denmark*').

¹⁰⁵ *Ibid* [7.9].

¹⁰⁶ *Ibid* [7.8].

¹⁰⁷ *Ibid* Annex [3].

¹⁰⁸ *Ibid* Annex [3] (emphasis added).

France to the United Kingdom in 2016. The Court of Appeal stated that the Tribunal ‘set too low a hurdle for permitting [the Dublin] process to be displaced by Article 8 considerations’.¹⁰⁹ The dilution of refugeehood’s significance and search for some type of exceptionality is evident in the Court’s insistence that only in an ‘especially compelling case’ can the right to family life override the Dublin Regulation.¹¹⁰ The Court stressed that all asylum seekers, including unaccompanied minors, must first make their application for asylum in the country in which they are located and, only once they can show that the system in that country is not working for them, should they turn to the United Kingdom.¹¹¹ The Court acknowledged that there would be exceptions to this, but they would be extreme and rare cases.¹¹² The example the Court gave is a baby ‘left behind in France when the door of a lorry bound for England closed after his mother got onto the lorry’.¹¹³ The Court referred to an earlier judgment delivered by Lord Justice Laws to explain that the underlying rationale for this approach was because the Dublin Regulation’s purpose would be ‘critically undermined’ if ‘it were seen as establishing little more than a presumption as to which State should deal with the claim’.¹¹⁴

This search for the exceptional asylum seeker or refugee is best encapsulated in the phrase ‘peculiarly vulnerable’, formulated by the United Kingdom Court of Appeal in its 2016 decision of *NA (Sudan) and MR (Iran) v Secretary of State for the Home Department* (‘*NA (Sudan)*’).¹¹⁵ The case concerned a Sudanese and Iranian asylum seeker resisting return to Italy pursuant to the Dublin Regulation. The Court acknowledged that all refugees are vulnerable ‘simply by reason of the fact that they have had to leave their homes, in circumstances typically of great stress and often danger, and find themselves trying to make a new life, for an indefinite period and perhaps permanently, in a new country’.¹¹⁶ However, certain refugees such as unaccompanied minors and pregnant women face additional difficulties and Lord Justice Underhill said, ‘I will refer to such persons as “peculiarly vulnerable”’.¹¹⁷

¹⁰⁹ *Secretary of State for the Home Department v ZAT* [2016] EWCA Civ 810 [92] (‘*SSHD v ZAT*’).

¹¹⁰ *Ibid* [8].

¹¹¹ *Ibid* [95].

¹¹² *Ibid* [95].

¹¹³ *Ibid* [95].

¹¹⁴ *R (CK (Afghanistan)) v Secretary of State for the Home Department* [2016] EWCA Civ 166 [31] cited in *SSHD v ZAT* (n 109) [92].

¹¹⁵ [2016] EWCA Civ 1060 (‘*NA (Sudan)*’).

¹¹⁶ *Ibid* [45].

¹¹⁷ *Ibid* [45]. His Honour was referring to article 21 of Directive 2013/33/EU (n 3), which provides that states are required to ‘take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence’.

This notion of ‘peculiar vulnerability’ represents a change in the ways decision-makers understand vulnerability. The idea of vulnerability is a controversial one in the refugee context. On one hand, some scholars recognise that a person who has travelled to a foreign land to seek international protection is in an inherently vulnerable position and that law and policy must take account of this.¹¹⁸ However, emphasising asylum seekers’ and refugees’ vulnerability leads to dehumanising depictions and understandings of refugees that downplay their agency¹¹⁹ as well as policy decisions that disempower refugees by, for example, causing them to be reliant on aid or welfare.¹²⁰ The idea of vulnerability projected in these later decisions is different from the approach to vulnerability taken in early decisions. In *M S S v Belgium and Greece*, the European Court of Human Rights drew on the concept of vulnerability to highlight that asylum seekers and refugees were in a vulnerable position because they no longer had the protection of their state and were trying to eke out an existence in a foreign country.¹²¹ Thus, the Court did not use the concept of vulnerability in a dehumanising or disempowering way. The Court recognised that vulnerability is a result of the position refugees are in, rather than any innate or immutable qualities. However, in the move towards ‘peculiar vulnerability’ jurisprudence, decision-makers have shifted their focus to whether an individual is vulnerable due to personal factors such as health conditions and gender. This approach to vulnerability is a disempowering one. To establish a ‘peculiar vulnerability’, the narrative the litigant has to present is one in which they are at the mercy of exterior forces and have no ability to protect or fend for themselves. This obscures the resolve and tenacity needed to travel to make a claim for international protection and survive in adverse conditions such as being rendered homeless and having no means of acquiring basic necessities.

Further, the shift towards identifying the exceptional or ‘peculiarly vulnerable’ refugee has transformed the nature of refuge from a remedy and provision of a legal status to a commodity.

¹¹⁸ Richard Black, ‘Livelihoods under Stress: A Case Study of Refugee Vulnerability in Greece’ (1994) 7(4) *Journal of Refugee Studies* 360, 362; Marcia Inhorn, *America’s Arab Refugees: Vulnerability and Health on the Margins* (Stanford University Press, 2018) 37; Eleonore Kofman, ‘Gendered Mobilities and Vulnerabilities: Refugee Journeys to and in Europe’ (2018) *Journal of Ethnic and Migration Studies* DOI: 10.1080/1369183X.2018.1468330: 2; Astri Suhrke, ‘Human Security and the Protection of Refugees’ in Edward Newman (ed), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (United Nations University Press, 2002) 93, 106–7.

¹¹⁹ Liisa Malkki, ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’ (1996) 11(3) *Cultural Anthropology* 377, 378, 388; Evangelia Tastsoglou et al, ‘(En)Gendering Vulnerability: Immigrant Service Providers’ Perceptions of Needs, Policies, and Practices Related to Gender and Women Refugee Claimants in Atlantic Canada’ (2014) 30(2) *Refuge* 67, 69, 70.

¹²⁰ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017) 137; Barbara Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford University Press, 1986); Malkki (n 119) 388.

¹²¹ *M S S v Belgium and Greece* (n 23) [230], [232], [233], [251].

Similar to the ‘hallmark of the welfare state’ where benefits are extended to ‘the most vulnerable’,¹²² decision-makers have approached refuge as if it is a scarce resource that they should apportion on a needs basis. While it is well accepted that factors such as gender, age, family responsibilities and disability exacerbate protection risks, conceiving of refuge as a commodity to be distributed to the neediest is at odds with the idea of refuge in refugee law. Hathaway explains that in formulating the refugee definition, the Refugee Convention’s drafters ‘were at pains to carefully limit the beneficiary class’ and excluded ‘persons who have yet to leave their own country, who cannot link their predicament to civil or political status, who already benefit from surrogate national or international protection, or who are found not to deserve protection’.¹²³ However, outside of these exclusions, refugees should be ‘conceived as a generic class, all members of which are *equally worthy of protection*’.¹²⁴

B *Fragmented and Rudimentary Refuge*

This judicial commodification of refuge diminishes engagement with its restorative, regenerative and palliative functions. What has been lost in this change in adjudicative reasoning is the use of human rights law as medium through which to elucidate refuge’s objectives. This is most starkly seen in the adoption of the conditions in Greece as a litmus test for conditions that place a complete bar on Dublin Regulation transfers. At no stage in its judgment in *M S S v Belgium and Greece* did the European Court of Human Rights specify that, to trigger article 3 protection, asylum seekers must establish that there is manifestly inadequate housing available in the prospective host state. Rather, the Court considered whether the particular situation in which the applicant found himself (being homeless with no means of providing for himself) amounted to inhuman and degrading treatment and the applicant’s position as an asylum seeker was crucial to the Court’s decision. This categorical reasoning enabled the Court to adopt a purposive approach to refuge through the prism of article 3 and engage with its restorative and regenerative functions. However, in later decisions when there is no longer a focus on refugeehood, courts ask whether the conditions in the host country are comparable to Greece. This neuters the potential for decision-makers to use human rights instruments to adopt a purposive approach to refuge. In particular, lack of consideration of the significance of being a refugee or asylum

¹²² Yeheskel Hasenfeld and Eve Garrow, ‘Non-Profit Human Service Organizations, Social Rights, and Advocacy in a Neoliberal Welfare State’ (2012) 86(2) *Social Service Review* 295, 295.

¹²³ Hathaway, *The Rights of Refugees* (n 73) 448.

¹²⁴ *Ibid* 239 (emphasis added). See also James Hathaway and Anne Cusick, ‘Refugee Rights Are Not Negotiable’ (2000) 14(2) *Georgetown Immigration Law Journal* 481, 484. Article 3 of the Refugee Convention (n 2) provides that states shall apply the provisions of the Refugee Convention to refugees without discrimination as to race, religion or country of origin.

seeker means that there is no longer an engagement with refugee's restorative, regenerative and palliative functions.

As a result, the idea of refuge reflected in these later decisions is a rudimentary one. By using the conditions in Greece as the relevant comparator, the European Court of Human Rights and domestic courts have set the threshold for what is deemed to be inadequate refuge as 'the most extreme poverty ... on a large scale' and being left 'without any means of subsistence'.¹²⁵ The European Court of Human Rights has never used the right to be free from inhuman and degrading treatment as a platform to evaluate whether a host state complies with all of its obligations towards refugees. Nevertheless, homelessness, extreme poverty and having absolutely no means of subsistence are very low thresholds for what can be deemed an inadequate protection environment for refugees and asylum seekers. The reduction in the threshold for what is understood to constitute adequate refuge is also evident in the Human Rights Committee's jurisprudence. In its 2015 view (*Jasin v Denmark*), the Committee suggested that article 7 of the ICCPR could be triggered when the prospective host state does not comply with its international protection obligations to refugees. However, in its 2016 view (*R A A and Z M v Denmark*), the Committee narrowed the circumstances to situations where refugees cannot provide for themselves or will not be protected from physical violence.¹²⁶

The loss of a purposive approach fractures and truncates the concept of refuge. In earlier jurisprudence, there is consideration of refuge's temporality and the ways it should enable refugees to build a better future and heal from past trauma. In later decisions, there is no consideration of a refugee's future and past. For example, in *Tarakhel v Switzerland* the European Court of Human Rights limited its focus to the conditions the asylum-seeking family would face on arrival or shortly after arrival.¹²⁷ It was satisfied that the Italian government would immediately take charge of them and concentrated only on the conditions in Italian reception centres. It did not consider the situation the family would be in once they left the centre. This is despite evidence that the situation for asylum seekers and refugees in Italy often significantly deteriorates after they are forced to leave reception centres.¹²⁸ They are not provided with accommodation or any assistance with entry into the work force and many are forced to live on the streets and

¹²⁵ *Tarakhel v Switzerland* (n 91) [117].

¹²⁶ *R A A and Z M v Denmark* (n 104) [7.8].

¹²⁷ *Tarakhel v Switzerland* (n 91) [80].

¹²⁸ Médecins Sans Frontières, *Informal Settlements: Social Marginality, Obstacles to Access to Healthcare and Basic Needs for Migrants, Asylum Seekers and Refugees* (2018) 10–11 <https://www.msf.org/sites/msf.org/files/out_of_sight_def.pdf>.

survive by begging for food.¹²⁹ This precludes a consideration of the enduring relationship between the prospective host state and refugee. By focussing only on the circumstances immediately on arrival, the European Court of Human Rights also partially removed the place of refuge (Italy) from the judicial lens.

Another example of the ways lack of a purposive approach obscures consideration of refugees' futures and a full examination of the place of refuge is seen in the United Kingdom Court of Appeal's judgment in *NA (Sudan)*. The Court was satisfied that the applicant, who had been raped and rendered homeless in Italy, could return without a real risk of inhuman and degrading treatment. This was because she would be assisted by non-government organisations ('NGOs') in the airport on her return to Italy and these NGOs would assist in finding her accommodation.¹³⁰ The Court did not consider what other type of assistance these NGOs could provide and for how long she would be under their care. Limiting the enquiry in this manner is problematic, because a refugee relies on the host state's protection until they find a durable solution and the host state's obligations to the refugee should increase the longer the refugee remains in the host state.¹³¹ By only examining the situation immediately on or shortly after arrival, hope for a more promising future is diminished and the place of refuge remains largely out of judicial view.

A further example of how refuge's temporality is curtailed can be observed in the United Kingdom Court of Appeal's reversal of the Upper Tribunal's decision on the right to family life.¹³² The Court of Appeal obscured refuge's palliative function through its insistence that article 8 of the ECHR can only be successfully invoked in rare circumstances such as a child being left behind when the door of a lorry closes just before it departs.¹³³ This displaced the Tribunal's focus on the ways family reunification can address the pain and suffering associated with persecution and displacement and severed consideration of the ways refuge should provide a space to heal from past trauma.

The shift in decision-makers' conceptualisation of refuge also diminishes human rights law's potency with respect to challenging states' interests in constraining refugees' movements. What

¹²⁹ Maurizio Ambrosini, 'Better Than Our Fears? Refugees in Italy: Between Rhetorics of Exclusion and Local Projects of Inclusion' in Susan Kneebone, Dallal Stevens and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014) 235, 241; Médecins Sans Frontières (n 128) 14; Susan Zimmermann, 'Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge' (2009) 22(1) *Journal of Refugee Studies* 74, 90.

¹³⁰ *NA (Sudan)* (n 115) [213]–[219].

¹³¹ Hathaway, *The Rights of Refugees* (n 73) 154.

¹³² *SSHD v ZAT* (n 109).

¹³³ *Ibid* [95].

is apparent in the jurisprudence's trajectory is that human rights law first proved somewhat robust in circumventing the Dublin Regulation other containment mechanisms and securing a transfer to an alternative place of refuge. However, decision-making bodies have now reined in the force of human rights law and only permit it to impinge on states' interests in limited and exceptional circumstances. It means that only those refugees decision-makers deem to be 'peculiarly vulnerable' can use court processes to continue their search for refuge. As noted in Chapter One, it is outside the scope of this thesis to investigate why there has been such a significant change in decision-maker approaches. Nevertheless, one possibility is that it is in response to the larger numbers of refugees that came to Europe as a result of the Syrian civil war. The number of applications for international protection in European countries from people outside the European Union started to rise in 2013.¹³⁴ This peaked in 2015 and 2016, with approximately 1.3 million applications in both years.¹³⁵

V THE PECULIARLY VULNERABLE REFUGEE

The 'peculiarly vulnerable' development in the jurisprudence could have provided strong grounds for women, parents, children and refugees with disabilities to be able successfully to use human rights law in protection from refuge challenges. However, the ways decision-makers approach this issue provides a mere semblance of human rights protection. In some cases, decision-makers simply do not consider the ways factors such as age, gender and disability can exacerbate protection risks. In cases where decision-makers do turn their minds to these questions, they do so in a perfunctory manner. This further diminishes the potential to use human rights law to engage with the concept of refuge and enable refugees from more marginalised backgrounds to continue their quests for refuge.

A Gender Blind Decisions

There are a number of instances where the European Court of Human Rights wholly ignores gender in its assessment as to whether a transfer pursuant to the Dublin Regulation would be in breach of article 3 of the ECHR. For example, in 2013 the Court considered a case brought by a Somali woman granted refugee status in Italy.¹³⁶ She became pregnant while in Italy after being raped. She travelled to the Netherlands and had another child there. She resisted being

¹³⁴ Eurostat, *Asylum Statistics* (2018) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Number_of_asylum_applicants.

¹³⁵ Ibid.

¹³⁶ *Samsam Mohammed Hussein v The Netherlands and Italy* (European Court of Human Rights, Third Chamber, Application No 27725/10, 2 April 2013) ('*Samsam Mohammed Hussein v The Netherlands and Italy*').

transferred to Italy on the grounds that it would be a breach of article 3, but was unsuccessful. In 2015, the Court handed down a judgment in a case concerning an Eritrean woman who sought asylum in Italy and was granted residence, but ‘was not provided with (money for) food or medical assistance, and was forced to live on the street’.¹³⁷ She travelled to the Netherlands in 2009, became pregnant and was subsequently diagnosed with human immunodeficiency virus. The Court held that transferring the applicant and her five-year-old daughter to Italy would not be in breach of article 3 of the ECHR.

In neither of these cases did the Court consider being a single mother, having previously experienced sexual violence or having a significant health condition as factors that need to be considered in the decision as to whether there was a real risk of being exposed to inhuman and degrading treatment. This is despite myriad materials from the UNHCR and refugee law experts regarding the additional difficulties faced by women and female-headed households in many places of ostensible refuge.¹³⁸ Further, in ignoring the risks of sexual violence for female asylum seekers, the European Court of Human Rights disregarded its own jurisprudence. The Court has held on a number of occasions that rape can amount to inhuman and degrading treatment¹³⁹ and torture,¹⁴⁰ and failure by the relevant authorities to investigate properly allegations of sexual violence can amount to a breach of article 3 of the ECHR.¹⁴¹

B Notional Consideration of Gender, Age and Disability

In cases where decision-makers do take account of gender, age and disability, they do so only superficially. This is evident in the United Kingdom Court of Appeal’s judgment in *NA (Sudan)*. The Court accepted that NA was ‘peculiarly vulnerable’ because she was raped while in Italy,

¹³⁷ *A T H v The Netherlands* (European Court of Human Rights, Third Section, Application No 54000/11, 10 December 2015) [4] (*A T H v The Netherlands*).

¹³⁸ Chaloka Beyani, ‘The Needs of Refugee Women: A Human-Rights Perspective’ (1995) 3(2) *Gender and Development* 29; Dale Buscher, ‘Refugee Women: Twenty Years On’ (2010) 29(2) *Refugee Survey Quarterly* 4; Jane Freedman, ‘Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection’ (2009) 48(1) *International Migration* 175; Susan Martin, ‘Refugee and Displaced Women: 60 Years of Progress and Setbacks’ (2011) 3(2) *Amsterdam Law Forum* 72; UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (1st ed, January 2008) <<http://www.unhcr.org/47cfa9fe2.pdf>>; UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* (May 2003) <<http://www.unhcr.org/3f696bcc4.pdf>>.

¹³⁹ *Cyprus v Turkey* (1982) 4 EHRR 482; *E v The United Kingdom* (European Court of Human Rights, Application No 33218/96, 26 November 2002) [89] (this case concerned rape perpetrated by a non-state actor).

¹⁴⁰ *Aydin v Turkey* (1998) 25 EHRR 251.

¹⁴¹ See, eg, *I G v Moldova* (European Court of Human Rights, Third Section, Application No 53519/07, 15 May 2012); *M A v Slovenia* (European Court of Human Rights, Application No 3400/07, 15 January 2015); *P M v Bulgaria* (European Court of Human Rights, Grand Chamber, Application No 49669/07, 24 January 2012); *S Z v Bulgaria* (European Court of Human Rights, Application No 29263/12, 3 March 2015).

had an overwhelming fear of being returned to the country in which she had been the victim of sexual violence, had no family to provide support and no ability to seek other forms of support.¹⁴² However, it concluded that the assistance provided by NGOs at the airport would alleviate these vulnerabilities without enquiring into the nature and level of assistance that they would provide beyond assistance with finding accommodation.¹⁴³

With respect to children's protection from refugee claims, the European Court of Human Rights in *Tarakhel v Switzerland* acknowledged that children are 'extremely vulnerable' and 'have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status'.¹⁴⁴ It also referred to the obligation in the *Convention on the Rights of the Child*¹⁴⁵ to take appropriate measures to ensure that children seeking asylum receive appropriate attention.¹⁴⁶ Costello and Mouzourakis argue that the Court had the opportunity to develop this point further by referring to the principle of best interests of the child but declined to do so.¹⁴⁷ However, in cases involving minors post-*Tarakhel v Switzerland*, the Court has taken a much more cursory approach to children's rights and protection needs. In a case that concerned an adult Eritrean refugee with children resisting return to Italy, the European Court of Human Rights noted that her status as a single parent meant that she belonged to a 'particularly underprivileged and vulnerable population group in need of special protection'.¹⁴⁸ The Court held that returning her to Italy would not expose her to a real risk of inhuman and degrading treatment, because she would have 'access to the available resources in Italy for an asylum-seeking single mother with a minor child'.¹⁴⁹ However, there was no examination of whether these resources would be adequate and appropriate for her children. In particular, there was no consideration of the children's ages or genders or any other factors that may be relevant to determining whether the resources available were adequate or appropriate. In other cases regarding the transfer of families with children to Italy (including the cases discussed above concerning single mothers), the European Court of Human Rights held that it was satisfied that

¹⁴² *NA (Sudan)* (n 115) [213].

¹⁴³ *Ibid* [213]–[219].

¹⁴⁴ *Tarakhel v Switzerland* (n 91) [99].

¹⁴⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 22.

¹⁴⁶ *Tarakhel v Switzerland* (n 91) [99].

¹⁴⁷ Cathryn Costello and Minos Mouzourakis, 'Reflections on Reading *Tarakhel*: Is "How Bad is Bad Enough" Good Enough?' (2014) 10 *Asiel en Migrantenrecht* 404, 408.

¹⁴⁸ *JA v The Netherlands* (European Court of Human Rights, Third Section, Application No 21459/14, 26 November 2015) [28].

¹⁴⁹ *Ibid* [32].

appropriate accommodation would be provided without inquiring as to the child asylum-seekers' needs.¹⁵⁰

Further, when considering additional vulnerabilities, decision-makers often fail to take into account the ways they intersect with a person's position as an asylum seeker or refugee. This is apparent in *A S v Switzerland*,¹⁵¹ a case brought by a Syrian asylum seeker of Kurdish origin who resisted Switzerland's attempt to transfer him to Italy pursuant to the Dublin Regulation. He suffered from significant mental and physical health conditions caused by the torture and trauma he experienced in Syria and, therefore, could be considered to have a disability. The applicant had two sisters in Switzerland and submitted that by being able to spend time with his sisters he had 'regained a certain emotional stability in his life'.¹⁵² He argued that if forced to return to Italy, he would have no family to care for him and this would aggravate his mental health problems.

This case involved not only Dublin Regulation jurisprudence but also case law relating to breaches of article 3 of the ECHR in situations of the expulsion of seriously ill persons.¹⁵³ In his submissions, the applicant attempted to highlight the intersections between his health conditions and his situation as an asylum seeker. He drew specifically on the reasoning in *M S S v Belgium and Greece* and argued that, as an asylum seeker, he belonged to 'a particularly vulnerable group in need of special protection'.¹⁵⁴ The European Court of Human Rights acknowledged that in *M S S v Belgium and Greece* 'considerable importance' was attached to 'the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'.¹⁵⁵ However, the Court stressed that the expulsion of a seriously ill person would only breach article 3 in rare cases¹⁵⁶ and the applicant's case did 'not disclose very exceptional circumstances'.¹⁵⁷

¹⁵⁰ *A T H v The Netherlands* (n 137); *S M H v The Netherlands* (European Court of Human Rights, Third Section, Application No 5868/13, 9 June 2016); *Samsam Mohammed Hussein v The Netherlands and Italy* (n 136).

¹⁵¹ (European Court of Human Rights, Second Section, Application No 39350/13, 30 June 2015) ('*A S v Switzerland*'). Also see *A M v Switzerland* (European Court of Human Rights, Third Section, Application No 37466/13, 3 November 2015), which concerned the transfer of an asylum seeker from Switzerland to Italy. He claimed that he suffered from post-traumatic stress disorder and would be at risk of suicide if returned to Italy. The Court deemed the case inadmissible on the grounds that the facts were indistinguishable from *A S v Switzerland*.

¹⁵² *A S v Switzerland* (n 151) [7].

¹⁵³ *N v United Kingdom* [2008] III Eur Court HR 227 ('*N v United Kingdom*'); *D v the United Kingdom* [1997] 24 EHRR 423 ('*D v United Kingdom*').

¹⁵⁴ *A S v Switzerland* (n 151) [18].

¹⁵⁵ *Ibid* [29].

¹⁵⁶ *N v United Kingdom* (n 153); *D v the United Kingdom* (n 153).

¹⁵⁷ *A S v Switzerland* (n 151) [51].

In coming to this conclusion, the Court did not consider the intersections between having a disability and being an asylum seeker, in particular, that his mental and physical health conditions were caused by the persecution he suffered in Syria. Further, in justifying the high threshold in healthcare cases, the Court did not demonstrate an appreciation of the distinction between expelling a person to their home country and expelling an asylum seeker to an alternative place of refuge; the Court even used the phrase ‘country of origin’. The Court explained that ‘[a]dvances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the *country of origin* may vary considerably’, but ‘Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction’.¹⁵⁸

Not only do decision-makers’ desultory approaches to the ways age, gender and disability may exacerbate protection risks make it more difficult for refugees to draw on human rights law to challenge Dublin Regulation transfers, they further disengage decision-makers from the concept of refuge. These cases presented an opportunity for the respective courts to delineate ideas about the function and nature of refuge for children, single parents, those who have experienced sexual violence and those with disabilities. Unlike in decisions discussed earlier in this chapter, where decision-makers considered the ways these factors interact with irreducible experiences of refugeehood, in these judgments there is no or only nominal consideration of these intersections. For example, the Court’s failure in *A S v Switzerland* to recognise the compounding effect of being an asylum seeker on a person’s mental health condition means that there was no consideration of refuge’s palliative function: that it should provide a space in which refugees can heal from past trauma and that this is often facilitated through family reunification.

VI CONCLUSION

In this chapter, I have examined how decision-makers in the European context approach and determine protection from refuge claims grounded in general human rights instruments, rather than refugee-specific rights. This chapter argues that human rights law, despite not specifically addressing refugees’ predicaments, can be used to engage with the functions and nature of refuge for those with or seeking international protection. In cases where this occurs, decision-makers adopt categorical reasoning by placing weight on the litigants’ position as refugees and

¹⁵⁸ Ibid [31] (emphasis added).

asylum seekers and use human rights as prisms through which to invoke ideas about the objectives of refuge as well as its remedial nature. These judicial approaches have provided grounds for large numbers of refugees to continue their search for refuge within Europe. However, these protection from refuge victories have been short lived. In subsequent decisions, the litigants' experience as refugees or asylum seekers has become less relevant and decision-makers look for some type of additional vulnerability beyond refugeehood before they can trigger the protection of human rights law. As a result, the bridge between these human rights and ideas about the objectives and nature of refuge is severed. Refuge is approached as a scarce commodity and is stripped down to the barest minimum of protections. The waning relevance of refugeehood in these decisions supports Koskeniemi's argument that human rights challenges defer to political priorities when they are unable to convey a sense of pain and injustice. It is the loss of focus on refugeehood and the nominal consideration of factors such as gender, age and disability that distance decision-makers from considerations of what refuge should be.

I have also suggested that human rights litigation, while first having potential to spark radical change, has ultimately proven impotent in challenging state interests with respect to refugee movements. The case law's trajectory indicates a shift from a human rights approach to protection from refuge scenarios to one more focussed on containment and migration management (albeit still cloaked in human rights language). This aligns with Douzinas' views on the role of the courts in human rights protection, especially his argument that human rights struggles can at best 'lead to small individual improvements', but ultimately 'reinforce rather than challenge established arrangements'.¹⁵⁹

However, there is one important point of distinction. Douzinas suggests that the only way human rights can 'reactivate a politics of resistance' is through 'the recognition of the absolute uniqueness of the other person and my moral duty to save and protect her'.¹⁶⁰ The cases discussed in this chapter indicate that identifying common aspects of refugeehood is the factor that can harness the power of human rights arguments, especially when pitted against states' containment mechanisms. When courts and other decision-making bodies ignore the relevance of refugeehood and concentrate on the uniqueness of the protection from refuge litigant, human rights arguments lose their potency in facilitating refugees' journeys in search of refuge.

¹⁵⁹ Douzinas (n 16) 109–10.

¹⁶⁰ *Ibid* 348.

CHAPTER FOUR

USING HUMAN AND REFUGEE RIGHTS TO CONTINUE QUESTS FOR REFUGE IN AFRICA

I INTRODUCTION

One of the most powerful voices against encampment is that of anthropologist Harrell-Bond, who contends that ‘refugee camps are not good for anyone. No-one freely chooses to move into a refugee camp to stay. Everyone who can gets out of them as quickly as possible’.¹ The refugee litigants described in this chapter are trying to do exactly this: they are drawing on human and refugee rights to avoid forced relocation to a refugee camp, or to leave the confines of a camp. In doing so, they are using courts in their quest to secure a place of refuge. Some are using courts to resist camp life and remain in a place where they feel they have attained a sense of refuge. Others are coming to courts to be able to continue their journeys in search of refuge by being able to travel onwards from a camp environment. However, their rights arguments collide with states’ justifications for confining refugees in their territory to a camp, in particular on national security grounds.

The purpose of this chapter is to continue my examination of how decision-makers determine protection from refuge claims grounded in human rights instruments and, in particular, how they use human rights law to conceptualise refuge’s functions and nature and approach challenges to containment agreements. First, I show the similarities between the approaches adopted by African decision-makers and their European and international counterparts with respect to using human rights to engage with the objectives and nature of refuge. I then highlight the ways African decision-makers’ approaches to protection from refuge challenges are distinct and provide for a deeper understanding of refuge. Finally, I highlight that African decision-makers, similar to decision-makers in the European context, have changed their approaches to protection from refuge decisions and this has diluted judicial understandings of refuge as well as the force of human and refugee rights in challenging containment policies. Throughout each section, I consider the consequences of African decision-makers’ approaches to protection from refuge

¹ Barbara Harrell-Bond, ‘Are Refugee Camps Good for Children?’ (New Issues in Refugee Research Working Paper No 29, UNHCR, 2000) 1.

claims for refugees of different genders and ages as well as refugees with care responsibilities and disabilities.

In this chapter, I build on the idea suggested in the previous chapter that protection from refugee claims are most potent when decision-makers focus on the unifying aspects of refugeehood, rather than the uniqueness of the protection from refugee litigant. I argue that when decision-makers draw on an abstract idea of refugeehood and then use the refugee litigant's particular circumstances to inform human rights arguments, human rights law can be used to engage with ideas of refuge in a sophisticated manner and this proves powerful in challenging containment policies. However, when refugees' individual circumstances are used to draw comparisons between refugees with respect to notions such as vulnerability, the concept of refuge is diluted and human rights arguments lose their force in the face of states' containment policies.

II FROM CATEGORICAL TO EXPERIENTIAL REASONING: ILLUMINATING REFUGE

Analogous to early or initial protection from refugee cases considered in Chapter Three, in some forced encampment challenges, African decision-makers also employ categorical reasoning: they identify core or unifying aspects of the refugee experience and use this to adopt a purposive approach to refuge through the prism of human rights. However, in contrast to European and Human Rights Committee decision-makers, they engage more heavily with refugee litigants' testimonies and, therefore, also exhibit experiential reasoning. Below, I discuss the ways African decision-makers' amalgamated categorical and experiential reasoning gives more vibrancy to the concept of refuge and lends even greater force to rights arguments in their contests with states' interests.

A Understanding Refugeehood

Some African decision-makers contemplate the irreducible aspects of refugeehood and use this to inform human rights and consider refuge's functions. An example of this categorical approach is evident in the High Court of Kenya's decision in *Kituo Cha Sheria v Attorney General* ('*Kituo Cha Sheria*').² Kituo Cha Sheria, a non-government organisation ('NGO'), and seven refugees who had been living in Nairobi for many years brought this case in response to a 2012 directive issued by the Kenyan government requiring all refugees in Kenya to move to one of Kenya's two refugee camps ('Directive'). The Directive was a response to a series of terror

² [2013] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division).

attacks in urban centres in Kenya.³ The Court's categorical approach to the petitioners' human rights claim is evident from an early point in the judgment. Before considering the petitioners' substantive arguments, the Court recognised that '[r]efugees are a special category of persons who are, by virtue of their situation, considered vulnerable'.⁴ Article 21(3) of *The Constitution of Kenya 2010* ('Kenyan Constitution') provides that Kenya's 'state organs and public officers have the duty to address the needs of vulnerable groups'. While refugees are not explicitly identified as a vulnerable group in article 21(3), the Court was satisfied that they are a vulnerable group within the meaning of this constitutional provision.⁵ By recognising that refugees are in a vulnerable position, the High Court of Kenya in *Kituo Cha Sheria* adopted a parallel approach to the European Court of Human Rights in *M S S v Belgium and Greece*.⁶ Although the High Court of Kenya referred to the Kenyan Constitution and the European Court of Human Rights drew on its own vulnerability jurisprudence, both used the concept of vulnerability to interpret the rights pleaded in a way that responds to refugees' circumstances.

One distinction is that the High Court of Kenya in *Kituo Cha Sheria* provided a more detailed account of the refugee experience. In explaining why refugees are a vulnerable group, the Court identified three core aspects of refugeehood. First, that refugees 'have been forced to flee their homes as a result of persecution, human rights violations and conflict'.⁷ Second, that '[t]hey or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion'.⁸ These understandings of refugeehood resonate with European decision-makers' descriptions of refugees having to flee their homeland⁹ and enduring traumatic experiences there.¹⁰ However, the High Court of Kenya also stated that refugees are 'vulnerable due to lack of means, support systems of family and friends and by the very fact of being in a foreign land where hostility is never very far away'.¹¹ While the European Court of Human Rights recognised that refugees are vulnerable due to their experience of migration,¹² the High

³ Ibid [5]; Robert Nanima, 'An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of their Rights' (2017) 21 *Law Democracy and Development* 42, 56.

⁴ *Kituo Cha Sheria* [2013] (n 2) [34].

⁵ Ibid [34].

⁶ [2011] I Eur Court HR 255 ('*M S S v Belgium and Greece*').

⁷ *Kituo Cha Sheria* [2013] (n 2) [40].

⁸ Ibid [40].

⁹ *M S S v Belgium and Greece* (n 6) [17].

¹⁰ *R v Secretary of State for the Home Department* IJR [2016] UKUT 00061 (IAC) [17] ('*R v SSHD*').

¹¹ *Kituo Cha Sheria* [2013] (n 2) [40].

¹² *M S S v Belgium and Greece* (n 6) [232].

Court of Kenya went further and acknowledged that refugees are vulnerable due to the compounding difficulties of building a life in exile after enduring acts of persecution.

This richer understanding of the irreducible experiences of refugeehood enabled the High Court of Kenya to paint a more vivid picture of refuge through the prism of human rights. An example of this is the Court's approach to the right to dignity in the Kenyan Constitution. The Court stated that the right to dignity:

has to be understood against the backdrop of appreciating the vulnerability of refugees and the suffering they have endured, the trauma and insecurity associated with persecution and flight, the need and struggle to be independent and the need to provide for themselves and their families and the struggle to establish normalcy in a foreign country.¹³

The Court explained that '[f]amily, work, neighbours and school all contribute to the dignity of the individual',¹⁴ and that through these activities refugees have 'established roots in the country'.¹⁵ It ruled that the Directive was in breach of refugees' right to dignity, because if it were implemented 'they [would] be uprooted from their homes and neighbourhoods' and this would disrupt the 'normalcy' they have established.¹⁶ Through this reasoning, the Court used the right to dignity in the Kenyan Constitution to invoke refuge's restorative, regenerative and palliative functions. While these ideas arise in some decisions in Chapter Three, the High Court of Kenya demonstrated a deeper appreciation of these concepts. By recognising that neighbourhoods are part of the right to dignity and refugees have 'established roots' in these communities, the Court conveyed that refuge's restorative and regenerative functions must not only encompass refugees rebuilding what they may have lost due to persecution and displacement, but must include becoming part of the fabric of the host country's social and cultural life. Moreover, by analysing these factors 'against the backdrop' of refugees' suffering and past trauma, the Court recognised that refuge's restorative and regenerative functions cannot be separated from its palliative objective: that re-establishment of a normal life and connections to community are integral to healing from past trauma. Thus, through the right to dignity in the Kenyan Constitution, the High Court of Kenya provided reflections on refuge's temporality and, in particular, the ways it should simultaneously address refugees' past, present and future.

¹³ *Kituo Cha Sheria* [2013] (n 2) [68].

¹⁴ *Ibid* [68].

¹⁵ *Ibid* [68].

¹⁶ *Ibid* [68].

The idea that refugees are entitled to be part of and share in the Kenyan community proved potent in the contest between human rights and state interests. The Court dismissed the Attorney-General's argument that the Directive was justified because it enhanced refugees' welfare.¹⁷ In doing so, the Court stressed that the petitioners, and refugees like them, had commenced employment or businesses and placed their children in school and, therefore, a policy of relocation and encampment would be 'clearly detrimental' to their welfare.¹⁸

Additionally, the High Court of Kenya's categorical approach was sensitive to the ways refugees must respond to the needs of refugees with family responsibilities and disabilities. This is evident in the Court's assessment of whether the Directive infringed the right to fair administrative action in article 47 of Kenya's Constitution. The Court interpreted this general human right in a way that responded not only to refugees' specific needs, but to particular refugees' needs. The Court reasoned that by virtue of the right to fair administrative action, '[e]very person who acquires refugee status under [Kenyan] law is entitled to be treated as such'.¹⁹ The Court ruled that a blanket directive that did not take into account individual circumstances such as refugees with serious health conditions or those with children was a violation of the right to fair administrative action.²⁰ This reasoning showed an awareness that while there are irreducible aspects of refugeehood (such as flight, past trauma and the need to rebuild a life in exile), these challenges manifest differently depending on refugees' particular circumstances. In the cases considered in Chapter Three, this only occurred when the particular litigants were parents or children.

Another difference between African and European protection from refugee challenges is that most of the rights pleaded in African forced encampment jurisprudence are qualified rights, meaning that they are subject to permissible limitations.²¹ Conversely, the overwhelming majority of European protection from refugee decisions are grounded in the right to be free from torture and inhuman and degrading treatment, which the European Court of Human Rights has ruled is an absolute right, meaning that there are no provisions for exceptions and no derogation

¹⁷ Ibid [89].

¹⁸ Ibid [82].

¹⁹ Ibid [62].

²⁰ Ibid [62], [65].

²¹ See, eg, Human Rights Committee, *General Comment No 27: Freedom of Movement (Article 12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 [2], [11]–[18] ('*General Comment No 27*').

from it is permissible.²² Therefore, these decisions provide further insight on the value of categorical reasoning in decision-makers' assessments as to whether a state's limitations of refugees' rights are permissible. What is evident in African decision-makers' proportionality assessments is that decision-makers placed weight on the fact that the petitioners were refugees and ideas about refuge's functions were channelled through fundamental principles of human rights law such as fairness, dignity, equality and freedom. In particular, the idea of surrogate state protection was used to defeat national security justifications for forced encampment policies. For example, the High Court of Kenya found that protection of national security was the Directive's main rationale²³ and acknowledged that when the government acts in the interest of national security it must 'ordinarily be believed' and 'be given some margin of appreciation'.²⁴ However, the Court stated that by creating a blanket policy, the Kenyan government was 'tarring a group of persons known as refugees with a broad brush of criminality', which is 'inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom'.²⁵ The Court further explained that the government needed to show that 'a specific person's presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace'.²⁶ The connection the Court drew between labelling all refugees as criminals and infringing the values of dignity, equality and freedom reflects the notion that host states are the surrogate protectors of refugees' human rights. This idea proved powerful against justifications for forced encampment policies. The High Court of Kenya acknowledged that creating a refugee policy that responds to 'the special circumstances of urban refugees' may be costly, but stressed that 'there will always be costs involved in ensuring that the Constitution is complied with'.²⁷

On appeal, the Kenyan Court of Appeal took a similar approach. It ruled that the High Court of Kenya 'struck the proper balance' in weighing the petitioners' rights against the interest of national security²⁸ and upheld the initial ruling.²⁹ It further held that the High Court of Kenya did not err in quashing the Directive.³⁰ In its reasoning, it stressed that the Directive targeted

²² *Republic of Ireland v United Kingdom* (1978) Eur Court HR (ser A) [163]; *Saadi v Italy* [2008] II Eur Court HR 207 [127].

²³ *Kituo Cha Sheria* [2013] (n 2) [85].

²⁴ *Randu Nzai Ruwa v Minister, Internal Security* [2012] eKLR [53], cited in *Kituo Cha Sheria* [2013] (n 2) [85].

²⁵ *Kituo Cha Sheria* [2013] (n 2) [87].

²⁶ *Ibid* [87].

²⁷ *Ibid* [92].

²⁸ *Attorney General v Kituo Cha Sheria* [2017] Kenya Law Reports (Court of Appeal of Kenya) 33 ('*Kituo Cha Sheria* [2017]').

²⁹ *Ibid* 34.

³⁰ *Ibid* 39.

‘innocent’ people whose ‘only crime appears to be that they fled for their lives and freedom and sought refuge in Kenya’³¹ and that forced encampment would ‘[strike] at the very heart of their dignity and worth, their self-respect and their essential humanity’.³² The Court used excoriating language in describing the Directive as a ‘knee-jerk reaction’ and ‘a high-handed decision quite oblivious to and uncaring about the ensuing hardships that the target group of persons would thereby be exposed to’.³³ The Court of Appeal’s association between refugees’ coming to Kenya to seek refuge and the Kenyan government acting with no concern for their welfare also reflects the idea that host states are the substitute protectors of refugees’ human rights.

As a counterpoint to the High Court of Kenya’s categorical approach to forced encampment policies in *Kituo Cha Sheria*, a lack of consideration of the irreducible aspects of refugeehood and the ways this diminishes the force of human rights arguments is evident in the High Court of Malawi’s decision of *Ex Parte Nsabimana v Department of Poverty and Disaster Management Affairs* (*Nsabimana*).³⁴ In 2006, the Republic of Malawi issued an order that confirmed that its Dzaleka and Luwani refugee camps were ‘the designated places of residence for all asylum seekers and refugees’ (*Order*).³⁵ The Order required all refugees living outside these camps to relocate there with the exception of those given express permission to reside outside the camps on medical, educational and other related grounds. A number of refugees challenged the Order, but the Court ruled that only the lead applicant, Nsabimana, had standing to bring the action.³⁶ The rights pleaded were non-discrimination in article 20(1) of the *Republic of Malawi (Constitution) Act 1966* (*Malawian Constitution*) and the right to freedom of movement contained in article 26 of the *Convention Relating to the Status of Refugees* (*Refugee Convention*).³⁷

The High Court of Malawi did not consider the relevance of refugee status for the rights arguments mounted by the lead litigant. This is evident in the Court’s determination of the lead

³¹ Ibid 36.

³² Ibid 36.

³³ Ibid 35.

³⁴ (Unreported, High Court of Malawi, Lilongwe District Registry, Civil Application No 19 of 2006, 17 April 2008).

³⁵ Ibid 2.

³⁶ There was insufficient information provided about the identity of the other 83 applicants and, therefore, they did not have standing: *ibid* 7.

³⁷ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

applicant's argument that the Order was discriminatory within the meaning of the Malawi Constitution. Article 20(1) of the Malawian Constitution provides that, 'Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status'.

The Court held that the Order was not discriminatory, because it applied to refugees of all nationalities.³⁸ However, an issue not considered was whether it was discriminatory on the grounds of 'other status'. The Human Rights Committee has indicated that refugee status may be considered an 'other status' for the purpose of the right to be free from discrimination.³⁹ Unlike the High Court of Kenya in *Kituo Cha Sheria*, the High Court of Malawi did not consider what it means to be a refugee and the ways refugeehood gives rise to particular vulnerabilities. Without a focus on the nature of refugeehood, the constitutional prohibition of discrimination was not used as a medium through which to respond to refugees' specific needs and proved feeble when pitted against the Malawian government's forced encampment policy.

At the end of Chapter Three, I suggested that protection from refugee claims grounded in human rights law are most potent when decision-makers focus on core or unifying experiences of refugeehood as opposed to the individual litigant's unique circumstances. The idea that an abstract notion of refugeehood can be powerful in protection from refugee challenges draws on Mégret's analysis of the ways general human rights are tailored to respond to particular groups that have distinct rights claims based on irreducible experiences.⁴⁰ This conclusion also refutes Douzinas' argument that human rights claims can only lead to significant change when there is a recognition of the right bearer's 'absolute uniqueness'.⁴¹ These decisions provide further support for Mégret's position: the High Court of Kenya displayed a more detailed, comprehensive appreciation of the nature of refugeehood than the decision-making bodies examined in Chapter Three, and this translated to richer understandings of refuge's objectives and nature.

³⁸ *Nsabimana* (n 34) 16.

³⁹ There is authority for the proposition that 'alienage' can be considered an 'other status' within the meaning of article 2(1). For example, the Human Rights Committee's General Comment 15 states that 'aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof': Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, UN Doc HRI/GEN/1/Rev.1 (11 April 1986) [2] ('*General Comment No 15*').

⁴⁰ Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30(2) *Human Rights Quarterly* 494, 514.

⁴¹ Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge, 2007) 348.

B Understanding Refugees

Another distinctive aspect of decision-making in African forced encampment jurisprudence is that there is reflection on the irreducible experiences of refugeehood and also consideration of the particular refugees' specific circumstances and needs. While there were glimpses of this type of reasoning in the Human Rights Committee's and United Kingdom Upper Tribunal's decisions examined in Chapter Three,⁴² African decision-makers go further and provide detailed accounts of the refugee litigants' day-to-day lives. They use this to inform their interpretation and application of rights arguments. This is evident in *Kituo Cha Sheria*, where the High Court of Kenya outlined each petitioner's particular circumstances early in its judgment⁴³ and explicitly stated that this understanding was essential for making the determination.⁴⁴ This method of reasoning is similar to experiential approaches to understanding refuge described in Chapter Two. Below, I discuss how combined categorical and experiential reasoning allows for a deeper understanding of refuge's functions and nature and the ways refuge is responsive to the needs of families, children and refugees with disabilities.

The High Court of Kenya provided a description of the seven refugee petitioners' lives in Nairobi. It narrated their different connections to the community through religion, charity work, employment and business ownership. For example, the sixth petitioner was a Congolese refugee and a bishop at a church he started in Nairobi, which had over 300 parishioners from Congolese and Kenyan communities.⁴⁵ The second petitioner provided translation services for Ethiopian texts⁴⁶ and the fourth petitioner was a French teacher.⁴⁷ There was also recognition of the fact that the petitioners had rebuilt their lives in Nairobi.⁴⁸ The Court noted the third petitioner's evidence that he was 'fully integrated in Nairobi'.⁴⁹ With respect to the sixth petitioner, the Court stressed that he and his family had 'established [themselves] in Nairobi and built a social network' and had 'good relations with the locals and created a family within the church'.⁵⁰ There was also consideration of the petitioners' race and nationality. For example, the fourth petitioner was a Rwandan Hutu and was concerned that he would be specifically targeted if

⁴² Human Rights Committee, *Views: Communication No 2360/2014*, 114th sess, UN Doc CCPR/C/114/D/2360/2014 (25 September 2015) ('*Jasin v Denmark*'); *R v SSHD* (n 10).

⁴³ *Kituo Cha Sheria* [2013] (n 2) [14]–[21].

⁴⁴ *Ibid* [13].

⁴⁵ *Ibid* [18].

⁴⁶ *Ibid* [14].

⁴⁷ *Ibid* [16].

⁴⁸ *Ibid* [20].

⁴⁹ *Ibid* [15].

⁵⁰ *Ibid* [18].

forced to relocate to a refugee camp due to an assumption that he took part in the Rwandan genocide.⁵¹ The fifth petitioner was an Ethiopian refugee who feared forced relocation to one of Kenya's refugee camps due to their proximity to Kenya's border with Ethiopia.⁵² The Court also took account of the petitioners' past experiences. For example, it noted that the sixth petitioner's family members were killed in Kenya's Katumba refugee camp.⁵³

Additionally, when discussing the seven refugee petitioners' particular circumstances, the High Court of Kenya placed emphasis on age, family life and health conditions. For example, with respect to the second petitioner, the Court noted that he suffered from diabetes, hypertension and asthma and received healthcare from an international NGO based in Nairobi.⁵⁴ The Court stressed that many of the petitioners were married, had children and grandchildren in Nairobi and that they were concerned that forced relocation to a camp would disrupt their education. For example, with respect to the second petitioner, the Court noted that his children attended school in Nairobi and had 'established friends and playmates',⁵⁵ while the sixth petitioner had children and grandchildren who had 'all studied and continue to study in Nairobi and relocating them to the camp will greatly interrupt their smooth learning'.⁵⁶

The Court drew on the petitioners' particular circumstances and everyday lives in its assessment of their rights arguments and this experiential reasoning allowed for a deeper engagement with the concept of refuge. For example, in its reasoning with respect to the right to fair administrative action in the Kenyan Constitution, the Court stressed that for the petitioner whose family members were killed in a refugee camp, 'the threat of going back to a refugee camp brings back haunting memories'.⁵⁷ Thus, through the prism of the general human rights in the Kenyan Constitution, the Court engaged with refuge's palliative function. It went further than the decisions discussed in Chapter Three by recognising that refuge should not only provide a space for healing from past persecution, but other types of painful experiences, and that the host state should avoid putting refugees in situations where they would be re-traumatised.

In Chapter Three, I showed that in early or initial cases, decision-makers approached refuge as a remedy or legal status. This understanding of the nature of refuge is also reflected in *Kituo*

⁵¹ Ibid [16].

⁵² Ibid [17].

⁵³ Ibid [18].

⁵⁴ Ibid [14].

⁵⁵ Ibid [14].

⁵⁶ Ibid [18].

⁵⁷ Ibid [64].

Cha Sheria, but the Court also conveys a sense that refuge is also a process. The Court used the right to dignity as a response to the wrongs and injustices faced by refugees in similar ways to how the decision-makers discussed in Chapter Three used the right to be free from inhuman and degrading treatment in a remedial fashion. Also, through the right to fair administrative action, the Court highlighted the significance of refugees having a recognised legal status. One reason for the Court’s ruling that the Directive interfered with this right was that it provided for the closure of refugee registration centres in urban areas.⁵⁸ This would mean that many refugees would not be able to renew their identity papers, which undermined the rights and protections to which they are entitled.⁵⁹ However, by concentrating on the petitioners’ efforts in establishing connections in the Nairobi community, the High Court of Kenya’s judgment indicates that refuge can also be conceived as a process. In its reasoning on the right to dignity, the Court demonstrated an understanding that refuge is not bestowed but created, and that refugees who had ‘established some normalcy’⁶⁰ would have their right to dignity infringed if they were to lose the new life they have worked hard to create. In the part of the judgment that addresses the right to fair administrative action, the Court found that the Directive, by taking away the ‘accrued or acquired’ rights and entitlements without taking into account individual circumstances, was not reasonable or fair.⁶¹ While the idea of accruing rights may be antithetical to the notion that human rights are inherent and inalienable,⁶² the Court was referring to the petitioners having found employment, schools for their children and healthcare for ongoing medical conditions. The Court used the idea of fairness in Kenya’s constitutional Bill of Rights to reason that it would be unfair to disrupt refugees’ efforts in creating a sense of sanctuary by a blanket policy that did not take into account individual circumstances. This reflects the idea that refuge is a process that involves the state, the local community and refugees themselves.

Further, the Court’s experiential approach illuminates refuge’s regenerative functions for refugees and the host community. This is evident in the Court’s rejection of the Kenyan Government’s argument that the Directive would protect and promote refugees’ welfare. The Court dismissed this argument on the grounds that the petitioners and other urban refugees were contributing to the Nairobi community and confining them to camps would inhibit their ability to

⁵⁸ Ibid [65].

⁵⁹ Ibid [65].

⁶⁰ Ibid [68].

⁶¹ Ibid [62].

⁶² As noted in Chapter Three, the preamble to the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) describes human rights as ‘inherent’ and ‘inalienable’. The inalienable nature of human rights is discussed in Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 2–3.

continue to contribute.⁶³ This indicates that for refugees, a place of genuine sanctuary should enable them to not just rebuild but grow their lives, and that the host country benefits from this process of rejuvenation.

The High Court of Kenya's use of experiential reasoning responds to Malkki's concerns that when people are generically referred to as refugees, refugees 'stop being specific persons and become pure victims in general'.⁶⁴ Malkki argues that once this occurs, they no longer have 'the authority to give credible narrative evidence or testimony about their own condition' and are rendered 'universal man, universal woman, universal child, and, taken together, universal family'.⁶⁵ The High Court of Kenya, by starting its analysis with identifying common aspects of refugeehood but also engaging with each petitioners' unique circumstances, provided a space for their personal narratives to be heard.

Nevertheless, there are risks in adopting experiential reasoning in determining protection from refugee claims. In *Kituo Cha Sheria*, the High Court of Kenya at certain points in the judgment came close to adopting an approach whereby those who had proved that they had contributed to the economic life of Nairobi were exemplary and deserving refugees who should not be forced to endure life in a refugee camp. The Court described the petitioners as 'productive residents'⁶⁶ who were 'independent and ... contributing to the economy',⁶⁷ and stated that 'confining ... persons of independent means ... who are employed or carry on their business to refugee camps does not serve to solve the insecurity problem'.⁶⁸ While gaining employment and contributing to the host community are core aspects of refugee's restorative and regenerative functions, prizing values of autonomy and self-sufficiency could prioritise particular refugee narratives, specifically refugees who have the ability to gain employment or start their own businesses. The seven refugee petitioners in *Kituo Cha Sheria* were gainfully employed or successful entrepreneurs, but not all refugees have 'the language skills, educational background, and professional experience to be attractive to potential employees outside of self-created businesses'.⁶⁹

⁶³ *Kituo Cha Sheria* [2013] (n 2) [82].

⁶⁴ Liisa Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) 11(3) *Cultural Anthropology* 377, 378.

⁶⁵ *Ibid* 378.

⁶⁶ *Kituo Cha Sheria* [2013] (n 2) [68]

⁶⁷ *Ibid* [82].

⁶⁸ *Ibid* [88].

⁶⁹ Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018) 86.

More generally, focussing on values of independence and self-sufficiency risks adopting a gendered understanding of refuge. Fineman critiques the assumption that the goal for individuals and families should be to become economically independent and self-sufficient.⁷⁰ The consequence of prizing economic self-sufficiency is that those who rely on state support are heavily stigmatised.⁷¹ Fineman's argument is that dependency as opposed to autonomy is by far the more natural state: each person is dependent on others for care at many stages in their life (for example, childhood, old age and periods of disability or illness).⁷² Those who exit the workforce to provide care for others also become dependent on the state.⁷³ In the refugee resettlement context, Ramsay argues that host countries impose 'neoliberal logics of individualisation and self-sufficiency' on newly arrived refugees by stressing the need to gain employment and become self-sufficient.⁷⁴ She explains that for female refugees this can provide 'exciting possibilities' to 'fulfil aspirations for further education' and 'employment', but it also means that 'the value of their lives is measured in terms of economic productivity and self-reliance rather than sociality and acts of regeneration'.⁷⁵ Through valuing autonomy and self-sufficiency, refugees are expected to produce 'particular kinds of futures that align with state interests'.⁷⁶

Prioritising independence and self-sufficiency is also antithetical to the nature of refuge embedded in the Refugee Convention. An initial reading of the Refugee Convention may indicate that it stresses economic self-reliance; for example, it contains rights to education and employment.⁷⁷ The *travaux préparatoires* also provide some evidence that the drafters considered economic self-sufficiency to be an important aspect of refugee protection. The Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems stipulated that:

refugees will lead an independent life in the countries which have given them shelter. With the exception of 'hard core' cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated into the economic system

⁷⁰ Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press, 2004) ('*The Autonomy Myth*'); Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251.

⁷¹ Fineman, *The Autonomy Myth* (n 70) 31.

⁷² *Ibid* 35.

⁷³ *Ibid* 35–6.

⁷⁴ Ramsay (n 69) 202.

⁷⁵ *Ibid* 154.

⁷⁶ *Ibid* 193.

⁷⁷ Refugee Convention (n 37) arts 17, 18, 19, 22.

of the countries of asylum and will themselves provide for their own needs and for those of their families.⁷⁸

However, this sentiment is not repeated in the drafting history and, in particular, is not raised in the discussions on Chapter III of the Refugee Convention, which addresses employment rights. Further, Chapter III of the Refugee Convention is followed by a chapter on welfare rights. Most of these rights (housing, public relief, labour rights and social security) do not accrue until the refugee is lawfully staying in the host state's territory.⁷⁹ This means that the deeper the relationship between the refugee and host state, the more welfare rights a refugee is entitled to. Additionally, these welfare rights are available to all refugees without discrimination on the grounds of race, religion or country of origin.⁸⁰ They are not reserved only for refugees who may not be able to achieve independence because of some form of disadvantage. More evidence for this position comes from the drafting history of the right to public relief (article 23), the initial draft of which reads:

The High Contracting Parties shall grant the relief and assistance accorded to nationals to refugees who are regularly resident in their territory and are unemployed, suffering from physical or mental disease and incapable because of their condition or age of earning a livelihood for themselves and their families, and also to children without support.⁸¹

This initial wording reflects the idea that public relief should be extended only to those who need it due to some form of disadvantage. However, the International Refugee Organisation representative voiced concerns on two grounds.⁸² First, the enumerated groups were not wide enough (in particular, pregnant women and nursing mothers were not mentioned). Second, which groups receive public relief was an issue for national legislators. Therefore, he suggested a different formulation:

In respect of public relief and assistance, the High Contracting Parties shall grant to refugees regularly resident in their territory the treatment accorded to nationals.⁸³

This was the preferred formulation and the one that was eventually adopted. Thus, pursuant to the Refugee Convention, welfare is provided not on the basis of specific needs or even on the

⁷⁸ UN Ad Hoc Committee on Statelessness and Related Problems, *Memorandum by the Secretary-General*, UN Doc E/AC.32/2 (3 January 1950).

⁷⁹ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 186 ('*The Rights of Refugees*').

⁸⁰ Refugee Convention (n 37) art 3.

⁸¹ UN Ad Hoc Committee on Statelessness and Related Problems (n 78).

⁸² United Nations Economic and Social Council, *Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Fifteenth Meeting*, UN Doc E/AC.32/SR.15 (6 February 1950) [27]–[29].

⁸³ *Ibid* [27]–[29].

grounds of refugeehood. Rather, it is granted according to the welfare model adopted by the host state. Therefore, the Refugee Convention's text and drafting history indicate that the drafters understood that state support is a normal and inevitable aspect of the state/citizen relationship. The model of surrogate state protection inscribed in the Refugee Convention is not one that assumes or prizes self-reliance. Instead, the presumption is that all refugees are most likely going to be in need of state assistance and this state assistance should increase, not decrease, the longer the refugee remains in the host state.

Did the High Court of Kenya in *Kituo Cha Sheria* elevate independence and autonomy above other values and create a neoliberal conceptualisation of refuge? The Court came close to such an approach in its analysis of the predicament faced by the seventh petitioner – a legal academic.⁸⁴ The Court noted that due to his 'professional background, the petitioner's services can only be offered in an environment where there are law faculties hence confinement to the camp would suffocate his means of survival'.⁸⁵ The Court explained that forced relocation to a refugee camp would be a breach of the right to fair administrative action, because it would threaten his right to work and right to dignity.⁸⁶ While the connection between work and dignity has been recognised in the refugee law context,⁸⁷ the judgment indicates that the reason this refugee could not be forced to relocate to a refugee camp was not because of his inherent right to dignity or work, but because he had professional qualifications that would be of no utility in a camp setting. The Court's approach to this issue prompts the question of whether the outcome would have been different if this particular refugee was not a legal academic, but instead unemployed or carried out unskilled work that could have continued in a camp environment. Nevertheless, tainting the entire judgment in this manner would be unfair because at a number of points the Court stressed that the pleaded rights to fair administrative action and dignity also respond to refugees with health conditions that require specialised medical treatment and the needs of families caring for children.⁸⁸

Did the Court, by using experiential reasoning, create a gendered precedent through stressing the petitioners' economic contributions? No female refugees were represented in *Kituo Cha*

⁸⁴ *Kituo Cha Sheria* [2013] (n 2) [63].

⁸⁵ *Ibid* [19].

⁸⁶ *Ibid* [63].

⁸⁷ Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17(2) *International Journal of Refugee Law* 293, 320.

⁸⁸ *Kituo Cha Sheria* [2013] (n 2) [62], [68].

Sheria. Despite this, the Court included women's experiences by referring to some of the petitioners' female family members. For example, the Court described the sixth petitioner's wife (also a refugee) as 'a business woman' who sold textiles, educated the 'children from the proceeds of her business' and had 'built faithful customers from this business'.⁸⁹ The Court noted that the couple had a daughter who was transitioning from primary to secondary school and another in her second year at university.⁹⁰ This is significant, because the Court recognised women not only in caring roles but as entrepreneurs and students. Nevertheless, prioritising economic contributions could serve to disadvantage any future female litigants wanting to challenge forced encampment policies. Some do not wish to participate in the market force and those who do (or have no choice) often face additional gender-related barriers to gaining employment or starting businesses such as discrimination, pregnancy and breastfeeding and the expectation that they be the primary caregivers. Betts and Collier highlight that '[s]elf-reliance does not have uniform effects for everyone ... [s]ome thrive while others merely survive'⁹¹ and that female refugees often earn significantly less than male refugees.⁹² However, the Court buttressed its focus on the economic contributions made by urban refugees with other considerations such as contributions to Nairobi's social and religious life⁹³ as well as family responsibilities and health conditions.⁹⁴ Thus, the Court established an efficacious precedent for refugees from many backgrounds, but its particular focus on economic contributions indicates the risks associated with experiential reasoning in a protection from refuge context.

Overall, the High Court of Kenya's blended categorical and experiential reasoning provides a more nuanced lens on Mégret's and Douzinas' disparate contentions. When decision-makers blend the abstract or metaphysical notion of refugeehood with the individual refugee's unique circumstances, this allows for a deeper connection with the concept of refuge. However, in doing this there is a danger that decision-makers may value certain refugee narratives over others, such as the exemplary refugee who contributes to the host country's economy. This risks making protection from refuge claims useful only for certain refugees who can fit these moulds and thwarting the concept of refuge by, for example, prioritising neoliberal values of independence and self-sufficiency and ignoring its broader palliative, restorative and regenerative objectives. This indicates that the refugee litigant's individual circumstances can inform this abstract

⁸⁹ Ibid [18].

⁹⁰ Ibid [18].

⁹¹ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017) 166.

⁹² Ibid 167.

⁹³ *Kituo Cha Sheria* [2013] (n 2) [18].

⁹⁴ Ibid [62], [68].

notion of refugeehood, but only to demonstrate the particular ways their rights would be infringed – not to make distinctions between refugees based on concepts such as self-sufficiency.

C Understanding Refugee Rights

The pattern that I have shown across European and African protection from refugee decisions is that decision-makers, by adopting categorical reasoning or a blended categorical and experiential approach, can interpret general human rights so that they respond to refugees' specific predicaments. What does this mean for refugee-specific rights? Are they redundant or do they bolster protection from refugee claims? To explore these questions, I examine the ways African decision-makers interpret and apply Refugee Convention rights in protection from refugee claims.

With respect to the connections between specific refugee rights and the notion of refuge, a categorical approach is still needed for these rights to act as a bridge to ideas about refuge's objectives. This can be seen in a comparison between the High Court of Kenya's and High Court of Malawi's approaches to refugees' specific rights to freedom of movement and residence in article 26 of the Refugee Convention. As part of the High Court of Kenya's judgment in *Kituo Cha Sheria* regarding whether the Directive breaches article 26 of the Refugee Convention, the Court examined the consequences for refugees of having their freedom of movement and choice of residence curtailed.⁹⁵ The Court explained that forcing all refugees to reside in refugee camps and the consequent closure of urban refugee registration centres would have 'deleterious effects' on refugees' other rights and freedoms.⁹⁶ In particular, the Court highlighted that:

New arrivals have nowhere to report their intention to apply for asylum or seek refugee status and, if they do the process is burdensome taking into account the vulnerability [sic]. Those whose identification documents have expired or are about to expire are put to great costs and expense to have the same renewed at peril to their livelihoods. Undocumented refugees and asylum seekers are left exposed to police harassment, extortion, arbitrary arrest and eventual prosecution for being in the country illegally. Undocumented refugees and asylum seekers within urban set ups cannot access humanitarian services from organisations that provide humanitarian services which require identification as a pre-requisite for qualification of services. Some undocumented refugee children are denied access to public services such as schools and hospitals.⁹⁷

⁹⁵ Ibid [60].

⁹⁶ Ibid [60].

⁹⁷ Ibid [60].

In this part of its judgment, the Court used the rights to freedom of movement and choice of residence in the Refugee Convention to invoke other rights such as refugee identity documents, physical security, freedom from arbitrary arrest, education and healthcare. This is the inverse of what I have shown some decision-makers do with rights in general human rights instruments and it reinforces ideas about refugee's objectives. The Court's emphasis on the connections between refugee identity documents and avoiding police harassment reflects one aspect of refugee's restorative function: ensuring refugees' safety and legitimate presence in the host state. While there is no explicit right to healthcare in the Refugee Convention, the association the Court drew between identity documents and access to hospitals also reflects the restorative objective of refuge, in particular, that the host state must act as a surrogate provider of essential services. In recognising that identity documents are essential for children to access education, the Court engaged both with refugee's restorative function (that it should enable refugees to re-establish a normal, everyday life) and regenerative objective (that refugees should be able to grow, develop and build a future).

Conversely, the High Court of Malawi did not take such an approach in its assessment of the rights to freedom of movement and residence in article 26 of the Refugee Convention. The Republic of Malawi has made a reservation to that article, stating that it 'reserves its right to designate the place or places of residence of the refugees and to restrict their movements whenever consideration of national security or public order so require'. The lead applicant in *Nsabimana* argued that the reservation should not apply because the government of Malawi had not shown that he personally posed a threat to national security or public order. Also, if he were forced to return to one of Malawi's refugee camps, this would disrupt his children's schooling. However, the Court ruled that:

to require refugees/asylum seekers to reside at designated camps is a sound administrative measure to ensure certainty of their population, provision of basic necessities, communication of information, protection of their persons and property, facilitation of repatriation etc. The State does not have to wait until there is an actual breakdown of national security and public order.⁹⁸

In its assessment of article 26 of the Refugee Convention, the High Court of Malawi did not consider the relevance of *Nsabimana*'s refugee status for the article's limitation, especially with respect to the education of his children. The Court's cursory assessment only took into account the state's interests in restricting freedom of movement and not refugees' particular needs to

⁹⁸ *Nsabimana* (n 34) 18.

move freely in the host state and choose their residence. The lack of consideration of the nature of refugeehood severs connection to ideas of refuge and dilutes the force of rights arguments in challenging forced relocation to a refugee camp.

That a blended categorical and experiential approach to refugee-specific rights can heighten ideas about the objectives of refuge and sharpen the force of rights arguments against state interests is evident in the first instance and appeal decisions in *Kituo Cha Sheria* with respect to *non-refoulement*. The Directive did not explicitly provide that all urban refugees would be expelled from Kenya. Nevertheless, the High Court of Kenya found the Directive to be in violation of Kenya's *non-refoulement* obligations.⁹⁹ In coming to this determination, the Court used both categorical and experiential reasoning. It noted that refugees who have been living in the host country for long periods had 'established roots and significant connections with local communities'. Being forced to relocate to a camp environment and, thus, 'being exposed to conditions that affect their welfare negatively' may 'lead to a situation that forces some of the petitioners to leave the country'.¹⁰⁰ The Court then explicitly referred to the fifth petitioner, who feared relocation to a refugee camp because 'he would be subjected to the same persecution that he was subjected to in the Congo'.¹⁰¹ The Court found that the fifth petitioner 'and others in like situations' would be forced to leave Kenya.¹⁰² The Court ruled that both situations would amount to constructive or indirect *refoulement*.¹⁰³

Through this amalgamation of categorical and experiential reasoning, the judgment provides that refugees should not be forced to choose between life in a refugee camp where they will lose the life they have built or returning to their country of origin where their life or freedom would be threatened. While Durieux argues that *non-refoulement* should not be considered refugee law's foundational principle because it is a negative obligation¹⁰⁴ and refuge necessitates welcome into the host community,¹⁰⁵ the High Court of Kenya utilised it to encompass the positive obligations associated with refuge. Through the principle of *non-refoulement*, the Court invoked refuge's restorative and regenerative functions, in particular, that it should allow refugees to rebuild their lives and create new relationships. On appeal, the Kenyan Court of Appeal

⁹⁹ *Kituo Cha Sheria* [2013] (n 2) [75].

¹⁰⁰ *Ibid* [73].

¹⁰¹ *Ibid* [73].

¹⁰² *Ibid* [73].

¹⁰³ *Ibid* [74]–[75].

¹⁰⁴ Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20(2) *International Journal on Minority and Group Rights* 147, 155.

¹⁰⁵ *Ibid* 156.

gave even greater force to the principle of *non-refoulement* in challenging state interests. It declared that *non-refoulement* is a peremptory norm of international law¹⁰⁶ and stated that ‘it is not open for the State to go against a peremptory norm of international law and its having done so is alone sufficient to justify the quashing of the Directive’.¹⁰⁷

While the general human rights claims pleaded in African protection from refugee decisions are potent against forcible relocation to a refugee camp, refugee-specific rights have greater potential to dismantle the practice of encampment more generally. This is apparent in the High Court of Kenya’s approach to refugees’ rights to freedom of movement and choice of residence in *Kituo Cha Sheria*. The Court acknowledged that the refugee petitioners had freedom of movement rights under the Kenyan Constitution,¹⁰⁸ *African Charter on Human and People’s Rights*,¹⁰⁹ *International Covenant on Civil and Political Rights* (‘ICCPR’)¹¹⁰ and Refugee Convention.¹¹¹ However, these freedom of movement and choice of residence rights are not identical. The Court highlighted in particular the differences between freedom of movement and choice of residence rights in article 39 of the Kenyan Constitution and article 26 of the Refugee Convention. Article 39(1) of the Kenyan Constitution provides that ‘every person has the right to freedom of movement’, but Article 39(3) states that only Kenyan citizens have the ‘right to enter, remain in and reside anywhere in Kenya’. The Attorney-General argued that refugees in Kenya do not have the right to choose their own places of residence, because Kenya’s Constitution only bestows that right on citizens. However, the Court stated that article 39 of Kenya’s

¹⁰⁶ *Kituo Cha Sheria* [2017] (n 28) 26. There is debate on whether the principle of *non-refoulement* is a norm of customary international law, but the United Nations High Commissioner for Refugees (‘UNHCR’) and most international law scholars agree that it is: Cathryn Costello and Michelle Foster, ‘*Non-Refoulement* as Custom and *Jus Cogens*? Putting the Prohibition to the Test’ (2015) 46 *Netherlands Yearbook of International Law* 273; Guy Goodwin-Gill, ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26(4) *Virginia Journal of International Law* 897; Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 87; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (26 January 2007) <<http://www.refworld.org/docid/45f17a1a4.html>>. Cf Kay Hailbronner, ‘*Non-Refoulement* and “Humanitarian Refugees”: Customary International Law or Wishful Legal Thinking?’ (1986) 26(4) *Virginia Journal of International Law* 857; James Hathaway, ‘Leveraging Asylum’ (2010) 45(3) *Texas International Law Journal* 503. Some scholars argue that *non-refoulement* is also a peremptory norm of international law: Jean Allain, ‘The *Jus Cogens* Nature of *Non-Refoulement*’ (2002) 13(4) *International Journal of Refugee Law* 533.

¹⁰⁷ *Kituo Cha Sheria* [2017] (n 28) 35.

¹⁰⁸ Article 39, cited in *Kituo Cha Sheria* [2013] (n 2) [51].

¹⁰⁹ Opened for signature 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) (entered into force 21 October 1986) art 12(1) cited in *Kituo Cha Sheria* [2013] (n 2) [53].

¹¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(1) [52].

¹¹¹ Article 26, cited in *Kituo Cha Sheria* [2013] (n 2) [51].

Constitution must be read in conjunction with article 26 of the Refugee Convention.¹¹² Article 26 of the Refugee Convention provides that refugees lawfully in the territory of a host state¹¹³ have the right to choose their places of residence. The High Court of Kenya held that the Directive violated refugees' right to choice of residence in article 26 of the Refugee Convention.¹¹⁴

At no point in the judgment did the Court directly consider whether Kenya's policy of encampment or the conditions in the camps infringe international, regional or domestic refugee or human rights law. This was because of the way the case was pleaded (the petitioners challenged their forced transfer to a refugee camp and not the policy of encampment per se). Nevertheless, it was at this point in the judgment that the High Court of Kenya came close to setting a precedent that would render not only forced relocation of urban refugees to camps inconsistent with Kenya's obligations under international refugee law, but put into question the legality of Kenya's practice of encampment more generally. While the rights to freedom of movement and choice of residence in the Refugee Convention are qualified rights, the grounds on which states can limit these rights are less flexible than the grounds in general human rights instruments such as the ICCPR. The rights to freedom of movement and choice of residence in article 26 of the Refugee Convention are 'subject to any regulations applicable to *aliens generally in the same circumstances*' (emphasis added). This means that for a forced encampment policy to be valid under the Refugee Convention, it must apply not only to refugees but to 'aliens generally in the same circumstances' which has been interpreted to mean other admitted non-citizens.¹¹⁵ The likelihood that the Kenyan Government would include within a forced encampment policy other admitted non-citizens such as tourists or those with a visa that permits work or education is highly improbable. Thus, under the framework of the Refugee Convention, the Kenyan Government would have no realistic grounds on which to justify a forced encampment policy. This

¹¹² *Kituo Cha Sheria* [2013] (n 2) [51].

¹¹³ The Court does not discuss whether the seven refugee petitioners are lawfully in Kenya within the meaning of the Refugee Convention (n 37). However, it cites the Human Rights Committee's conclusion that, for the purposes of freedom of movement and residence, 'an alien who entered the State illegally, but whose status has been regularized, must be considered lawfully within a State': Human Rights Committee, *General Comment No 27* (n 21) [4] cited in *Kituo Cha Sheria* [2013] (n 2) [54]. However, given that they had all been living in Kenya for a number of years at the time of the judgment and the fact that they all had refugee status leaves no doubt that they were lawfully in the country for the purposes of article 26 of the Refugee Convention (n 37). For an analysis of when a refugee is lawfully in the host state's territory, see Cathryn Costello, Yulia Ioffe and Teresa Büchsel, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (UNHCR Legal and Protection Policy and Research Series, PPLA/2017/01, July 2017) 6 <<http://www.refworld.org/docid/59ad55c24.html>>; Hathaway, *The Rights of Refugees* (n 79) 140.

¹¹⁴ *Kituo Cha Sheria* [2013] (n 2) [59].

¹¹⁵ Hathaway, *The Rights of Refugees* (n 79) 197; Reinhard Marx, 'Part Six Administrative Measures: Article 26' in Andreas Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) [54]–[57].

is different from the grounds on which a state can justify restrictions on freedom of movement and residence under the ICCPR. Pursuant to art 12(3), these rights can be curtailed if those restrictions are provided by law; are necessary to protect national security, public order, public health or morals or the rights and freedoms of others; and are consistent with the other rights in the ICCPR. Under the ICCPR's framework, it is possible that the Kenyan Government could justify a policy of forced encampment for refugees. It would have to justify the policy on the grounds of, for example, public order. It would also have to ensure that such a policy does not offend the principle of non-discrimination in articles 2(1) and 26 of the ICCPR.¹¹⁶ Distinctions on one of the grounds enumerated in articles 2(1) and 26 are permissible as long as they are reasonable, objective and achieve a purpose legitimate under the ICCPR.¹¹⁷ Thus, under the ICCPR framework, the Kenyan government has more flexible grounds on which to justify a forced encampment policy for refugees than it does under the Refugee Convention. This indicates that the rights in the Refugee Convention, designed to address refugees' specific needs, can be particularly potent in challenging state interests.

The Kenyan Court of Appeal's judgment further demonstrates refugee-specific rights' power to contest containment policies. It upheld the High Court of Kenya's decision that the Directive violated refugees' rights to freedom of movement.¹¹⁸ It specifically confirmed that the first instance judge was correct in reading article 39 of the Kenyan Constitution in conjunction with article 26 of the Refugee Convention on the grounds that article 2(6) of Kenya's Constitution provides that international treaties ratified by Kenya form part of Kenyan law.¹¹⁹ In dismissing the Attorney-General's appeal, the Court stressed that it is the duty of all courts to apply the provisions of Kenya's constitutional Bill of Rights (which, by virtue of article 2(6), encompasses international human rights) 'in a bold and robust manner', even if the consequences are 'disruptive' to ensure that 'no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights'.¹²⁰ By quashing the Directive,¹²¹ these two

¹¹⁶ Article 2(1) of the ICCPR (n 110) provides that the rights in the ICCPR shall be granted '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'. There is authority for the proposition that 'alienage' can be considered an 'other status' within the meaning of article 2(1): Human Rights Committee, *General Comment No 15* (n 39) [2]; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 2005).

¹¹⁷ Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess (10 November 1989) [13]; Human Rights Committee, *Views: Communication No 198/1985*, 30th sess, UN Doc CCPR/C/30/D/198/1985 (9 July 1987) 170 ('*Stalla Costa v Uruguay*'); Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) ('*Waldman v Canada*').

¹¹⁸ *Kituo Cha Sheria* [2017] (n 28) 21.

¹¹⁹ *Ibid* 19.

¹²⁰ *Ibid* 17.

¹²¹ *Kituo Cha Sheria* [2013] (n 2) [100]; *Ibid* 39.

decisions were a triumph of human and refugee rights over a state's desire to constrain refugees' movements and inhibit their quests for refuge. They were victories not just for the seven refugee petitioners, but for all refugees living in Kenya's urban centres. The High Court of Kenya's decision was also potentially a victory for all refugees in Kenya when taking into account its reasoning on the right to freedom of movement, which came close to providing a precedent indicating that Kenya's practice of encampment was inconsistent with its human rights obligations.

III FROM CATEGORICAL AND EXPERIENTIAL TO EXCEPTIONAL: THE DESERVING REFUGEE

In a shift similar to the one identified in Chapter Three, there has been a change in the way African decision-makers approach challenges to forced encampment policies. There is now a focus on finding the exceptional refugee. African decision-makers look for vulnerabilities in addition to refugeehood, but they also try to find the laudable or 'good' refugee who has made an exceptional contribution to their host country. I now outline the changes in judicial approaches to challenges to forced encampment policies. I argue that they have altered the concept of refuge, diluted the potential for rights arguments to challenge containment policies and obstructed refugees' searches for refuge.

A Diminishing Significance of Refugeehood and the Individualisation of Human and Refugee Rights Claims

In forced encampment challenges initiated after *Kituo Cha Sheria*, African decision-makers no longer adopt a categorical approach to rights arguments. They do not start their reasoning by considering the irreducible experiences of refugeehood and how this may inform the interpretation and application of human and refugee rights. Instead, they move directly to enquiring as to how forced encampment would affect each individual refugee and whether, on a case-by-case basis, this would amount to a violation of their human rights.

This shift first occurred in the High Court of Kenya's 2014 judgment in *Samow Mumin Mohamed v Cabinet Secretary, Ministry of Interior Security and Co-ordination* ('*Samow Mumin Mohamed*').¹²² In this case, 10 urban refugees unsuccessfully challenged a second directive issued by the Kenyan government requiring all refugees to relocate to one of Kenya's two refugee camps ('Second Directive'). The petitioners attempted to frame their case in line with the

¹²² [2014] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division).

precedent set by *Kituo Cha Sheria*. They argued that the Second Directive violated their fundamental rights and freedoms, in particular, ‘the right to equality and freedom from discrimination, right to human dignity, freedom and security of the person, right to privacy, freedom of movement and residence, right to own property, right to fair administrative action and the right to a fair hearing’.¹²³ However, in determining their claims, the Court did not place any significance on the petitioners’ refugee experience and, unlike in *Kituo Cha Sheria*, did not undertake its rights assessment against the backdrop of refugees being vulnerable persons within the meaning of the Kenyan Constitution art 21(3). Instead, the Court found against the refugee petitioners because they did not demonstrate ‘how the Directive affects their individual circumstances to the extent that their fundamental rights and freedoms are violated’.¹²⁴

The High Court of Kenya adopted the same test in the 2015 case of *Refugee Consortium of Kenya v Attorney General* (‘*Refugee Consortium of Kenya*’),¹²⁵ in which the Second Directive was challenged by an NGO and a refugee petitioner acting in a representative capacity. In this subsequent challenge to the Second Directive, the High Court of Kenya clarified that in *Samow Mumin Mohamed*, ‘the Court did not ... make a declaration that the [Second] Directive and press statement are unconstitutional, but held that the Petitioners in that case had failed to demonstrate how the Directive affects their individual circumstances’.¹²⁶ The Court then explained that it was ‘at liberty to consider the constitutionality of the [Second] Directive by firstly determining whether or not the Petitioners in this matter have made a convincing case that it infringes upon their rights and fundamental freedoms’.¹²⁷

What is evident in this trajectory is a shift in judicial approaches to forced encampment challenges grounded in human and refugee rights arguments. At no point in the judgment in *Kituo Cha Sheria* did the High Court of Kenya require the seven refugee petitioners to prove individually that due to their specific circumstances their human and refugee rights would be violated. The Court referred to the petitioners’ individual circumstances but only to demonstrate how the Directive would violate their human and refugee rights. While in *Samow Mumin Mohamed* the Court emphasised that the petitioners did not bring the claim in any representative capacity,¹²⁸ neither did the refugee petitioners in *Kituo Cha Sheria*. Nevertheless, at a number of points in

¹²³ Ibid [16].

¹²⁴ Ibid [27].

¹²⁵ [2015] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division) [44].

¹²⁶ Ibid [44].

¹²⁷ Ibid [44].

¹²⁸ *Samow Mumin Mohamed* (n 122) [20].

the judgment in *Kituo Cha Sheria*, the Court referred to the petitioners and other refugees in their situation.¹²⁹ This and the fact that the Court quashed the Directive indicates that it did not require the petitioners in *Kituo Cha Sheria* to establish how the Directive would affect their individual circumstances to the extent that their fundamental rights and freedoms would be violated.

Nanima suggests that the petitioners in *Samow Mumin Mohamed* were unsuccessful because they did not comply with their obligation to plead their human rights claim with precision and clarity,¹³⁰ but this argument is unconvincing. It is possible that the petitioners in *Samow Mumin Mohamed* did not argue their cases with the same degree of detail and precision as the petitioners in *Kituo Cha Sheria*, who had the assistance of an NGO. Another distinguishing factor is that in *Kituo Cha Sheria*, the United Nations High Commissioner for Refugees appeared as *amicus curiae* and provided significant assistance to the Court on the relevant legal issues, whereas it did not submit an *amicus curiae* brief in *Samow Mumin Mohamed*. However, the same judge of the High Court of Kenya, Justice Majanja, decided both cases and, as outlined above, took distinctly different approaches to both challenges. It is outside this thesis' scope to investigate the reasons for shifts in decision-makers' approaches to protection from refugee cases. Future research could investigate whether the domestic political environment may have influenced this change in judicial approach.

B *The Exceptional Refugee*

The loss of a categorical approach and the shift in judicial reasoning, whereby challenges to forced encampment are considered on a case-by-case basis, means that decision-makers look for exceptionalities beyond refugeehood. This is evident in the High Court of Kenya's 2015 judgment in *Refugee Consortium of Kenya*. The second petitioner was a refugee who was forcibly relocated to Dadaab Refugee Camp pursuant to the Second Directive. She and other refugees were taken to the camp after attending a church service. She had left her six children at home during the church service and was not allowed to see them or make arrangements for them before she was forcibly transferred to the camp and remained separated from them while living in the camp. She brought the petition on behalf of her six children and 48 other children separated from their parents as a result of the same incident. The Court started its analysis by

¹²⁹ *Kituo Cha Sheria* [2013] (n 2) [68], [100].

¹³⁰ Nanima (n 3) 62, 66.

referring back to the precedent of *Kituo Cha Sheria* and acknowledging that refugees are vulnerable persons within the meaning of the Kenyan Constitution.¹³¹ It then noted that ‘[i]n addition to vulnerabilities which a person may face by virtue of being a refugee, the difficulties of a person’s situation is extrapolated if that person is also a child and belongs to another group of “vulnerable persons”’.¹³²

While the Court recognised the compounding effects of youth and refugeehood, the Court’s reasoning indicates that, if not for this additional vulnerability, the petitioners would not have been successful. The Court held that there had been a breach of the right to fair administrative action in Kenya’s constitutional Bill of Rights.¹³³ However, unlike in *Kituo Cha Sheria*, where the Court broadly considered encampment’s effects on families, employment, access to healthcare, renewal of identity papers and previous trauma associated with camp environments, the Court in *Refugee Consortium of Kenya* limited its consideration to the second petitioner’s and other parents’ arrest and forced relocation after the church service while their children were at home. The Court reasoned that their right to fair administrative action was breached because the ‘affected parents were arrested while in Church, denied the opportunity to make arrangements for the care of their minor children, detained and removed to the Refugee Camps’.¹³⁴ This is different from the Court’s reasoning in *Kituo Cha Sheria* on the right to fair administrative action, in which it found that ‘[e]very person who acquires refugee status under our law is entitled to be treated as such. The Government Directive ... being a blanket directive, is inconsistent with the provisions of ... international law’.¹³⁵ Under this reasoning, it is the government’s obligation to take into account individual circumstances. However, in *Refugee Consortium of Kenya*, the Court changed its reasoning in a way akin to shifting the burden of proof by requiring the petitioners to show why forced encampment affected their individual circumstances to such an extent that their fundamental freedoms were infringed.

Unlike many of the protection from refugee challenges considered in Chapter Three in which decision-makers considered factors such as age and gender in a perfunctory manner, the High Court of Kenya, when considering refugees’ individual circumstances, demonstrated sensitivity towards the ways containment policies affect women, parents and children. This is most apparent in its assessment of the petitioners’ argument that the forced relocation of refugee parents

¹³¹ *Refugee Consortium* (n 125) [45].

¹³² *Ibid* [46] (emphasis in original).

¹³³ *Ibid* [58].

¹³⁴ *Ibid* [58].

¹³⁵ *Kituo Cha Sheria* [2013] (n 2) [62].

to camps and subsequent separation from their children amounted to a breach of children's rights to parental care, education and protection from neglect.¹³⁶ The Court highlighted the ways the Second Directive harmed the children's health, education and welfare. It noted that that some of the children were being breastfed at the time the Kenyan government forcibly relocated their mothers to Dadaab Refugee Camp and 'consequently suffered malnutrition'.¹³⁷ The Court stressed that many of the children represented by the second petitioner had to leave school because their parents were unable to pay school fees.¹³⁸ Also, many were placed in dangerous positions because they had no income and their new guardians were not able to provide for them financially.¹³⁹

Nevertheless, a shift from categorical reasoning informed by core or unifying aspects of refugeehood to one where decision-makers look for some form of exceptionality beyond refugeehood renders rights arguments less efficacious in challenging containment policies. It also means that only certain refugees can successfully use court processes in their quest to find refuge. At no point did the Court indicate that the Kenyan government's forced encampment policy would imperil all refugee children's lives and safety. This is in line with its insistence at the beginning of the judgment that the petitioners had to prove that the Second Directive infringes their fundamental rights and freedoms 'in the specific circumstances and pleadings in [the] case'.¹⁴⁰ While this case was a victory for the second petitioner and the other families she represented, it was not a victory for all urban refugees. Unlike in *Kituo Cha Sheria*, the High Court of Kenya did not quash the Second Directive, but only made an order for reunification in relation to the second petitioner and the other families she represented.¹⁴¹ While this case would have made a significant difference to the lives of the 48 represented children and their parents, it aligns with Douzinas' argument that human rights litigation can 'undoubtedly improve the lives of people' through individual victories, but cannot lead to radical change.¹⁴²

Further, this exceptionality approach leads to impoverished understandings of refuge. For example, in *Samow Mumin Mohamed*, the Court did not address the 10 refugee petitioners' arguments regarding the ways forced encampment would be a violation of their human rights such as the rights to dignity, equality and freedom from discrimination. Instead, the Court assessed

¹³⁶ *Refugee Consortium* (n 125) [66].

¹³⁷ *Ibid* [60].

¹³⁸ *Ibid* [60].

¹³⁹ *Ibid* [60].

¹⁴⁰ *Ibid* [44].

¹⁴¹ *Ibid* [85].

¹⁴² Douzinas (n 41) 109.

whether the petitioners would face persecution if forcibly transferred to refugee camps or whether their business would be disrupted. The Court found that ‘[u]nlike in the *Kituo Cha Sheria Case*, the petitioners have not established a basis for persecution if they return to the camps’.¹⁴³ However, in *Kituo Cha Sheria*, only ‘some of the petitioners’ established that they would be persecuted if forcibly relocated to refugee camps.¹⁴⁴ Further, in *Kituo Cha Sheria*, the Court considered the risk of persecution in the context of the right to fair administrative action. The petitioners in *Samow Mumin Mohamed* pleaded this right, but the Court did not address it. This reasoning confines the concept of refuge to the bare minimum of protection from persecution and obscures the broader and richer notions of refuge reflected in *Kituo Cha Sheria* such as the need to establish normalcy, heal from past trauma, create a new community and pursue education. It limits refuge’s objectives to a narrow conception of its restorative function (re-establishing safety and security) and ignores its regenerative and palliative functions.

In focussing on the petitioners’ identity as business owners, the Court skewed the nature of refuge from a remedy that addresses the difficulties associated with refuge to a reward. The Court found that ‘there is nothing to show that [the petitioners’] businesses will be disrupted’ and stressed that, like all other refugees living in refugee camps in Kenya, they could apply for movement permits.¹⁴⁵ In making this determination, the Court implied that the petitioners’ work is not consequential or prestigious enough that it would be disrupted by forced relocation to a refugee camp. Unlike the legal academic in *Kituo Cha Sheria* who could not continue his profession in the confines of a camp or the other petitioners who were ‘productive residents’ and ‘contributing to the economy’, the petitioners in *Samow Mumin Mohamed* did not meet these thresholds. This change in approach by the same judicial officer moves the jurisprudence in the direction of permitting individual challenges when the refugee petitioners can establish that they contribute to the Kenyan economy in unique or exceptional ways and, thus, are exemplary refugees who do not deserve to be relocated to a camp environment. Refuge is no longer understood to be a response to the vicissitudes of persecution and displacement, but a prize to be granted to the most meritorious refugees. This is an unhelpful decision for those who, because of factors such as age, gender, disability and family responsibilities, cannot become what is understood to be productive or exemplary refugees. It indicates that these refugees cannot make

¹⁴³ *Samow Mumin Mohamed* (n 122) [26].

¹⁴⁴ *Kituo Cha Sheria* [2013] (n 2) [64].

¹⁴⁵ *Samow Mumin Mohamed* (n 122) [26].

use of courts in their journeys in search of refuge. It also ignores the situation of refugees confined to a camp environment and who have never had the opportunity to contribute to Kenyan society.

C An End to Encampment?

All of the above cases concerned urban refugees resisting forced relocation to a refugee camp, but what about refugees in a camp environment who may have been living there for many years or who may have been born there and do not know any other home? In the cases examined so far in this chapter, the Courts could not directly address this issue (although, as discussed above, the High Court of Kenya in *Kituo Cha Sheria* adopted reasoning that came close to setting a precedent pursuant to which the practice of encampment would be seen as a breach of the Refugee Convention). A different type of protection from refugee challenge was made in *Coalition for Reform and Democracy v Republic of Kenya* ('*Coalition for Reform and Democracy*').¹⁴⁶ One of the issues in this 2015 case was whether an amendment to Kenya's *Refugee Act 2006* that provided that refugees living in one of Kenya's refugee camps shall 'not leave the designated refugee camp without the permission of the Refugee Camp Office'¹⁴⁷ violated refugees' right to freedom of movement. This case was an opportunity for the High Court of Kenya to consider the legality of forcing refugees residing in camps to remain there.

The Court's approach to determining this claim continued its trajectory of lost focus on the significance of refugeehood and the consequential dilution of the force of refugees' rights claims in the face of states constraining their mobility and ability to search for refuge. The diminishing significance of refugeehood is evident in the Court's failure to consider the rights refugees are entitled to domestically, regionally and internationally. The Court acknowledged that refugees are entitled to freedom of movement under article 39 of the Kenyan Constitution.¹⁴⁸ However, it did not acknowledge that refugees are considered vulnerable persons within the meaning of the Kenyan Constitution and that the government has a special duty to address their needs. While the Court referred to the Refugee Convention and *Convention Governing the*

¹⁴⁶ [2015] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division).

¹⁴⁷ The *Refugee Act 2006* was amended by section 47 of the *Security Laws (Amendment) Act 2014* (Kenya) by adding section 14(c) which applies only to those living in camps and requires them to remain there unless they have the Refugee Camp Officer's permission to leave.

¹⁴⁸ *Coalition for Reform and Democracy* (n 146) [394].

Specific Aspects of the Refugee Problems in Africa,¹⁴⁹ it did so only with respect to provisions that confirm that refugees have a duty to conform to the host country's laws and regulations.¹⁵⁰ The Court did not consider the rights to freedom of movement and residence in those instruments, or other refugee-specific rights despite earlier precedent confirming that these rights are part of Kenyan law.¹⁵¹

Without reference to these additional rights, the petitioners' claim was a weak one. The Court dismissed the claim on the grounds that the 'right to enter, remain and reside anywhere in Kenya is constitutionally reserved to citizens and therefore there is no violation of the right to freedom of movement in requiring that refugees wishing to leave the camp obtain permission from the Camp Officer'.¹⁵² It did not consider the greater freedom of movement and choice of residence rights refugees have pursuant to the Refugee Convention.

Without adopting a categorical approach and considering the irreducible experiences of refugeehood, the Court did not reflect on the importance of freedom of movement for refugees and its connection to other rights such as education and healthcare. This dilutes the force of refugee rights in contests against state interests and narrows ideas of refuge. The Court did not reflect on the significance of freedom of movement rights for refugees and justified the requirement to remain in a camp unless permission to leave is granted on the grounds that it enabled the Kenyan government to 'protect and offer security to refugees' by ensuring the Camp Officer 'knows the whereabouts of each refugee' which is particularly important for ensuring national security.¹⁵³ This limits the notion of refuge to offering protection and security to refugees and ignores broader ideas of refuge associated with rebuilding lives, regenerating futures and healing from trauma.

The approach taken by the High Court of Kenya in *Coalition for Reform and Democracy* was a missed opportunity for it to rule on the legality of encampment. If the Court adopted the same approach taken in *Kituo Cha Sheria*, it would have considered, with reference to domestic, regional and international human rights and refugee law, whether it is permissible to allow

¹⁴⁹ Organization of African Unity, *Convention Governing the Specific Aspects of the Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) preamble ('OAU Refugee Convention').

¹⁵⁰ Article 2 of the Refugee Convention (n 37) and Article 3 of the OAU Refugee Convention (ibid), referred to in *Coalition for Reform and Democracy* (n 146) [398], [399].

¹⁵¹ *Kituo Cha Sheria* [2013] (n 2) [32].

¹⁵² *Coalition for Reform and Democracy* (n 146) [402].

¹⁵³ Ibid [402].

refugees to leave camps only with government permission. The categorical approach taken in the earlier decision would have prompted the Court to consider whether such restrictions were an infringement of refugees' rights in the context of their vulnerable position of having fled their homeland and needing to build a life for themselves in a foreign land.

Further, the trajectory of forced encampment jurisprudence in Kenya means that human rights arguments are more useful for refugees who have managed to leave a camp environment or avoid it altogether and to establish residence in an urban area. Under the precedent of *Kituo Cha Sheria*, urban refugees were able to have the first Directive quashed on the grounds that the sense of normalcy they had established would be disrupted if forced to live in a refugee camp. While the subsequent decisions are less powerful, they still provide grounds for urban refugees to point to some exceptional, individual grounds as to why their rights would be infringed by forced transfer to a refugee camp. The judgment in *Coalition for Reform and Democracy* indicated no human rights grounds that refugees living in a camp environment can raise to avoid being confined there. There are many reasons why refugees living in camp environments would face challenges in moving to an urban area such as disability, youth, old age and family responsibilities, and the judicial approaches to forced encampment jurisprudence in Kenya compound these challenges.

Finally, when human rights arguments against forced encampment atrophy, refuge becomes relative. In a twist to the battles between refugees and the government in Kenya's forced encampment saga, in 2017 the Kenyan National Commission on Human Rights lodged a petition in the High Court of Kenya contesting the closure of Dadaab Refugee Camp.¹⁵⁴ The Kenyan Government had ordered the camp's closure along with the repatriation of all Somali refugees. The Court declared the decision to close Dadaab Refugee Camp null and void because it did not allow individual refugees to make representations about the closure and, thus, infringed the right to fair administrative action.¹⁵⁵ This legal challenge sheds a different light on Harrell-Bond's observation that 'refugee camps are not good for anyone' and '[e]veryone who can gets out of them as quickly as possible'.¹⁵⁶ The camp, which urban refugees petitioned against being transferred to and refugees in the camp fought for permission to leave, became a place that refugees and their advocates fought to keep open.

¹⁵⁴ *Kenya National Commission on Human Rights v Attorney General* [2017] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division).

¹⁵⁵ *Ibid* 35.

¹⁵⁶ Harrell-Bond (n 1) 1.

IV CONCLUSION

This chapter's objective was to continue my analysis of the ways decision-makers determine protection from refugee claims grounded in human rights arguments by comparing decision-makers' approaches in Africa with those in Europe. Looking across international, regional and domestic decision-making bodies and claims based in international, Council of Europe, African and domestic human rights and refugee law, I have identified three different approaches: categorical, blended categorical and experiential, and exceptionality reasoning. When decision-makers employ categorical or blended categorical and experiential reasoning, they engage with the concept of refuge in a purposive manner. I have suggested that through the prism of human and refugee rights, decision-makers engage with refuge's restorative, regenerative and palliative functions. They also use human rights law as a medium to recognise the nature of refuge as a remedy, legal status and process. Further, these approaches encompass the ways refuge must respond to refugees of different ages and genders as well as refugees with family responsibilities and disabilities. This type of reasoning also lends potency to human rights arguments when pitted against states' containment policies. They provide human rights grounds for large numbers of refugees to be able to continue their quests for refuge.

However, I have also argued that these decision-making bodies have shifted to exceptionality reasoning. Refugeehood is given less emphasis and the protection from refugee litigant must establish why they are acutely vulnerable or otherwise exceptional or distinctive. This narrows the concept of refuge to minimalist ideas of refugee protection and truncates refuge's temporality – in particular, the way it addresses refugees' future and past. It usurps refuge's remedial nature and transforms it into a commodity to be given to the most vulnerable or a reward to be bestowed on the most deserving. This approach thwarts the potential for human and refugee rights to dismantle containment policies, because it assesses the application of such policies to individual refugees on a case-by-case basis. While this exceptionality reasoning should, in theory, mean that children, parents and refugees with serious health conditions are more likely to be successful in protection from refugee claims and continue their journeys in search of refuge, this is only the case when decision-makers are sensitive to how gender, age, family responsibilities and disability are relevant to the experience of refuge.

Overall, the trajectory of decision-makers' approaches to and determination of protection from refugee claims grounded in human and refugee rights arguments indicates that these challenges

are most powerful when decision-makers conceptualise the figure of the refugee as a metaphysical one based on the irreducible experiences of refugeehood. The refugee litigant's individual circumstances can inform this abstract notion of refugeehood, but only to demonstrate the particular ways their rights would be infringed – not to make distinctions between refugees based on concepts such as vulnerability or self-sufficiency. Requiring refugees to establish that they are exceptional in some way dilutes the concept of refuge and diminishes the force of rights arguments in contests with state's justifications for containment policies. It enables only particular refugees to turn to courts to continue their quest for refuge and often does not assist those who face the greatest challenges in travelling in search of refuge.

CHAPTER FIVE

DIRECT CHALLENGES TO BILATERAL AND MULTILAT- ERAL CONTAINMENT AGREEMENTS IN REFUGEES’ JOURNEYS IN SEARCH OF REFUGE

I INTRODUCTION

‘The journey was worth it. I’m happy I’m here. To go back, I lose my life’.¹ Seidu Mohammed, a Ghanaian refugee, spoke these words after he had all of his fingers amputated. He had walked across the border from the United States to Canada in December 2016 in freezing conditions, suffered severe frostbite and almost died. The United States had refused to hear his asylum claim and he crossed into Canada in a remote area to avoid the operation of an agreement between the two countries pursuant to which Canada could have returned him to the United States. In this chapter, I examine legal challenges to this and other international containment agreements. All of the refugee litigants are, similar to Seidu Mohammad, trying to escape from one country to another in their search for refuge, but in doing so confront state mechanisms designed to prevent or disrupt these journeys. However, unlike the refugee litigants in Chapter Three, the protection from refugee claimants discussed in this chapter are directly challenging a bilateral or multilateral agreement’s validity or operation.²

This chapter provides different insights on the research questions posed in this thesis. In the previous two chapters, I investigated how decision-makers approach protection from refugee claims grounded in human and refugee rights law. The arguments that refugee and asylum seeker litigants plead in the cases discussed in this chapter are more wide-ranging. Human and refugee rights claims are present, but they are not the focal point. The arguments the litigants raise traverse many areas of domestic, regional and international law, and courts must assess which aspects of these bodies of law are relevant in determining the protection from refugee claim. Also, a contentious issue in these cases is whether these legal frameworks permit courts to pass judgment on another state’s laws and policies. The third difference is that, unlike the

¹ Austin Grabish, Canadian Broadcasting Commission, ‘Frostbitten Refugee Will Lose Fingers, Toe After 7-Hour Trek to Cross US-Canada Border’, *CBS News* (online at 12 January 2017) <<http://www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146>>.

² Bilateral agreements are agreements between two nation-states. Multilateral agreements are agreements between three or more nation-states.

previous two chapters where decision-makers' focus was on refuge's functions, in these cases decision-makers are grappling with the threshold of refuge other countries must meet. Because of these differences, the role of juridical and geographic boundaries is more salient in these cases.

The purpose of this chapter is to examine the ways decision-makers approach juridical and geographic boundaries in determining protection from refuge claims that directly challenge the operation or validity of a multilateral or bilateral containment agreement. I commence this chapter by discussing theories of the relationship between law and borders, which will guide the analysis of the case law. I then examine the ways judges position juridical borders in conceptualising the threshold and nature of refuge and determining a bilateral or multilateral agreements' legality and whether their manoeuvring of borders facilitates or frustrates refugees' (or particular refugees') journeys in search of refuge. I argue that when courts consider the significance of refugeehood and expand their juridical borders to permit assessment of sites of refuge in other states, they set high thresholds for refuge and disrupt the continuation of containment agreements. However, in later cases, courts ignore the salience of refugee status and retract their juridical borders. This means that there is no longer a minimum standard of refuge set in these protection from refuge cases and refugees become trapped in the resisted place of refuge, unable to continue their journey except in exceptional or extraordinary circumstances.

II BORDERS AND BOUNDARIES

The relationship between law and borders is a perennial theme in refugee and migration law scholarship and one of the ideas to emerge is the multiplication and malleability of borders. Kesby argues that states do not have a single, distinct border, but many borders that strategically include or exclude people in different locations.³ Shachar draws a distinction between states' geographic and juridical borders and highlights the ways juridical borders shift.⁴ She argues that:

The firm borderlines drawn in the world atlas do not necessarily coincide with those adhered to, indeed created through, immigration law and policy. Instead, we increasingly witness a border that is in flux: at once more open and more closed than in the past ... the location of

³ Alison Kesby, 'The Shifting and Multiple Border in International Law' (2007) 27(1) *Oxford Journal of Legal Studies* 101, 112–13.

⁴ Ayelet Shachar, 'The Shifting Border of Immigration Regulation' (2009) 30(3) *Michigan Journal of International Law* 809, 810.

the border is shifting – at times penetrating into the interior, in other circumstances extending beyond the edge of the territory.⁵

While Shachar focusses on how the parliament and executive expand and shift state borders, courts also engage in moving, enlarging and retracting legal boundaries. They do this when they consider the relevance of international law and foreign jurisprudence as well as the extent to which they examine and pass judgment on other states' laws and policies. With respect to the relationship between decision-makers and juridical borders, Slaughter argues that many domestic courts and tribunals engage in 'transjudicial communication', which involves courts around the world having a global conversation.⁶ Transjudicial communication can be vertical, which involves domestic courts drawing on decisions by international bodies.⁷ It can also be horizontal, whereby judges in domestic, supranational or international courts refer to each other's jurisprudence.⁸ She suggests that such 'judicial globalization'⁹ may lead to increased protection of human rights¹⁰ and 'the gradual construction of a global legal system'.¹¹

Refugee law scholars draw on Slaughter's idea of transjudicial communication to assess the extent to which decision-makers engage in comparative jurisprudence. They also share Slaughter's view that it is a positive phenomenon for the development of common understandings of international rights and obligations. Lambert highlights that 'refugee law provides tremendous opportunity in terms of seeking a greater transnational judicial role'.¹² This is because it has 'evolved mostly under the influence of judges' and there is no 'international court competent to provide a common interpretation of the Refugee Convention'.¹³ However, her study of transjudicial communication among courts in European Union member states conducted with Goodwin-Gill indicates that 'judges rarely *use* each other's decisions' and 'the extent of this problem is remarkable'.¹⁴ They argue that in refugee law decisions, judges 'ought to have some

⁵ Ibid 810.

⁶ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 66 ('*A New World Order*').

⁷ Ibid 67.

⁸ Ibid 67.

⁹ Ibid 66.

¹⁰ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29(1) *University of Richmond Law Review* 99, 135.

¹¹ Slaughter, *A New World Order* (n 6) 67.

¹² Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in Guy Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 1, 4 ('Transnational Law').

¹³ Ibid 4.

¹⁴ Ibid 8 (emphasis in original).

regard to relevant case law from the jurisdictions of other states party to the Convention'.¹⁵ However, in the European Union 'while a transnational dialogue between judges exists, it is having no real impact'.¹⁶ Beyond the European Union and with respect to the refugee definition in the *Convention Relating to the Status of Refugees* ('Refugee Convention'),¹⁷ Hathaway and Foster argue that decision-makers engage in transjudicial communication and 'the result has been a rich comparative jurisprudence concerning the key terms of the refugee definition, which shows a determined effort to engage with the international and comparative nature of the refugee definition'.¹⁸

In this chapter, I draw on the ideas of multiple and malleable borders and transjudicial communication in my assessment of how decision-makers set the threshold of refuge and determine direct challenges to a multilateral or bilateral containment agreement. I also consider the consequences of decision-makers' positioning of juridical borders for children, women, sexual minorities and those with disabilities in their journeys in search of refuge.

III SETTING A THRESHOLD FOR ADEQUATE PROTECTION: THE ROLE OF BORDERS IN JUDICIAL REASONING

In determining direct challenges to bilateral and multilateral containment agreements, courts confront what refugee scholars refer to as 'protection elsewhere' scenarios.¹⁹ Courts must determine what aspects of refugee or human rights protection the third country must guarantee. In the challenges I examine below, courts must answer this question with reference to domestic or supranational legal instruments. In doing so, some courts extend their juridical borders vertically to take into account international law, while others push their borders horizontally to be guided by comparative jurisprudence. Once they establish the threshold for adequate protection, they must determine the extent to which they can expand their judicial gaze across borders and

¹⁵ Guy Goodwin-Gill, 'The Search for One, True Meaning ...' in Guy Goodwin-Gill and H el ene Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 204, 204 ('The Search for One, True Meaning').

¹⁶ Lambert, 'Transnational Law' (n 12) 9.

¹⁷ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

¹⁸ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 4–5.

¹⁹ Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28(2) *Michigan Journal of International Law* 233, 224–8. I do not classify the cases in Chapter Three as protection elsewhere cases because the decision-makers are determining the discrete question as to whether the transfer is compatible with the prohibition on inhuman or degrading treatment or the right to family life. They do not have to consider the broader question of what rights protections must be in place for refugees in other states.

pass judgment on a foreign state's law and policy. Below, I examine the different ways courts in three seminal cases in Australia, Canada and the European Union manoeuvre their juridical borders in determining these two questions. The analysis indicates that adopting categorical reasoning by focussing on refugeehood or refugee status, an idea established in Chapters Three and Four, carries over into protection from refuge challenges where the litigants are directly challenging a bilateral or multilateral containment agreement.

A Refuge Beyond Non-Refoulement?

In direct challenges to bilateral and multilateral containment agreements' legality or operation, courts in Australia, Canada and the European Union set markedly different thresholds for adequate refuge in protection elsewhere contexts. The High Court of Australia in *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff M106/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*')²⁰ set a high water mark for refugee protection. While not going as far as stipulating a precise threshold, the decision provides that the rights and protections in the Refugee Convention (not just the protection against *refoulement*) are relevant when determining the minimum threshold for adequate protection.²¹ In *Canadian Council for Refugees v Canada* ('*Canadian Council for Refugees*'),²² the Federal Court of Canada, at first instance, set the threshold much lower at protection from *refoulement*. The Court of Justice of the European Union in *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ('*N S and M E*')²³ established a similarly low threshold, but one further removed from international refugee law: the right to not be subjected to inhuman or degrading treatment.

While each Court is interpreting legal instruments from its own jurisdiction, the different thresholds set are attributable to the ways they position their juridical borders and the significance they place on refugee status. This is evident in the High Court of Australia's decision in *Plaintiff M70*, the first in a series of cases that challenged Australia's offshore processing regime. Two asylum seeker plaintiffs, who were in Australian territory but whom the Australian government planned to transfer to Malaysia pursuant to an agreement between the two countries, instigated this case in Australia's final appellate court. Australia entered into the *Arrangement between*

²⁰ (2011) 244 CLR 144.

²¹ Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 *Melbourne Journal of International Law* 395, 418.

²² [2007] FC 1261.

²³ (C 411/10) and (C 493/10) [2011] ECR I 13905.

*the Government of Australia and the Government of Malaysia on Transfer and Resettlement*²⁴ ('Malaysia Agreement') pursuant to section 198A(1) of Australia's *Migration Act 1958* (Cth) ('Migration Act'). Section 198A(1) has subsequently been removed from the Migration Act, but, pursuant to the wording at the time, it provided that an asylum seeker on an offshore territory²⁵ may be taken to another country if the Minister for Immigration has made a declaration under section 198A(3)(a) that the third country:

- (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection;
- (ii) provides protection for persons seeking asylum, pending determination of their refugee status;
- (iii) provides protection for persons given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
- (iv) meets the relevant human rights standards in providing that protection.

The plaintiffs argued that the Minister's declaration in respect to Malaysia was made *ultra vires*. This argument was based on the plaintiffs' submission that the criteria in s198A(3)(a) of the Migration Act were jurisdictional facts. This meant that these criteria would have to be objectively satisfied before the Minister could make a valid declaration. The lead majority (Justices Gummow, Hayne, Crennan and Bell), as well as Justice Kiefel in a concurring opinion, accepted this argument.²⁶ This finding allowed the High Court of Australia to then consider whether the Malaysia Agreement satisfied the criteria in section 198A(3)(a).

While the High Court of Australia's approach to whether the Malaysia Agreement was consistent with the relevant criteria was essentially one of domestic statutory construction,²⁷ its reasoning has resonance with categorical approaches to elucidating refuge. The categorical reasoning is subtler than the decisions considered in Chapters Three and Four, but is nevertheless detectable and consequential to the outcome of the decision. The lead majority in *Plaintiff M70* referred to the special position refugees occupy in international law. They did this through a process of textual legislative interpretation. The plaintiffs submitted that the word 'protection' in s 198A(3)(a) was 'a legal term of art to describe the rights to be accorded to a person who is,

²⁴ signed 25 July 2011.

²⁵ The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) amended the *Migration Act 1958* (Cth) to designate certain places (such as Christmas Island) as 'excised offshore places'.

²⁶ *Plaintiff M70* (n 20) [109]. The significance of the lead majority's conclusion that the criteria in section 198A(3)(a) are jurisdictional facts (particularly from an administrative law perspective) is discussed in Mark Smyth and Matt Sherman, 'Case Note – Plaintiff M70/2011 v Minister for Immigration and Citizenship' (2012) 19 *Australian Journal of Administrative Law* 64.

²⁷ Tamara Wood and Jane McAdam, 'Australian Asylum Policy all at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274, 287.

or claims to be, a refugee under the Refugee Convention'.²⁸ In line with this submission,²⁹ the lead majority reasoned that the word 'protection' in section 198(3)(a) of the Migration Act 'must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol'.³⁰ Their Honours explained that 'this is most clearly evident from consideration of the requirement of s 198A(3)(a)(iii): that the country in question "provides protection to persons *who are given refugee status*"'.³¹ Taking a slightly different approach by drawing on principles of statutory interpretation,³² Justice Kiefel stated that a construction of section 198A(3)(a) that 'closely accords with the fulfilment of Australia's Convention obligations ... is to be preferred to one which does not',³³ and Chief Justice French confirmed that it 'must be understood in the context of relevant principles of international law concerning the movement of persons from state to state'.³⁴

All of these approaches place significance on the fact that the plaintiffs were seeking recognition of their refugee status. This provided the Court with a bridge to consider what type of rights refugees are entitled to in international law. At this juncture, the High Court of Australia blended categorical reasoning with a rights-based approach to the meaning of section 198A(3)(a) of the Migration Act. In doing so, the High Court of Australia extended its juridical border vertically to take into account international law on refugee protection. Each of the majority judges was satisfied that the word 'protection' in the Migration Act encompassed Australia's obligation of *non-refoulement* under the Refugee Convention.³⁵ However, the lead majority went further and stated that the concept of 'protection' and the criteria in section 198A(3) of the Migration Act were a 'reflex of obligations Australia undertook when it became signatory to the [Refugee] Convention'.³⁶ Thus, the word 'protection' referred to 'provision of *protections of all of the kinds* which parties to the Refugees Convention and the Refugees Protocol

²⁸ *Plaintiff M70* (n 20) [63] (French CJ).

²⁹ Tamara Wood and Jane McAdam note that the lead majority 'largely agreed' with this submission: Wood and McAdam (n 27) 295.

³⁰ *Plaintiff M70* (n 20) [118].

³¹ *Ibid* [119] (emphasis in judgment).

³² When there is ambiguity in domestic legislation that implements an international treaty, Australian courts interpret the legislation with reference to the context of the treaty and aim to provide an interpretation that is consistent with these international obligations: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287. This rule of statutory construction is discussed in Justice Kiefel's judgment in *Plaintiff M70* (n 20) [247]. This principle of interpretation is also used in other jurisdictions. See, eg, the Canadian decision of *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324, 1371.

³³ *Plaintiff M70* (n 20) [246].

³⁴ *Ibid* [91].

³⁵ *Ibid* [63] (French CJ), [117] (Gummow, Hayne, Crennan and Bell JJ), [240] (Kiefel J).

³⁶ *Ibid* [118] (Gummow, Hayne, Crennan and Bell JJ).

are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement'.³⁷ Their Honours listed some of these other obligations such as freedom of religion, access to the courts and work and education rights.³⁸ Justice Kiefel added that the reference to 'relevant human rights standards' in the Migration Act encompasses 'standards required by international law'.³⁹

Extending its juridical borders vertically to take into account international law also led the Court to characterise the nature of refuge as a duty. The lead majority classified the rights and protections in the Refugee Convention as 'obligations' undertaken by signatory states⁴⁰ and stressed that nation-states 'are *bound* to accord to those who have been determined to be refugees the rights that are specified in' the Refugee Convention'.⁴¹ Accordingly, the lead majority reasoned that reference to 'protection' in the Migration Act must be 'construed as references to provision of access or protection *in accordance with an obligation to do so*'.⁴² This means that in transferring refugees to a third country, the prospective third country must have a legal obligation to accord the relevant rights and protections to refugees and reference to what occurs in practice is not sufficient.

In establishing a high threshold for adequate refugee protection, Australia's final appellate court did not engage in what Slaughter refers to as horizontal judicial communication. It did not consider protection elsewhere cases from other jurisdictions, but was guided directly by the Refugee Convention. While transjudicial communication may in some contexts strengthen human rights protection, when decision-makers engage in horizontal transjudicial communication but disregard the significance of refugeehood, this can result in bare minimum protections travelling across national frontiers. This is evident in *Canadian Council for Refugees*, in which the applicants challenged the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* ('Canada/United States Agreement').⁴³ Pursuant to the Canada/United States Agreement, asylum seekers who first arrive in the United States are barred from pursuing a claim for refugee protection in Canada, and those who first arrive in Canada cannot lodge an asylum claim in the United States. The Canada/United States Agreement only

³⁷ Ibid [119] (emphasis added).

³⁸ Ibid [117], [119].

³⁹ Ibid [240].

⁴⁰ Ibid [117].

⁴¹ Ibid [117] (emphasis added).

⁴² Ibid [135] (emphasis added).

⁴³ signed 5 December 2002, TIAS 04-1229 (entered into force 29 December 2004).

applies at a Canada/United States land border port of entry. If an asylum seeker makes a refugee claim at a land border port of entry, they can be summarily turned back, subject to some exceptions.⁴⁴ The asylum seeking applicant in *Canadian Council for Refugees* was ‘John Doe’, a Columbian man living in the United States whose claim for refugee status was not entertained due to the one-year time bar.⁴⁵ Due to the lack of protection available to him in the United States, he wanted to seek refugee protection in Canada. He had not attempted to enter Canada, because Canada would have denied him entry pursuant to the Canada/United States Agreement. The applicants grounded their challenge in many different aspects of domestic and international law. They sought a declaration that Canada’s decision to declare the United States a safe third country is unlawful pursuant to administrative law principles, the *Canadian Charter of Rights and Freedoms* (‘Canadian Charter’),⁴⁶ Refugee Convention and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’).⁴⁷

In determining the appropriate threshold of refugee protection in the context of protection elsewhere decisions, the Federal Court of Canada, at first instance, did not place significance on John Doe being a person seeking recognition of his refugee status. Unlike the High Court of Australia in *Plaintiff M70*, the Court was not guided by the rights available to refugees and those seeking recognition of their refugee status pursuant to the Refugee Convention. Instead, Justice Phelan referred to United Kingdom and Council of Europe jurisprudence ‘for comparative purposes’ and to ‘establish international norms’.⁴⁸ However, His Honour did this without questioning whether the approach adopted in those jurisdictions was consistent with the Refugee Convention. Justice Phelan’s examination of United Kingdom and European Court of Human Rights case law led His Honour to conclude that when assessing the validity of a protection elsewhere agreement under international law, the only relevant consideration is *non-refoulement* and not the broader panoply of refugee rights.⁴⁹

⁴⁴ The exceptions relate to family reunification, unaccompanied minors and document holders, and there is also a public interest exception: *ibid* arts 4(2), 6.

⁴⁵ In the United States, those who do not file their application for asylum within a year of arriving in the territory are barred from claiming asylum: *Immigration and Nationality Act 1952* 8 USC § 1158(2)(B). There are some limited discretionary exceptions with respect to ineffective legal assistance, illness or disability (including legal disability) and changed circumstances in the asylum seekers’ country of origin or habitual residence: *Aliens and Nationality* 8 CFR § 208.4(a).

⁴⁶ *Canada Act 1982* c 11, sch B pt I.

⁴⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1456 UNTS 85 (entered into force 26 June 1987).

⁴⁸ *Canadian Council for Refugees* (n 22) [110].

⁴⁹ *Ibid* [118], [125].

Without focussing on John Doe being a person seeking refugee protection, the Federal Court of Canada was misguided in its selection of comparative sources. In particular, when referring to Council of Europe jurisprudence, the Court did not take into account that the European Court of Human Rights does not have jurisdiction to consider the Refugee Convention.⁵⁰ There were other sources available to the Court to suggest that it was required to consider whether the United States respects the rights in the Refugee Convention. For example, the United Nations High Commissioner for Refugees' ('UNHCR') position is that the asylum seeker and/or refugee must enjoy 'effective protection' in the third country.⁵¹ At the time, the UNHCR defined effective protection to include *non-refoulement*, but also 'accession to and compliance with the 1951 Convention and/or 1967 Protocol ... unless the destination country can demonstrate that the third State has developed a practice akin to the 1951 Convention and/or its 1967 Protocol'.⁵² Another available source was the Michigan Guidelines on Protection Elsewhere.⁵³ The position in the Michigan Guidelines is that 'effective protection' means not only *non-refoulement* but compliance with all of the obligations outlined in the Refugee Convention.⁵⁴ Also, expert evidence given to the Court by two leading refugee law scholars indicated that rights beyond *non-refoulement* should be considered in determining protection elsewhere decisions.⁵⁵

Further, by setting the threshold of refugee protection in protection elsewhere cases through selective horizontal transjudicial communication, the Court did not consider international law in interpreting its domestic legislation. Canada entered into the Canada/United States Agreement pursuant to the *Immigration and Refugee Protection Act*, SC 2001 ('Immigration and Refugee Protection Act'). While the relevant sections of the legislation predominantly focus on whether

⁵⁰ The European Court of Human Rights' jurisdiction is limited to matters concerning the interpretation of the ECHR: *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) art 32(1) ('ECHR').

⁵¹ UNHCR, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum Seekers (Lisbon Expert Roundtable, 9–10 December 2002)* (February 2003) <<http://www.refworld.org/docid/3fe9981e4.html>> ('*Summary Conclusions on the Concept of "Effective Protection"*').

⁵² UNHCR, *Summary Conclusions on the Concept of 'Effective Protection'* (n 51) [15(e)]. This was the most relevant UNHCR source available to the Federal Court of Canada at the time of judgment. As discussed in Chapter Two, in later publications the UNHCR does not specifically state that all of the rights outlined in the Refugee Convention (n 17) must be guaranteed by the receiving state. See UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (May 2013) <<http://www.refworld.org/pdfid/51af82794.pdf>>; UNHCR, 'Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR, at the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme' (7 October 2004).

⁵³ Fourth Colloquium on Challenges in Refugee Law, 'The Michigan Guidelines on Protection Elsewhere' (2007) 28(2) *Michigan Journal of International Law* 207.

⁵⁴ *Ibid* [8].

⁵⁵ Affidavits of Professors James Hathaway and Kay Hailbronner: Michelle Foster, 'Responsibility Sharing or Shifting: "Safe" Third Countries and International Law' (2008) 25(2) *Refugee* 64, 67.

the prospective safe third country complies with its *non-refoulement* obligations⁵⁶ (section 101(e) permits the Governor in Council to designate countries that comply with *non-refoulement* obligations in the Refugee Convention and CAT as safe third countries), there was nevertheless an opportunity for the Court to refer to international law to set a higher threshold for refugee protection. In particular, the Immigration and Refugee Protection Act provides that in deciding to designate a country as a safe third country, the Governor in Council must consider the country's policies and practices with respect to claims under the Refugee Convention⁵⁷ and its human rights record.⁵⁸ Unlike the High Court of Australia in *Plaintiff M70*, the Federal Court of Canada did not extend its juridical border vertically to encompass Canada's international law obligations when interpreting domestic legislation, thus missing an opportunity to bring a broader set of refugee rights into the frame of judicial consideration in setting the threshold for adequate refuge.

Akin to the approach taken by the Federal Court of Canada in *Canadian Council of Churches*, in the leading European Union protection elsewhere case, the Court of Justice of the European Union failed to place any significance on asylum seeking or refugeehood. It also engaged in selective transjudicial communication and circumscribed international law's relevance. The case arose from questions referred by the Court of Appeal of England and Wales and High Court of Ireland. One of the questions was whether, when transferring an asylum seeker to another European Union state pursuant to the Dublin Regulation, the transferring state should first consider whether the asylum seeker's fundamental human rights would be observed. This question arose because the Court of Appeal of England and Wales and High Court of Ireland were hearing cases in which asylum seekers were resisting transfers to Greece pursuant to the Dublin Regulation. This question is distinct from the arguments raised in the cases discussed in Chapter Three. It does not concern asylum seekers using rights available under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR')⁵⁹ to resist transfer to another country pursuant to the Dublin Regulation. Rather, the question asks whether and when rights under European Union law, in particular, the *Charter of Fundamental Rights of the European Union* ('European Union Charter'),⁶⁰ may prohibit transfers under the

⁵⁶ Ibid 75.

⁵⁷ *Immigration and Refugee Protection Act*, SC 2001, s 102(2)(b).

⁵⁸ Ibid s 102(2)(c).

⁵⁹ ECHR (n 50).

⁶⁰ *Charter of Fundamental Rights of the European Union*, opened for signature 7 December 2000, [2012] OJ C 326/321 (entered into force 1 December 2009).

Dublin Regulation. Unlike the cases considered in Chapter Three, this case was a direct challenge to the Dublin Regulation's operation.

The Court of Justice of the European Union in *N S and M E* had the opportunity to articulate a high threshold for refugee protection. In particular, there was flexibility as to what it could deem to be a 'fundamental right'. The rights the parties highlighted were articles 1 (human dignity), 4 (prohibition of torture and inhuman and degrading treatment or punishment), 18 (right to asylum), 19(2) (prohibition of removal where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment) and 47 (right to an effective remedy and a fair trial) of the European Union Charter. Also referenced were a number of European Union Directives on minimum standards for asylum seekers and refugees.⁶¹ Many of these sources of European Union law make direct reference to the Refugee Convention. For example, article 18 of the European Union Charter provides that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees'. The preambles to all of the European Union Directives the parties refer to⁶² state that the Common European Asylum System is designed to achieve the 'full and inclusive application of the Geneva Convention Relating to the Status of Refugees 28 July 1951, as supplemented by the New York Protocol of 31 January 1967'. The UNHCR intervened in the case and argued that a transfer should be precluded when there is a 'real risk of a breach of fundamental rights, including (but not limited to) serious breaches of the minimum standards laid out in the EU Asylum Directives'.⁶³ The UNHCR also insisted that the Dublin Regulation, being secondary European Union legislation, 'must be read as subject to fundamental rights, not the other way around'.⁶⁴ The

⁶¹ *Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers* [2003] OJ L 31/18 (this has subsequently been recast: *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)* [2013] OJ L 180/96); *Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* [2004] OJ L 304/12 (this has subsequently been recast: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* [2011] OJ L 337/9); *Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* [2005] OJ L 326/13 (this has subsequently been recast: *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60-180/95).

⁶² See above n 61.

⁶³ UNHCR, 'UNHCR Intervention Before the Court of Justice of the European Union in Joined Cases of *N S* and *M E* and Others', Submission in *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 28 June 2011, [14].

⁶⁴ *Ibid* [5].

Advocate General Trstenjak concluded that ‘the transfer of asylum-seekers to a Member State in which there is a serious risk of violation of the asylum-seekers’ fundamental rights is incompatible with the [European Union Charter]’.⁶⁵

However, the Court of Justice of the European Union adopted a much narrower approach. It described the purpose of the Common European Asylum System as ‘full and inclusive application of the [Refugee] Convention’⁶⁶ and acknowledged that article 18 of the European Union Charter requires that ‘the rules of the [Refugee] Convention and the 1967 Protocol are to be respected’.⁶⁷ Nevertheless, the Court held that when transferring a refugee or asylum seeker pursuant to the Dublin Regulation, the sending state only has to consider whether they will be subject to inhuman or degrading treatment within the meaning of article four of the European Union Charter.⁶⁸ In coming to this position, the Court of Justice of the European Union did not consider the significance of refugeehood and the protections refugees are entitled to under European Union and international law. Rather, the starting point was the need to preserve the continued operation and integrity of the Dublin Regulation. The Court reasoned that if minor breaches of the European Union Charter or relevant European Union Directives prevent a member state from transferring an asylum seeker or refugee, the objective of the Common European Asylum System (to provide a speedy determination of the responsible member state) will be undermined. The Court of Justice of the European Union stressed that:

At issue here is the *raison d’être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.⁶⁹

⁶⁵ Opinion of Advocate General Trstenjak in *N S v Secretary of State for the Home Department and M E v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 22 September 2011, [116].

⁶⁶ *N S and M E* (n 23) [7].

⁶⁷ *Ibid* [75].

⁶⁸ Specifically, the Court holds that the only grounds upon which a European Union member state is prevented from transferring an asylum seeker to the responsible member state is, ‘[w]here they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter’: *N S and M E* (n 23) [94]. As noted in Chapter Three, the Court of Justice of the European Union has since clarified that even when there are not systemic deficiencies in the asylum system of an EU member state, a transfer cannot occur if there is evidence that a transfer would result in a real risk that a particular asylum seeker would be subject to inhuman or degrading treatment: *C K v Supreme Court of the Republic of Slovenia* (Court of Justice of the European Union, C 578/16, 16 February 2017), [92], [96]. The Court’s departure from the systemic deficiency test may be due to criticism of that test by the UK Supreme Court and European Court of Human Rights: *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12; *Tarakhel v Switzerland* [2014] VI Eur Court HR 195.

⁶⁹ *N S and M E* (n 23) [83].

This low threshold for refugee protection is also partly arrived at through selective transjudicial communication. The Court of Justice of the European Union handed down its judgment in *N S and M E* after the European Court of Human Rights' judgment in *M S S v Belgium and Greece*⁷⁰ and referred to that decision.⁷¹ However, in *M S S v Belgium and Greece*, the asylum seeker litigant specifically pleaded article 3 of the ECHR. The European Court of Human Rights was restricted in its ability to consider other legal instruments, in particular, the Refugee Convention and relevant EU Directives, to set a higher threshold for refugee protection. This is because its jurisdiction is limited to matters concerning the interpretation of the ECHR.⁷² Conversely, the Court of Justice of the European Union in *N S and M E* had the opportunity to delineate a much more comprehensive threshold for refugee protection by reference to the spectrum of rights in the European Union Charter and relevant European Union Directives, all of which reference the Refugee Convention. As Costello explains:

The referring national courts in [*N S and M E*] invited the [Court of Justice of the European Union] to go further than the ECHR, and explore the Charter's additional protections. However, the Court declined, instead focusing only on Article 4 of the [European Union Charter] (Article 3 ECHR). There are many legally innovative paths not taken ... The judgment is strikingly economical, in that the [Court of Justice of the European Union] traces a path already worn by [the European Court of Human Rights].⁷³

As a consequence of the Court's approach to the questions posed, protection from refugee litigants in the European Union are caught in a region that regards European Union law as supreme, does not entertain arguments grounded in broader international law and refers to Council of Europe jurisprudence in a way that has the effect of lowering protection standards. Thus, these cases are arbitrated in a European enclave in which the potential for refugees to invoke international refugee law to challenge transfer decisions and continue their journeys in search of refuge has been restrained. The prospect for a higher threshold for refugee protection is evident in some domestic decisions in which courts have been willing to refuse transfers on grounds other than article 4 of the European Union Charter. For example, in a case concerning transfer of an asylum seeker to Malta, the German Minden Administrative Court held that, due to serious shortcomings in the reception conditions in Malta, it could no longer be assumed that asylum seekers are treated in accordance with the European Union Charter, ECHR and Refugee

⁷⁰ [2011] I Eur Court HR 255.

⁷¹ *N S and M E* (n 23) [88]–[90], [112].

⁷² As noted above at n 50, the European Court of Human Rights' jurisdiction is limited to matters concerning the interpretation of the ECHR.

⁷³ Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) *Human Rights Law Review* 287, 333.

Convention.⁷⁴ Nevertheless, the test set down by the Court of Justice of the European Union in *NS and ME* is the one codified in the recast Dublin Regulation.⁷⁵ Also, in a subsequent case, the Court of Justice of the European Union ruled that when unaccompanied minors have lodged asylum applications in more than one European Union member state, the responsible member state is the one in which they are physically located.⁷⁶ This decision took into account the principle of best interests of the child,⁷⁷ and the Court reasoned that it is not in the child's best interest to unnecessarily prolong the asylum application procedure.⁷⁸

A comparison between these three seminal cases from Australia, Canada and the European Union indicates that, in establishing a standard for adequate refuge in protection from refugee challenges, a higher threshold is set when courts consider refugees' special position in international law and extend their juridical border vertically to encompass the rights and obligations in international law and, specifically, the Refugee Convention. In all three cases, the courts had the opportunity to do this pursuant to the legal instruments pleaded, but only the High Court of Australia did so. Conversely, the Federal Court of Canada and the Court of Justice of the European Union engaged in selective horizontal transjudicial communication without placing significance on refugee status and set much lower standards for adequate refuge.

B Manoeuvring Juridical Borders in Protection Elsewhere Challenges

While courts in Australia, Canada and the European Union have set different thresholds for adequate protection, in this section I examine where these courts position their juridical borders in determining whether the third country meets these thresholds. When the judiciary aligns its juridical borders with that of the legislature and executive, conceptualisations of refugee's threshold prove powerful in undermining bilateral and multilateral containment agreements and enabling refugees to continue their voyages in search of refuge. For example, Australia's Migration Act allows the Australian government to send asylum seekers to another country. The High Court of Australia in *Plaintiff M70* interpreted that legislation in a way that permitted an assessment of that country's law and practice with respect to refugee protection. In particular,

⁷⁴ *Verwaltungsgericht Minden* [Minden Administrative Court] decision of 12 January 2015, 1 L 551/14.A.

⁷⁵ *Regulation (EC) 604/2013 of 29 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* [2013] OJ L180/31-180/59, art 3(2).

⁷⁶ *M A and Others v Secretary of State for the Home Department* (Court of Justice of the European Union, C-648/11, ECLI:EU:C:2013:367, 6 June 2013) [66].

⁷⁷ *Ibid* [57], [60].

⁷⁸ *Ibid* [61].

in characterising refuge as a duty owed to refugees by nation-states, the Court conducted an examination of Malaysia's legal obligations towards refugees. The Court found that Malaysia had no obligation to provide refugees with the protections and rights outlined in the Refugee Convention.⁷⁹ The Court highlighted that Malaysia was not a signatory to the Refugee Convention or its Protocol and had not made a 'legally binding arrangement with Australia obliging it to accord the protections required by those instruments'.⁸⁰ Also, the Court stressed that Malaysia did not provide for refugee status in its domestic law and did not undertake any activities with respect to refugee registration, but instead left these tasks to the UNHCR. On these grounds, the lead majority ruled that the Minister made the declaration under the Migration Act without power and the refugee plaintiffs could not be transferred to Malaysia.⁸¹ In her judgment, Justice Kiefel added that the state itself must undertake refugee status assessment and cannot defer the obligation to the UNHCR.⁸² The Court also indicated that in addition to assessing legal obligations, there should also be an examination of the third country's practices.⁸³ Chief Justice French emphasised that '[c]onstitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states'.⁸⁴ Thus, the High Court of Australia brought its juridical borders in line with those of the executive and the legislature. By doing so, the Court had a significant role in facilitating the plaintiffs' and other refugees' access to a place of refuge.

While the Federal Court of Canada set a much lower threshold for adequate refuge, when examining whether the United States complied with the principles of *non-refoulement* as the 'minimum recognized standard',⁸⁵ the Court aligned its juridical borders with those of the Canadian legislature and executive. To determine if the Governor in Council acted reasonably in concluding that the United States complied with its *non-refoulement* obligations under the Refugee Convention and CAT, the Court conducted a thorough investigation of United States refugee law and policy. This assessment included consideration of United States legislation and case law, expert evidence regarding the operation of United States refugee law and policy, and UNHCR comments on refugee law and policy in the United States. Justice Phelan held that the

⁷⁹ *Plaintiff M70* (n 20) [135].

⁸⁰ *Ibid* [135].

⁸¹ *Ibid* [148].

⁸² *Ibid* [242].

⁸³ *Ibid* [67] (French CJ), [112] (Gummow, Hayne, Crennan and Bell JJ), [245] (Kiefel J).

⁸⁴ *Ibid* [67].

⁸⁵ *Canadian Council for Refugees* (n 22) [136].

United States did not comply with its *non-refoulement* obligations under the Refugee Convention,⁸⁶ because of its one-year bar,⁸⁷ exclusion of people from refugee status for reasons impermissible by the Refugee Convention⁸⁸ and equivocal approach to gender claims.⁸⁹ Further, Justice Phelan found that the United States did not comply with its *non-refoulement* obligations under CAT, because there was no absolute bar on deportation to a country where a person faces a real risk of torture.⁹⁰ Thus, even though Justice Phelan set a bare minimum standard for refugee protection, His Honour's judgment provided a protection from refugee victory: the Court declared the Canada/United States Agreement *ultra vires*, and this provided grounds for refugees in the United States to travel to Canada in search of refuge. This is largely due to the Federal Court of Canada expanding its juridical border to enable it to assess and pass judgment on United States refugee law and policy.

Another way in which the Federal Court of Canada manoeuvred juridical borders to reach across the geographic border in *Canadian Council for Refugees* was through Justice Phelan's approach to the Canadian Charter. The applicants pleaded that the Canada/United States Agreement violated sections 7 and 15 of the Canadian Charter (the right to life, liberty and security of the person and the right to equality). While John Doe, the asylum seeker applicant, was not within Canadian territory and had not approached the Canadian border, Justice Phelan found that the rights in the Canadian Charter extended to him. Justice Phelan reasoned that if John Doe had approached the Canadian border and was under the control of Canadian immigration officials, the Charter would apply to him. However, if he did in fact approach the border, he would have been denied entry into Canada and returned to US authorities. On this basis, Justice Phelan explained that:

it would be pointless to force a claimant in the US to approach Canada, and then be sent back to US custody in order to prove that this would in fact happen. Given other findings by this Court as to the operation of the US system, that individual could be exposed to the very harm at issue before the Court.⁹¹

⁸⁶ Ibid [154].

⁸⁷ If an asylum seeker cannot make a claim for refugee status due to the one-year bar, they can only apply for withholding status or protection under the CAT (n 47), which imposes a higher threshold than the test for 'well-founded fear of persecution' under the Refugee Convention (n 17). This higher threshold means that some genuine refugees are at a real risk of *refoulement* in the United States: *Canadian Council for Refugees* (n 22) [154].

⁸⁸ *Canadian Council for Refugees* (n 22) [191].

⁸⁹ Ibid [206].

⁹⁰ Ibid [256]–[262].

⁹¹ Ibid [48].

Through this reasoning, the Court set up a ‘legal fiction – imagining John Doe as having approached the border without requiring to do so’.⁹² This legal fiction enabled the Court to shift the border and bring John Doe ‘within the fold of constitutional protection’.⁹³ The Court held that the Canada/United States Agreement offended article 7 of the Canadian Charter because refugees’ life, liberty and security were put at risk because the United States did not comply with its *non-refoulement* obligations in the Refugee Convention and CAT.⁹⁴ The right to equality was also violated because the Canada/United States Agreement ‘discriminates against and exposes people to risk [of *refoulement*] based solely on the method of arrival in Canada, a wholly irrelevant Charter consideration’.⁹⁵ These breaches could not be justified pursuant to section 1 of the Canadian Charter.⁹⁶ The Court’s manoeuvring of juridical borders is significant in the context of refugees’ journeys in search of refuge. John Doe did not have to make the arduous and risky journey to the Canadian border to trigger Canada’s domestic human rights law in making his protection from refuge claim.

There is discernible discomfort with respect to juridical borders penetrating geographic borders in the Court of Justice of the European Union’s decision in *N S and M E*. It may seem incongruous to examine the role of borders in European Union protection elsewhere decisions. The European Union is a ‘community committed to the removal of internal borders’.⁹⁷ It has a supranational agreement on standards for refugee protection, a regional responsibility sharing agreement and a regional human rights instrument, questions or disputes about which can be referred to the Court of Justice of the European Union. This may suggest that borders, either geographic or juridical, diminish in significance. Nevertheless, unlike the High Court of Australian in *Plaintiff M70* and the Federal Court of Canada in *Canadian Council for Refugees*, which undertook a rigorous examination of Malaysian and United States refugee law and policy respectively, the Court of Justice of the European Union indicated that European Union member states should be cautious in examining and passing judgment other European Union member states’ law and practice. The Court of Justice of the European Union does not determine factual disputes, so did not rule on whether the United Kingdom and Ireland could transfer the asylum seekers to Greece. Nevertheless, it stressed that there must be an assumption that all European

⁹² Efrat Arbel, ‘Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States’ (2013) 25(1) *International Journal of Refugee Law* 65, 81 (‘Shifting Borders’).

⁹³ *Ibid* 80.

⁹⁴ *Canadian Council for Refugees* (n 22) [285].

⁹⁵ *Ibid* [333].

⁹⁶ *Ibid* [337].

⁹⁷ Goodwin-Gill, ‘The Search for One, True Meaning’ (n 15) 205.

Union member states comply with the requirements of the European Union Charter, Refugee Convention and ECHR.⁹⁸ This is because the Common European Asylum System ‘was conceived in a context making it possible to assume that all the participating states ... observe fundamental rights, including the rights based on the [Refugee Convention], and on the ECHR’.⁹⁹ Thus, there was a retraction of courts’ juridical borders and the geographic borders of individual European Union states became salient, making it more difficult for refugees to turn to courts to continue their quests to find refuge.

C Gendered Juridical Borders

In extending their juridical borders to enable a consideration of law and policy in foreign states, the High Court of Australia and Federal Court of Canada not only delivered protection from refugee victories, these decisions were of particular significance for child refugees, women refugees with a well-founded fear of gender-based violence, sexual minorities and refugees with disabilities in their journeys in search of refuge. In *Plaintiff M70*, the High Court of Australia declined to answer the question of whether it would be in the second plaintiff’s (an unaccompanied minor) best interests to transfer him to Malaysia. This is because it found the Malaysia Agreement unlawful. Nevertheless, in referring to the Refugee Convention to determine the appropriate threshold for protection, the High Court of Australia at a number of points in the judgment referenced the rights to education in the Refugee Convention and, in particular, the obligation to accord refugees the same treatment as is accorded to nationals with respect to elementary education.¹⁰⁰ Chief Justice French stated that one of the ‘salient’ findings of the Department of Foreign Affairs’ assessment of Malaysia’s treatment of refugees is that lack of official status impedes access to formal education.¹⁰¹ The right to education is particularly important for refugee children and the approach taken by the High Court of Australia indicates that it is a necessary consideration in cases where refugees are resisting transfer to an alternative place of so-called refuge.

The Federal Court of Canada’s extension of its juridical borders enabled consideration of the relationship between gender, sexuality and *non-refoulement*. One argument the applicants raised was that the United States’ equivocal approach to gender claims created a *refoulement*

⁹⁸ *N S and M E* (n 23) [80].

⁹⁹ *Ibid* [78].

¹⁰⁰ *Plaintiff M70* (n 20) [117], [119].

¹⁰¹ *Ibid* [28].

risk for female refugees, especially those basing their claim on family violence.¹⁰² Another argument was that the one-year time bar disadvantaged female refugees and those making sexual orientation claims, because they were more likely than male asylum seekers to file for asylum outside of the one-year period.¹⁰³ This is because they most likely would not know that the refugee definition can encompass claims grounded in sexual orientation and family violence, and in any event they would be reticent to disclose the details necessary to make a protection claim on these grounds.¹⁰⁴ The Court assessed the gendered operation of United States refugee law¹⁰⁵ and agreed that these aspects of United States refugee law and policy created a *refoulement* risk for female refugees and refugees making sexuality claims.¹⁰⁶ These findings formed part of the Court's decision that the Governor in Council's determination that the United States complies with its *non-refoulement* obligations was unreasonable.¹⁰⁷

By extending the Canadian Charter's reach across the geographic border and finding the Canada/United States Agreement inconsistent with the Canadian Charter, the Federal Court of Canada's decision was of particular value for refugees who would face the greatest impediments in travelling to the Canadian border. As discussed in Chapter Two, it is well established that female refugees, children and refugees with care responsibilities and disabilities are less likely to be able to make these arduous journeys. Also, by removing the necessity to present at the border to trigger Canadian Charter protection, the Federal Court of Canada's decision defuses the risk of being subject to immigration detention. Arbel explains that when asylum seekers and refugees come to the border, they are often summarily returned to the United States and immediately placed in immigration detention.¹⁰⁸ While conditions of immigration detention in the United States are problematic for people of all genders,¹⁰⁹ female refugees who are rejected at Canada's border with the United States 'are more likely to be detained under worse conditions

¹⁰² The applicants argued that United States law on the relationship between gender and particular social group was 'in a state of flux' and this created *refoulement* risks, especially for women basing their claims on domestic violence: *Canadian Council for Refugees* (n 22) [198]. The United States had issued proposed guidelines confirming that identification of an immutable or fundamental trait was the only necessary factor in establishing a particular social group and gender was considered an immutable or fundamental trait: at [199]. However, at the time of judgment, the guidelines were not finalised and there was no authoritative case law confirming the position in the guidelines: at [203].

¹⁰³ *Ibid* [162].

¹⁰⁴ *Ibid* [162]–[163].

¹⁰⁵ *Ibid* [162]–[164], [197]–[216].

¹⁰⁶ *Ibid* [164], [206].

¹⁰⁷ *Ibid* [237]–[240].

¹⁰⁸ Efrat Arbel, 'Gendered Border Crossings' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 243, 254 ('Gendered Border Crossings').

¹⁰⁹ *Ibid* 254–6.

of confinement'.¹¹⁰ This is because, while men are transferred to a dedicated immigration detention facility, women are 'more likely to be held in mixed-purpose facilities or local jails, sometimes under questionable conditions of confinement'.¹¹¹ Because they are not in dedicated immigration detention facilities, they are not given appropriate assistance to advance their asylum claim or challenge a deportation order and may simply 'fall off the radar'.¹¹²

IV MISALIGNED BORDERS

Subsequent to the landmark cases of *Plaintiff M70* and *Canadian Council for Refugees*, there has been a shift in the way Australian and Canadian courts approach challenges to bilateral containment agreements. In these earlier cases, where some content was given to the threshold of refuge, the courts framed the matter in a way that enabled them to consider and pass judgment on the state of refuge in a foreign country. However, in subsequent cases, courts have manoeuvred juridical borders to avoid having to cast judgment on the allegedly inadequate place of refuge. Below, I outline these changes and discuss the consequences for the judiciary's conceptualisation of refuge and asylum seekers' and refugees' ability to cross international borders in search of sanctuary.

A Asymmetrical Borders

While the High Court of Australia in *Plaintiff M70* and the Federal Court of Canada in *Canadian Council for Refugees* expanded their juridical borders, in subsequent decisions these juridical borders have been retracted. In the Australian context, this is partly due to amendments to domestic legislation. In response to the High Court of Australia's decision in *Plaintiff M70*, the Australian government passed the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) ('Regional Processing Act').¹¹³ The Regional Processing Act removed section 198A from the Migration Act and inserted new sections 198AA to 198AH. These provisions give the Minister for Immigration the power to designate a third country as a 'regional processing centre'.¹¹⁴ The only condition for the exercise of this power is that the Minister thinks that it is in the national interest.¹¹⁵ The reforms specifically provide that 'the

¹¹⁰ Ibid 256.

¹¹¹ Ibid; Efrat Arbel and Alletta Brenner, 'Bordering on Failure: Canada–U.S. Border Policy and the Politics of Refugee Exclusion' (Criminal Justice, Borders and Citizenship Research Paper No 2420854, Cambridge, 2013) 68.

¹¹² Arbel, 'Gendered Border Crossings' (n 108) 256.

¹¹³ The Explanatory Memorandum states that it was introduced in direct response to *Plaintiff M70*: Explanatory Memorandum, Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 (Cth), 1.

¹¹⁴ *Migration Act 1958* (Cth) s 198AB(1).

¹¹⁵ Ibid s 198AB(2).

designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country'.¹¹⁶

The situation created by the amendments to the Migration Act has resonance with Kesby's observations that states have multiple borders that 'strategically include or exclude people in different locations'.¹¹⁷ In particular, while the executive's juridical border can extend outwards to contemplate transferring asylum seekers to other countries, the judiciary's juridical border cannot similarly extend to examine refugee law and policy in those countries. Pursuant to these amendments, Nauru and Papua New Guinea have been designated as regional processing centres. Asylum seekers have been sent to Nauru and Papua New Guinea's Manus Island since August 2012, but Australia retains a significant degree of control of the asylum seekers and the facilities in which they are accommodated.¹¹⁸ Thus, Australia has expanded its juridical border outside of its territory and into the territory of other nation-states. At the same time, the Regional Processing Act restricts the Australian judiciary's ability to look to international law and Papua New Guinea's and Nauru's law and practice in arbitrating the legality of Australia's offshore processing regime. This is evident in *Plaintiff S156/2013 v Minister for Immigration and Border Protection* ('*Plaintiff S156*'),¹¹⁹ a case brought by an Iranian asylum seeker detained in Papua New Guinea. The High Court of Australia was asked to determine, inter alia, whether the Minister had validly designated Papua New Guinea as a regional processing country.¹²⁰ The asylum seeker argued that the Minister is obliged to take into account factors such as Australia's and Papua New Guinea's international law obligations, Papua New Guinea's domestic law and practice, and the conditions in which asylum seekers were being detained. In a unanimous judgment, the Court rejected this submission on the grounds that section 198AB(2) of the Migration Act provides that the only condition for the Minister's exercise of power is that he or she 'thinks that it is in the national interest' which is 'largely a political question'.¹²¹

¹¹⁶ Ibid s 198AA(d).

¹¹⁷ Kesby (n 3), 112–13.

¹¹⁸ Human Rights Committee, *Concluding Observations on the Sixth Period Report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [35]; Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru* (2015) 121 ('*Taking Responsibility*').

¹¹⁹ (2014) 254 CLR 28.

¹²⁰ The plaintiff also argued that ss 198AB and 198AD of the Migration Act are not supported by s 51 of the Australian Constitution (the aliens power), but the High Court rejected this submission: *ibid* [38].

¹²¹ *Plaintiff S156* (n 119) [40].

A similar situation of multiple and misaligned borders exists in Canada, but was not brought about by legislative change. On appeal, the Federal Court of Appeal overturned Justice Phelan's judgment and restored the validity of the Canada/United States Agreement.¹²² In doing so, the Federal Court of Appeal adopted a different interpretation of the Immigration and Refugee Protection Act, and one that limits judicial oversight of the Governor in Council's decisions. The Federal Court of Appeal held that Justice Phelan erred in ruling that the United States' compliance with the Refugee Convention and CAT was a condition precedent to the Governor in Council exercising delegated authority.¹²³ Rather, the only requirement was that the Governor in Council considered the factors outlined in the relevant sections of the Immigration and Refugee Protection Act (such as the United States' human rights record and its policies and practices with respect to claims under the Refugee Convention) and, 'acting in good faith', designated the United States as a country that complied with its *non-refoulement* obligations and was 'respectful of human rights'.¹²⁴ By adopting a different interpretation of the Immigration and Refugee Protection Act, the Federal Court of Appeal retracted the juridical boundary in a way that does not permit consideration and assessment of refugee law and policy in the United States. This creates multiple and misaligned borders similar to those in the Australian context: the executive's juridical border extends horizontally to take into account the law and practice of other states, but the judiciary's juridical border does not have the same reach.

While the motivations behind judicial approaches to protection for refugee claims are outside this thesis' scope, one reason why the Federal Court of Appeal adopted a different interpretation of the Immigration and Refugee Protection Act may be due to a reticence to pass judgment on another state's compliance with its human rights obligations. This concern may be heightened when taking into account the diplomatic ties and geographic proximity of Canada and the United States. However, if the asylum seeker is in Canada's territory and makes such a claim, Canadian courts usually have no choice but to assess the allegations. Such is the case when those subject to the death penalty in the United States cross the border into Canada and resist extradition.¹²⁵ Conversely, for protection from refugee litigants outside Canada's territory such as John Doe, juridical borders remain malleable and can be manoeuvred by decision-makers to short-circuit claims involving an assessment of another state's human rights compliance. Thus,

¹²² *Canada v Canadian Council for Refugees* [2008] FCA 229 ('*Canada v Canadian Council for Refugees*').

¹²³ *Ibid* [80].

¹²⁴ *Ibid* [80].

¹²⁵ See, eg, *United States v Burns* [2001] SCR 283.

John Doe and other protection from refugee claimants in his position wanting to cross international borders in search of refuge are made acutely aware of the ‘persistent impact of sovereignty’,¹²⁶ as opposed to the prospect of a transnational legal order.

Not only is there a retraction of the judiciary’s juridical border, the appeal decision restrained the reach of constitutional protections. While the Federal Court of Canada extended the Canadian Charter’s reach beyond Canada’s geographic borders and into United States’ territory, the Federal Court of Appeal limited its application to those at or within Canada’s geographic borders. The Federal Court of Appeal held that the rights in the Canadian Charter were not triggered, because ‘John Doe never presented himself at the Canadian border’.¹²⁷ The Court stated that Justice Phelan’s ‘conclusion that John Doe should nevertheless be considered as having come to the border and as having been denied entry runs directly against the established principle that Charter challenges cannot be mounted on the basis of hypothetical situations’.¹²⁸ The consequence for refugees in the United States wanting to have recourse to Canadian courts to continue their journey in search of refuge is that they now have to make the journey to the Canadian border.

Similarly, the High Court of Australia has also limited the reach of constitutional protections and this is evident in its decision in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (‘*Plaintiff M68*’).¹²⁹ This case was initiated by a Bangladeshi asylum seeker transferred to and detained on Nauru, but sent back to Australia for medical treatment. She sought an injunction against the Minister and officers of the Commonwealth and a writ of prohibition preventing them from removing her to Nauru if she were to be detained there. After she filed the proceedings, Nauru introduced ‘open centre arrangements’, whereby asylum seekers would not be detained, but would be granted permission to leave between certain hours. Therefore, the plaintiff would not be detained if sent back to Nauru as long as Nauru continued with its open centre arrangements. The Court was satisfied that the plaintiff had standing to bring the claim, because it would ‘determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the

¹²⁶ Antonio Cassese, ‘A Plea for a Global Community Grounded in a Core of Human Rights’ in Antonia Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 136, 138.

¹²⁷ *Canada v Canadian Council for Refugees* (n 122) [102].

¹²⁸ *Ibid* [102].

¹²⁹ (2016) 257 CLR 42.

centre'.¹³⁰ The issue the High Court determined was whether the plaintiff was entitled to a declaration that the conduct of the Commonwealth in relation to her past detention was unlawful. In answering this question, the High Court of Australia restrained the reach of constitutional limits on the Commonwealth's executive power to detain. The majority (Chief Justice French and Justices Kiefel and Nettle with Justice Keane concurring) held that these protections would not apply to the plaintiff once Australia transfers her to Nauruan authorities.¹³¹

The High Court of Australia not only limited the reach of constitutional protections, but drew a sharp boundary between the actions of the governments of Australia and Nauru. It found that the plaintiff was detained by Australia for the purposes of removing her to Nauru,¹³² but, thereafter, she would be detained by Nauru.¹³³ The majority created a clear demarcation of responsibility, despite the fact that the processing centres in Nauru were established at Australia's request, Australia funds the operation of the centres, Australia deploys contractors to carry out the running of the centres, and Australian government staff are present at the centres.¹³⁴ This creation of a neat juridical boundary is also apparent in the Court's assessment of the plaintiff's argument that her detention would be invalid under article 5(1) of the *Constitution of the Republic of Nauru*¹³⁵ and that sections 198AHA(2) and 198AHA(5) of the Migration Act 'should not be construed as referring to detention which is unlawful under the law of the country where the detention is occurring'.¹³⁶ The majority found that the authority given in section 198AHA is not qualified by the requirement that the laws passed by Nauru in relation to regional processing 'be construed as valid according to the Constitution of Nauru'.¹³⁷ It also stressed that it is not for the High Court of Australia to examine the constitutional validity of another state's laws.¹³⁸ Justice Keane explained that section 198AHA(2) is not 'conditional upon a judgment by the domestic courts of this country as to the validity of the laws of Nauru'¹³⁹ and highlighted that 'considerations of international comity and judicial restraint militate strongly against' such a construction.¹⁴⁰

¹³⁰ Ibid [23] (French CJ, Kiefel and Nettle JJ).

¹³¹ Ibid [41] (French CJ, Kiefel and Nettle JJ), [238]–[241] (Keane J).

¹³² Ibid [31] (French CJ, Kiefel and Nettle JJ), [239] (Keane J).

¹³³ Ibid [32] (French CJ, Kiefel and Nettle JJ), [239] (Keane J).

¹³⁴ Senate Select Committee, *Taking Responsibility* (n 118) 13.

¹³⁵ Article 5(1) states that a person shall not be deprived of their personal liberty except as authorised by law for the purposes specified in that article.

¹³⁶ *Plaintiff M68* (n 129) [47].

¹³⁷ Ibid [52] (French CJ, Kiefel and Nettle JJ).

¹³⁸ Ibid [48] (French CJ, Kiefel and Nettle JJ).

¹³⁹ Ibid [248].

¹⁴⁰ Ibid [250].

The creation of a neat boundary between Australia and Nauru has created a situation of multiple and misaligned borders that enables the governments of Australia and Nauru to remain unaccountable for their actions. In the Memorandum of Understanding between Nauru and Australia, Australia accepts some responsibility for those transferred to Nauru with respect to their detention, assessment of refugee status, deportation or settlement in Nauru or a third country. A Senate Committee report in 2015 concluded that, due to the Australian government's involvement with the setting up and running of the centre, Australia has obligations under international and domestic law in relation to the care of asylum seekers in the centre and holds joint obligations with Nauru in respect to the asylum seekers' human rights.¹⁴¹ In making this assessment, the Committee's views are in line with the principle that a state carries its human rights obligations with it when acting extraterritorially.¹⁴² The Committee further stated that '[t]he Government of Australia's purported reliance on the sovereign and legal system on Nauru in the face of allegations of human rights abuses and serious crimes at the [Regional Processing Centre] is a cynical and unjustifiable attempt to avoid accountability for a situation created by this country'.¹⁴³ The High Court of Australia in *Plaintiff M68* had an opportunity to recognise that the Australian government was acting extraterritorially in Nauru and that its obligations should extend with it across borders. However, due to the juridical boundary drawn by the majority judges, Australia can continue to operate in Nauru without the limitations placed on it by the *Constitution of the Commonwealth of Australia* and the Court's oversight. Also, Nauru's treatment of refugees and asylum seekers remains outside the judicial lens, because of the High Court of Australia's unwillingness to pass judgment on Nauru's refugee law and policy.

The consequence of the ways the judiciary in Australia and Canada manoeuvred juridical borders in these cases is that the idea that there is a threshold for adequate refuge in protection elsewhere scenarios has disappeared from jurisprudence. The High Court of Australia has shifted from a high threshold for adequate refuge guided by the rights in the Refugee Convention to an approach whereby no threshold for adequate protections is set. In Canada, while the first instance decision set the threshold only at the protection from *refoulement*, the appeal decision removed this baseline level of protection.

¹⁴¹ Senate Select Committee, *Taking Responsibility* (n 118) 121.

¹⁴² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] 1CJ Rep 136 [109]; Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN DOC CCPR/C/21/Rev.1/Add.5 (8 April 1994), [4].

¹⁴³ Senate Select Committee, *Taking Responsibility* (n 118) 122.

Further, the courts' conceptualisation of the nature of refuge has shifted from a duty to a discretion. Macklin argues that the Canada/United States Agreement reflects 'the notion that refugee protection is a form of humanitarianism, motivated by kindness, not by duty' and refugees, as beneficiaries, cannot 'choose the donor'.¹⁴⁴ In their initial decisions, Canadian and Australian courts conceptualised refuge as an international obligation. However, in subsequent cases, the idea of refuge promulgated is one of discretion that states can assign to third countries without judicial oversight.

As a result of these changes, the prospect of a successful challenge to these bilateral containment agreements is illusory. All challenges to Australia's offshore processing regime subsequent to *Plaintiff M70* have been unsuccessful.¹⁴⁵ At the time of writing, there was a challenge afoot to the Canadian/United States Agreement and the applicants had filed evidence regarding the treatment of refugees in the United States pursuant to changes to law and policy made by President Donald Trump.¹⁴⁶ However, if the Federal Court follows the Federal Court of Appeal's approach to the Canadian Charter and Immigration and Refugee Protection Act, any changes to refugee law and policy in the United States will remain outside the judicial lens.

B The Gendered Nature of Malleable and Misaligned Borders

The changes in judicial approaches seen across Canadian and Australian cases have gendered consequences in the context of refugees' journeys in search of refuge. In the Australian context, the approach taken in *Plaintiff M70* enabled consideration of factors such as age in conceptualising the threshold for refuge. Subsequent cases, in particular, *Plaintiff M68*, provided an opportunity to advance the courts' conceptualisation of refuge with respect to considerations of gender. While there has been criticism of the conditions all asylum seekers and refugees in Nauru and Papua New Guinea's Manus Island are subject to,¹⁴⁷ there is particular concern about

¹⁴⁴ Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement' (2005) 36(2) *Columbia Human Rights Law Review* 365, 381.

¹⁴⁵ *Plaintiff S156* (n 119); *Plaintiff M68* (n 129); *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 346 ALR 181 ('*Plaintiff S195*') (discussed below).

¹⁴⁶ Amnesty International, *The US is Less Safe Than Ever for Refugees, Evidence in Court Challenge Shows* (4 July 2018) <<https://www.amnesty.ca/news/us-less-safe-ever-refugees-evidence-filed-court-challenge-shows>>.

¹⁴⁷ See, eg, Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (Second Edition)* (2017); Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31st sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016).

female asylum seekers. There have been reports of sexual violence against women in immigration detention in Nauru.¹⁴⁸ There is also evidence that women released from immigration detention and living in shared accommodation in Nauru paid for by the Australian government endure unsafe and insecure conditions.¹⁴⁹ However, by retracting its juridical border, the High Court of Australia has removed judicial scrutiny of these injustices in refugees' legal challenges to be transferred permanently to or remain in Australia.

With respect to Canadian jurisprudence, the Federal Court's approach to the exercise of executive power pursuant to the Immigration and Refugee Protection Act enabled a consideration of the gendered operation of United States' refugee law and policy. It also provided a gender-sensitive interpretation on the *non-refoulement* obligations in the Refugee Convention and CAT. However, the appeal decision rendered these considerations irrelevant. Also, by requiring asylum seekers and refugees in the United States to present at the Canadian border to trigger Canadian Charter protections, the Federal Court of Appeal's decision disadvantages female refugees and places them at heightened risk. Due to factors such as care responsibilities or lack of financial independence, female asylum seekers are less likely to be in a position to make the journey to the Canada's border with the United States. Those who do and are summarily returned face the prospect of being detained, not in dedicated immigration detention centres, but in remote and mixed-purpose jail facilities.¹⁵⁰

C Judicial Dissonance

The retraction of juridical borders gives rise to disharmony between courts in different countries, which imposes greater difficulties for asylum seekers and refugees wanting to cross international borders in their searches for refuge. This is evident in a failed attempt by asylum seekers on Manus Island to secure a transfer to Australia through successive litigation in the Supreme Court of Papua New Guinea and the High Court of Australia. In *Belden Norman Namah v Hon Rimbink Pato, Minister for Foreign Affairs and Immigration* ('*Belden Norman Namah*'),¹⁵¹ the asylum seekers challenged the legality of their detention before the Supreme

¹⁴⁸ Senate Select Committee, *Taking Responsibility* (n 118) 99.

¹⁴⁹ The case of *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] 243 FCR 17 ('*Plaintiff S99*') (discussed below) concerns a female refugee who was raped while living in shared accommodation in Nauru arranged and paid for by the Australian government. See also Wendy Bacon et al, *Protection Denied, Abuse Condoned: Women on Nauru at Risk* <https://static1.squarespace.com/static/5624aa24e4b0bca6fa63ec33/t/5754f2f327d4bd54e0327996/1465185083858/Women_on_Nauru_WEB.pdf>.

¹⁵⁰ Arbel, 'Gendered Border Crossings' (n 108) 256.

¹⁵¹ [2016] PJSC 13.

Court of Papua New Guinea. The Court stated that the asylum seekers on Manus Island were ‘forcefully brought into [Papua New Guinea]’¹⁵² and acknowledged that the litigation’s ultimate aim was to secure their removal from the Manus Detention Centre and transfer to Australia.¹⁵³ The Court found that the asylum seekers’ detention was in violation of the right to liberty in section 42 of the *Constitution of Papua New Guinea*. In coming to this conclusion, the Court engaged in categorical and rights-based reasoning. It placed emphasis on the fact that those in the Manus Detention Centre were seeking recognition of their refugee status and discussed Papua New Guinea’s international obligations as a signatory to the Refugee Convention.¹⁵⁴ The Court also referred to the UNHCR’s detention guidelines and noted that the UNHCR had reported that the conditions in the Manus Detention Centre ‘lack some of the basic conditions and standards required’.¹⁵⁵ The Court ruled that Papua New Guinea’s Memorandum of Understanding with Australia was unconstitutional and invalid.¹⁵⁶ It ordered the governments of Australia and Papua New Guinea to take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers at the Manus Detention Centre.¹⁵⁷

While the asylum seekers’ challenge to the bilateral agreement between Papua New Guinea and Australia was successful in the Supreme Court of Papua New Guinea, they could not secure a transfer to Australia without a similar victory in the Australian courts. Four months after the Supreme Court of Papua New Guinea handed down its judgment in *Belden Norman Namah*, an Iranian asylum seeker held in the Manus Detention Centre challenged the validity of the Memorandum of Understanding between the two countries before the High Court of Australia in *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (‘*Plaintiff S195*’).¹⁵⁸ One issue the Court addressed was whether Australia’s entry into the Memorandum of Understanding with Papua New Guinea and subsequent Regional Resettlement Arrangement was beyond the power of the Commonwealth of Australia¹⁵⁹ by reason of the Supreme Court of Papua New Guinea’s decision in *Belden Norman Namah*. One argument the plaintiff advanced was that ‘the Constitution denies to the Commonwealth any legislative or executive power to authorise or take part in activity in another country which is unlawful according to the domestic law of

¹⁵² Ibid [20].

¹⁵³ Ibid [39].

¹⁵⁴ Ibid [67].

¹⁵⁵ Ibid [27], [66], [68].

¹⁵⁶ Ibid [39].

¹⁵⁷ Ibid [72].

¹⁵⁸ *Plaintiff S195* (n 145). The High Court of Australia noted that the plaintiff asserted that he is a refugee. However, his claim to refugee status was rejected by Papua New Guinea: at [1].

¹⁵⁹ As conferred by section 61 of the Australian Constitution and section 198AHA of the Migration Act.

that country'.¹⁶⁰ In its judgment, the High Court of Australia referred to this proposition as 'novel and sweeping'¹⁶¹ and stated that:

neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to international law. Equally there should be no doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country.¹⁶²

These two decisions are indicative of the dissonance that can occur between domestic courts when juridical borders are misaligned and the consequences for refugees' quests for refuge. The Supreme Court of Papua New Guinea stretched its juridical border more broadly than the Australian High Court. While it based its decision on the right to liberty in the Constitution of Papua New Guinea, it also took into account Papua New Guinea's international law obligations such as those under the Refugee Convention and made an order directed to Australia. Conversely, the High Court of Australia referred exclusively to Australian domestic law and ignored the Supreme Court of Papua New Guinea's decision in *Belden Norman Namah*. This incongruity is partly due to Australia's lack of a federal Bill of Rights or Human Rights Act as well as the absence of a regional human rights regime in the South Pacific. This gives rise to a situation where asylum seekers are trapped within a place of unsafe and inadequate refuge, unable to wield legal arguments to continue their journey to find genuine sanctuary.

V THE TRAPPED REFUGEE

As a result of the ways judges manoeuvre juridical borders in challenges to containment agreements, are particular refugees more likely to be successful in using courts in their searches for refuge? In Chapters Three and Four, I argued that refugees have to be viewed as exceptional in some way, acutely vulnerable or exemplary to succeed in protection from refuge claims grounded in human rights law. What is the figure of the refugee that emerges from changes to judicial approaches to protection from refuge cases in which a containment agreement's oper-

¹⁶⁰ *Plaintiff S195* (n 145) [19].

¹⁶¹ *Ibid* [19].

¹⁶² *Ibid* [20]. The second proposition was that 'an arrangement or understanding which the Commonwealth has entered into with another person or body in relation to the regional processing functions of another country is not an "arrangement" for the purpose of s 198AHA if that other person or body lacked lawful authority or capacity to enter into it'. In rejecting this argument, the High Court of Australia stated, 'The premise is contradicted by the express terms of the definition of "arrangement" in s 198AHA(5). The definition is specifically framed to encompass an arrangement, agreement, understanding, promise or undertaking which is not legally binding. Even if the 2013 Memorandum of Understanding and the Regional Resettlement Arrangement were beyond the power of PNG under the PNG Constitution, each would remain an arrangement or understanding in fact and, on that basis, each would remain an arrangement within the scope of s 198AHA': at [28].

ation or validity is directly challenged? In this section, I argue that while some scholars conceive of refugees who are subject to bilateral containment agreements as in a state of exception or beyond the pale of law, a more accurate understanding is that asylum seekers and refugees are trapped within multiple and misaligned borders, unable to wield legal arguments to continue their journey to find genuine sanctuary except in extreme and exceptional circumstances.

A State of Exception or State of Exceptionality?

In the Canadian context, Arbel argues that refugees in the United States wanting to cross into Canada in search of refuge are in a state of liminality. She explains that after the Federal Court of Appeal's decision, the asylum seeker applicant, John Doe, was '[s]tripped of recourse to effective legal action under the Canadian law, and suspended between two conflicting directives, his predicament is that of liminality: he is still subject *to* the law, but left bereft *by* it'.¹⁶³ She notes that this 'is in many ways reminiscent of the "state of exception" as discussed by Agamben'.¹⁶⁴

Conceiving of John Doe as a person suspended in a liminal state misses an essential dynamic in the scenario. Perhaps it can be said that John Doe, as an asylum seeker in the United States, is in a state of exception: he is subject to United States asylum laws, but also abandoned by them because he is prevented from lodging his claim for refugee status due to the one-year bar. However, his attempt to trigger Canadian legal protections and continue his journey in search of refuge there provides additional layers of complexity obscured by an Agambenian framework which focusses on the relationship between the sovereign and the individual¹⁶⁵ and does not contemplate situations where a refugee is in one place of refuge, but wants to escape to another. These missing dynamics are evident in Arbel's analysis. She describes John Doe as in an 'impossible bind', because he is required to present at the Canadian border to trigger the Canadian Charter, but the Canada/United States Agreement prevents him from doing so.¹⁶⁶ This is not quite accurate. It is true that the Federal Court of Appeal required John Doe to present at the Canadian border to trigger Charter protection, but there is nothing in the Canada/United States Agreement to prevent him from doing this. It may be very difficult in a practical sense for John Doe and protection from refugee claimants in his position to reach the border, and they

¹⁶³ Arbel, 'Shifting Borders' (n 92) 83.

¹⁶⁴ *Ibid* 83.

¹⁶⁵ Giorgio Agamben, *State of Exception*, tr Kevin Attell (University of Chicago Press, 2005) 1–2.

¹⁶⁶ Arbel, 'Shifting Borders' (n 92) 83.

may be taking great risks in making the journey, but they are not legally prevented from travelling to the border. Therefore, it is not correct to say that John Doe is bound by the law but bereft by it. According to the Federal Court of Appeal, John Doe was never subject to the Canadian Charter. Similarly, while John Doe is subject to the Canada/United States Agreement, he is not bereft by it. He was able to challenge the Agreement in Canadian courts. Both the Federal Court and Federal Court of Appeal entertained his argument regarding the validity of the Governor in Council's designation of the United States as a safe third country. He was not required to be within Canadian territory or present at the border for Canadian courts to hear this argument. Further, the Federal Court of Appeal left open the possibility of asylum seekers in the United States being able to mount a claim under the Canadian Charter by presenting at the border and triggering the Canadian Charter's protection.¹⁶⁷

A more complete way to understand John Doe's predicament is that he is an asylum seeker in a country that does not provide him with adequate refuge, but he is trapped there, unable to trigger a neighbouring country's legal protections to continue his journey to find sanctuary. He is trapped because the Federal Court of Appeal retracted its juridical border, refused to undertake an assessment of United States refugee law and policy, and required him to present at the border to trigger protections in the Canadian Charter. Therefore, the only option for John Doe and asylum seekers in his position is to travel to the border to enliven Canadian Charter protections or cross into Canada in a way that avoids the operation of the Canada/United States Agreement through a remote border region or by air travel. Both options are risky and would be impossible for the majority of asylum seekers and refugees in the United States, many of whom would not have the finances or physical ability to make the journey. Those with care responsibilities or disabilities that effect their mobility are less likely to be able to cross successfully from the United States into Canada. Further, by presenting at the border to trigger the protection of the Canadian Charter, asylum seekers risk being summarily returned to the United States, placed in immigration detention and possibly deported. Seeking refuge in Canada from the United States requires extraordinary—for some, impossible—feats of bravery.

B Beyond the Pale of Law or Trapped Between Dissonant Legal Systems?

Drawing on Arendt's theory of the right to have rights, Larking argues that refugees locked up in detention centres funded by liberal democracies, such as those on Nauru and Manus Island,

¹⁶⁷ *Canada v Canadian Council for Refugees* (n 122) [103].

cannot ‘be considered to exist within the privileged pale of law’.¹⁶⁸ This is because, unlike citizens, permanent residents or lawful visitors, they are not the bearers of ‘a constituted legal personality’.¹⁶⁹ While they are ‘occasionally subjects of pity, compassion and “humanitarian concern”’, they are ‘never full subjects of justice, law and rights’.¹⁷⁰

When the High Court of Australia first retracted its juridical borders in *Plaintiff S156*, it was possible to conceptualise asylum seekers in the Manus Island detention centre as being beyond the pale of law. They were not full subjects of justice, law and rights, because the High Court of Australia did not entertain their arguments regarding their treatment in Papua New Guinea and instead deferred to what the Minister of Immigration believed to be in the national interest. One could also say that these asylum seekers were suspended in a state of liminality: they were subject to Australian law (the Migration Act stated that they can be transferred to an offshore territory and the Memorandum of Agreement between Australia and Nauru provided for their transfer), but are bereft by it (Australian courts would not examine complaints about the transfer or conditions in which they are detained).

Nevertheless, if we rest the analysis at this point, we are missing an important element: that the asylum seekers were in Papua New Guinea’s territory and, therefore, beneficiaries of Papua New Guinea’s human rights protections. In their protection from refugee challenge before the Supreme Court of Papua New Guinea (*Belden Norman Namah*), the asylum seekers had a constituted legal personality. They were not objects of humanitarian concern or pity, but full bearers of rights. They were also not in a state of liminality, because, while they are subject to Papua New Guinean law, they were not bereft by it. Rather, they were able to use the human rights protections in Papua New Guinea’s Constitution to argue successfully against their confinement in the Manus Island detention centre.

However, due to misaligned juridical borders, asylum seekers in Papua New Guinea were only able to trigger human rights law to obtain a partial victory, the closing of the Manus Detention Centre. They could not use legal processes to secure their ultimate aim, which was transfer to Australia. They were not beyond the pale of law or in a liminal state, but were trapped within multiple and misaligned juridical borders, unable to use courts to escape from a place of inadequate refuge and continue their journeys in search of genuine sanctuary. Thus, in the South

¹⁶⁸ Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of Law* (Ashgate, 2014) 120.

¹⁶⁹ *Ibid* 135.

¹⁷⁰ *Ibid* 135.

Pacific region at least, the prospect of a transnational jurisprudence that bolsters human rights protection remains far off.

The only way asylum seekers and refugees can escape their entrapment and continue their searches for refuge in the South Pacific region is by virtue of extraordinary circumstances. This is evident in the aftermath of the High Court of Australia's decision in *Plaintiff M68*. As a result of this judgment, asylum seekers and refugees in Nauru or in Australian territory awaiting transfer to Nauru are trapped within multiple and misaligned juridical borders. The Australian government can transfer them to Nauru and cooperate in their detention or containment in open processing centres through its extraterritorial expansion of its juridical borders. However, they cannot challenge their detention or the conditions they are subject to before Australian courts. They are able to challenge their detention under the Constitution of Nauru.¹⁷¹ However, given the High Court of Australia's decision in *Plaintiff S195/2016*, even a successful challenge is unlikely to result in the asylum seekers being transferred to Australia. Nevertheless, the Minister for Immigration permitted the asylum seeker litigant in *Plaintiff M68* to remain in Australian territory. Her story 'triggered an outpouring of public support' for asylum seekers in specific situations¹⁷² and inspired the 'Let Them Stay' campaign.¹⁷³ As a result of this grassroots campaign, she and other asylum seekers understood to have special protection needs such as children, cancer patients, those identified as a suicide risk and victims of sexual assaults have been permitted to stay in Australia.¹⁷⁴ However, they only have permission to stay on a temporary basis and at the Minister's discretion.¹⁷⁵ Another example of a transfer in an exceptional circumstance after a sustained public campaign is the Australian government's agreement to bring a terminally ill asylum seeker to Australia to receive palliative care after a petition signed by over 2,000 doctors, organisations and Australian residents.¹⁷⁶

¹⁷¹ Such an action was lodged in the Supreme Court of Nauru in 2016, but no decision has been handed down: Jane Lee, 'Asylum Seekers: Nauru's Top Court May be Forced to Decide Whether Detention is Lawful', *Sydney Morning Herald* (online at 18 August 2016) <<http://www.smh.com.au/national/asylum-seekers-naurus-top-court-may-be-forced-to-decide-whether-detention-is-lawful-20160818-gqvm5i.html>>.

¹⁷² Madeline Gleeson, *Offshore: Behind the Wire at Manus and Nauru* (University of New South Wales Press, 2016) 5.

¹⁷³ Law Institute of Victoria, 'Let Them Stay Campaign a Success' (2016) 90(5) *Law Institute Journal* 26, 26.

¹⁷⁴ Gleeson (n 172).

¹⁷⁵ Kaldor Centre for International Refugee Law, *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors [2016] HCA 1* (13 July 2016) 16 <<http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1>>.

¹⁷⁶ Ben Doherty, 'Dying Refugee Removed from Nauru to Australia after Intense Campaign', *The Guardian* (online at 23 June 2018) <<https://www.theguardian.com/australia-news/2018/jun/23/dying-refugee-moved-from-nauru-to-australia-after-intense-campaign>>.

In addition to extra-legal grounds for a transfer, asylum seekers and refugees in Nauru and Papua New Guinea have initiated cases against the Minister for Immigration in Australian courts seeking to be brought to Australia. The refugees have to ground their pleading in private law (they alleged a breach of the Minister's duty of care), because there is no public law cause of action available to them that would secure a transfer to Australia. The relief sought in these claims has been granted only in exceptional circumstances and only to access medical care. For example, in two interlocutory matters, the Federal Court of Australia ordered the Australian government to transfer a child asylum seeker on Nauru who had attempted suicide so that they could receive specialist child mental healthcare.¹⁷⁷ In these cases, the Court drew heavily on the reasoning in *Plaintiff S99/2016 v Minister for Immigration and Border Protection*,¹⁷⁸ in which a refugee who had been raped on Nauru after becoming unconscious during an epileptic fit became pregnant as a result of the rape and wanted to terminate the pregnancy. The Australian Minister for Immigration transferred her to Papua New Guinea to have the abortion, but she commenced civil proceedings in Australia and pleaded that the Minister owed her a duty of care to arrange for a safe and lawful abortion and this duty would be breached if he forced her to undergo the procedure in Papua New Guinea. The Federal Court of Australia found that the Minister owed her a novel duty of care.¹⁷⁹ Critical to this decision was the Court's assessment of her situation of being in a position of vulnerability and completely reliant on the Minister for Immigration for access to appropriate medical assistance.¹⁸⁰ These cases indicate that private law claims for transfers from Nauru and Papua New Guinea will only be successful in exceptional circumstances where the asylum seeker or refugee is considered vulnerable in some way. Also, courts have not ordered a permanent transfer to Australia.¹⁸¹ The Australian government has recently passed legislation to permit temporary transfers for people currently in Nauru and

¹⁷⁷ *AYX18 v Minister for Home Affairs* [2018] FCA 283 (6 March 2018); *FRX17 as Litigation Representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 (9 February 2018).

¹⁷⁸ *Plaintiff S99* (n 149).

¹⁷⁹ *Ibid* [258]–[263].

¹⁸⁰ *Ibid* [258]–[263]. For a detailed analysis of this case, see Kate Ogg, 'Sexing the Leviathan: When Feminisms and Crimmigration Meet' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, forthcoming).

¹⁸¹ In *S99*'s case, the Federal Court granted an injunction prohibiting the Minister from procuring the abortion in Papua New Guinea or any other place that would expose *S99* to criminal liability and does not have appropriate medical expertise: *Plaintiff S99* (n 149) [500]. The Federal Court was not prepared to order that the Minister transfer *S99* to Australia to undergo the required medical treatment. The careful wording of the injunction meant the Minister could have transferred *S99* to Australia or arranged for her transfer to another country that complied with the terms and conditions stipulated in the injunction. The cases brought by *FRX17* and *AYX18* had not proceeded to a final hearing at the time of writing.

Manus Island, but only if the refugee or asylum seeker has been assessed by doctors as requiring urgent medical treatment.¹⁸²

When trapped between multiple and misaligned juridical borders and without the ability to escape through some form of exceptional or extraordinary circumstances, refuge becomes relative. The judicial dissonance in the saga of challenges to Australia's offshore processing regime has given rise to a situation in which the asylum seekers and refugees on Manus Island, who launched litigation in the Supreme Court of Papua New Guinea to have the Manus Detention Centre closed, later petitioned for it to remain open. After the judgment in *Beldon Norman Namah*, the Papua New Guinean government started closing down the Manus Detention Centre, but the Australian government insisted that it would not bring any asylum seekers from the centre to Australia.¹⁸³ Many of the asylum seekers and refugees in the Manus Detention Centre were afraid of leaving the centre because they felt they would not be safe in the Manus Island community.¹⁸⁴ They argued for the Manus Detention Centre to be kept open, but the Supreme Court of Papua New Guinea dismissed the action.¹⁸⁵ Thus, similar to the trajectory of forced encampment jurisprudence in Kenya, what asylum seekers on Manus Island saw as an unacceptable and inadequate place of refuge became the only space of protection available to them and they fought to keep it open.

VI CONCLUSION

In this chapter, I set out to build on my analysis of decision-maker approaches to protection from refuge cases. In Chapters Three and Chapter Four, I examined how decision-makers determine protection from refuge challenges grounded in human and refugee rights law. In this chapter, I investigated protection from refuge claims in which these rights are part of a broader range of legal arguments pleaded. Four patterns emerge across these chapters. First, decision-makers adopt robust ideas of refuge when they adopt categorical reasoning by interpreting legal instruments with reference to experiences common to refugeehood or refugees' position in international law. In this chapter, when decision-makers adopt this approach, they set a high

¹⁸² *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) sch 6.

¹⁸³ Lizzie Dearden, 'Australia to Close Manus Island Refugee Processing Centre after Papua New Guinea Rules Detention Illegal', *Independent* (online at 17 August 2016) <<http://www.independent.co.uk/news/world/australia/australia-to-close-manus-island-refugee-processing-centre-papua-new-guinea-rules-detention-illegal-a7195106.html>>.

¹⁸⁴ Liam Fox, 'Manus Island Detention Centre to Permanently Close Today, 600 Men Refusing to Leave', *ABC News* (online at 31 October 2017) <<http://www.abc.net.au/news/2017-10-31/manus-island-detention-centre-to-close-at-5pm-today/9102768>>.

¹⁸⁵ *Boochani v Independent State of Papua New Guinea* [2017] PGSC 28 (7 November 2017).

threshold for refuge and characterise it as a duty. Second, in initial or early cases, decision-makers approach protection from refuge challenges in a way that disrupts containment agreements, but subsequent decisions ensure their continuation. Third, as part of this change, decision-makers excise or partially excise the place of refuge from the judicial lens. For example, in Chapter Three I highlighted that European decision-makers only consider the circumstances upon immediate arrival and in this chapter judges retract their juridical borders. Fourth, once this shift occurs, the refugee or asylum seeker must be exceptional in some way or be the beneficiary of extraordinary circumstances to continue their journeys in search of refuge.

The additional element of complexity in the cases I examine in this chapter is the role of borders in judicial decision-making. The analysis indicates that taking account of refugees' special position and invoking international law may set higher thresholds for adequate refuge as opposed to referring to comparative jurisprudence. Thus, lack of horizontal transjudicial communication should not always be viewed as a 'problem'.¹⁸⁶ I am not suggesting that transjudicial communication is inherently problematic or should be discouraged. In some contexts, it has enabled courts in different jurisdictions to reach 'correct and authoritative' interpretations of many aspects of refugee law.¹⁸⁷ However, an understanding of refugeehood and refugees' status in international law must guide decision-makers in their use of comparative jurisprudence in protection from refuge contexts.

Once decision-makers determine the threshold for adequate refuge, decision-makers must be willing and able to extend their juridical boundaries across geographic borders. In the protection from refuge decisions examined in this chapter, decision-makers excise consideration of the place of refuge through retracting their juridical borders. These later decisions give rise to a situation where borders' salience is simultaneously diminished and enhanced to the detriment of refugees: governments extend their juridical borders extra-territorially to transfer to or keep refugees in third countries, but courts retract their juridical borders to avoid passing judgment on sites of refuge in other nation-states.

These multiple and misaligned borders trap refugees in an inadequate place of refuge and make it impossible for them to continue their journeys in search of genuine sanctuary except in exceptional or extraordinary circumstances. However, the protection provided in these atypical

¹⁸⁶ H el ene Lambert refers to the lack of transjudicial communication in refugee decisions in the European Union as a 'problem': Lambert, 'Transnational Law' (n 12) 8.

¹⁸⁷ Hathaway and Foster (n 18) 4.

circumstances is less secure, being achieved extra-legally, or the transfers are only for temporary periods. Through this process, the idea of a threshold for adequate refuge dissipates and the nature of refuge morphs from a duty to a discretion. Due to the changes in the ways courts approach these protection from refuge challenges, their answer to the ‘essential question’ of “Whose refugee?” is all too easily answered by a curt “Not mine”.¹⁸⁸

¹⁸⁸ Jean-François Durieux, ‘Three Asylum Paradigms’ (2013) 20(2) *International Journal on Minority and Group Rights* 147, 172.

CHAPTER SIX

SEEKING REFUGE AS A PALESTINIAN REFUGEE

I INTRODUCTION

Palestinian refugees are one of the largest refugee groups in the world¹ and constitute the longest standing protracted refugee situation.² They were also the only group of refugees excluded from the *Convention Relating to the Status of Refugees* ('Refugee Convention')³ when it was drafted. The majority of Palestinian refugees live in the Middle East region and receive protection and assistance from the United Nations Relief and Works Agency for Palestinian Refugees in the Near East ('UNRWA'). While Palestinian refugees have worked hard to rebuild their communities in exile,⁴ many feel they have a bleak existence. Samar, a 20-year-old living in a Palestinian refugee camp in Lebanon exclaims, "We have no rights and no future. We have a lot of problems; We can't work freely, we cannot own a house, we cannot move around. We are treated as if we are not human"⁵. Some Palestinian refugees leave these environments in search of better protection conditions. These journeys are particularly difficult and precarious for Palestinian refugees, many of whom are stateless.⁶ In their journey to find refuge further

¹ Susan Akram, 'Myths and Realities of the Palestinian Refugee Problem: Reframing the Right of Return' in Susan Akram et al (eds), *International Law and the Israeli-Palestinian Conflict* (Routledge, 2011) 13, 13 ('Myths and Realities'); BADIL Resource Centre for Palestinian Residence and Refugee Rights, *Q and A: What You Need to Know about Palestinian Refugees and Internally Displaced Persons* (May 2015) 5 <<http://www.badil.org/phoca-downloadpap/badil-new/campaigning-tools/brochures/2015/Q&A-en-2015.pdf>>; Terry Rempel, 'Who Are Palestinian Refugees?' (2006) 26 *Forced Migration Review* 5, 5. The most recent figures are that there are 5.4 million refugees under UNRWA's mandate and 19.9 million refugees under UNHCR's mandate, totalling 25.3 million refugees globally: UNHCR, *Global Trends: Forced Displacement in 2017* (25 June 2018) 2 <<http://www.unhcr.org/en-au/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html>> ('Global Trends'). This means that Palestinian refugees account for approximately one out of every five refugees in the world. They were considered the largest group of refugees until recently when the numbers of Syrian refugees reached a reported 6.3 million, making them the largest group of refugees in the world: *ibid*.

² Akram, 'Myths and Realities' (n 1) 13; Susan Akram, 'Palestinian Refugees and their Legal Status' (2002) 31(3) *Journal of Palestinian Studies* 36, 36 ('Palestinian Refugees'); BADIL Resource Centre for Palestinian Residence and Refugee Rights (n 1); UNHCR, *Global Trends* (n 1).

³ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴ See Nadya Hajj, *Protection Amid Chaos: The Creation of Property Rights in Palestinian Refugee Camps* (Columbia University Press, 2016).

⁵ Clancy Chassay and Duncan Campbell, 'Middle East: Life Inside the Palestinian Refugee Camps in Lebanon', *The Guardian* (online), 30 May 2007 <<https://www.theguardian.com/world/2007/may/29/syria.israelandthepalestinians>>.

⁶ Brookings Institution, *The State of Statelessness in the Middle East* (15 May 2015) <<https://www.brookings.edu/blog/future-development/2015/05/15/the-state-of-statelessness-in-the-middle-east/>>; Abbas Shibliak, 'Stateless Palestinians' 26 *Forced Migration Review* 8, 8; Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Oxford University Press, 1998) ch 5. Statelessness is defined as 'a person who is not considered as a national by any State under the operation of its law': *Convention Relating to the Status of Stateless Persons*,

abroad, Palestinian refugees confront article 1D: the Refugee Convention's only exclusion and 'contingent inclusion' clause.⁷ Human rights arguments are relevant to these article 1D cases and borders play a role in their determination, but the other significant element is the movement of those in need of protection from the developing to the developed world. Depending on how decision-makers approach these claims, and, in particular, where they set the scope of refuge, Palestinian refugees will continue to be contained in the UNRWA region or they will have a pathway to secure refugee protection further abroad.

The purpose of this chapter is to examine how decision-makers approach and determine protection from refuge claims grounded in the Refugee Convention and in situations where refugees would be shifting their place of refuge from the Global South to the Global North. To guide this exploration of decision-makers' approaches to these claims, I draw on scholarship that employs critical race theory and third world approaches to international law ('TWAIL') to expose the ways the Refugee Convention acts to contain those in need of protection in the developing world. I commence this chapter by outlining this literature and discussing how it applies to Palestinian refugees' unique status under the Refugee Convention. I then examine how decision-makers determine the scope and nature of refuge for Palestinian refugees and discuss the consequences for Palestinian refugees' ability to secure a place of genuine refuge. I argue that particular approaches come close to setting a broad scope of refuge for Palestinian refugees and characterising the nature of refuge as right as well as a duty. However, decision-makers approach these protection from refuge claims in a way that narrows and truncates the scope of refuge for Palestinian refugees and inhibits Palestinian refugees' ability to find a place of refuge outside the UNRWA region. These approaches create additional barriers for female Palestinian refugees in their searches for a place of genuine refuge.

opened for signature 28 September 1954, 360 UNTS 117 (entry into force 6 June 1960) art 1 ('1954 Statelessness Convention'). Many Palestinian refugees fit within this definition—Jordan is the only country in which UNRWA operates to have granted collective citizenship to Palestinian refugees: Akram, 'Palestinian Refugees' (n 2) 51. However, article 1(2)(i) of the 1954 Statelessness Convention contains an exclusion clause similar to article 1D of the Refugee Convention (n 3).

⁷ Akram, 'Palestinian Refugees' (n 2) 39; Guy Goodwin-Gill and Susan Akram, 'Brief *Amicus Curiae* on the Status of Palestinian Refugees under International Law' (2000) 11 *Palestine Yearbook of International Law* 187, 191; Mutaz Qafisheh and Valentina Azarov, 'Article 1D' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) [25].

II THE REFUGEE CONVENTION AS A CONTAINMENT MECHANISM

Approximately 85 per cent of the world's refugees are hosted in developing regions.⁸ This is predominantly because these host states share borders with or are close to countries producing large numbers of refugees. Refugees seek safety in these nearby countries and, while some do not want to travel any further, those who do face a number of barriers in reaching places of refuge further afield. In reflecting on this problem, the United Nations Secretary-General explains that '[s]tronger solidarity with refugee-hosting countries in the [G]lobal South is absolutely a must'.⁹

Some scholars argue that the Refugee Convention and the ways states implement it compound these inequities.¹⁰ In this chapter, I draw on two of the most well known proponents of this position, Tuitt and Chimni, who draw on critical race theory and TWAIL respectively to advance their positions. Some of Tuitt's and Chimni's critiques of the Refugee Convention have subsequently been addressed by legal developments and I discuss this below, but neither Tuitt or Chimni specifically consider the Refugee Convention's treatment of Palestinian refugees. I outline Tuitt's and Chimni's scholarship and consider how their insights apply to Palestinian refugees in their use of the Refugee Convention to secure a different place of refuge.

Tuitt argues that the creation of refugee law and refugee definitions in the first half of the twentieth century¹¹ served as a type of containment mechanism in the sense that this new area of international law restricted, rather than facilitated, movement across international borders.¹² Tuitt explains that international refugee law's 'supposed positive benefit' is the principle of

⁸ UNHCR, *Global Trends* (n 1) 2, 15.

⁹ António Guterres, United Nations Secretary-General, 'Press Conference by Secretary-General António Guterres at United Nations Headquarters' (Press Conference, SG/SM/18580, 20 June 2017) <<https://www.un.org/press/en/2017/sgsm18580.doc.htm>>. António Guterres was formerly the United Nations High Commissioner for Refugees.

¹⁰ See, eg, Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws in Australia and Canada* (University of British Columbia Press, 2005) 85; Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracies and the Response to Refugees* (Cambridge University Press, 2004) 3; Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of Law* (Ashgate, 2014) 128; Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press, 1995) 88–94.

¹¹ For a discussion of the international instruments pertaining to and defining refugees in the first half of the twentieth century prior to the adoption of the Refugee Convention (n 3) in 1951, see Goodwin-Gill and McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 16–20 ('*The Refugee in International Law*').

¹² Patricia Tuitt, 'Defining the Refugee by Race: The European Response to "New" Asylum Seekers' in Paddy Ireland and Per Laleng (eds), *The Critical Lawyers' Handbook 2* (Pluto Press, 1997) 96 ('Defining the Refugee by Race'). Article 31(1) of the Refugee Convention (n 3) provides, 'No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion'.

non-refoulement.¹³ However, she writes that we can only conceive of international refugee law granting such a benefit if before its emergence migrants ‘were confronted with closed state borders’.¹⁴ Tuitt argues that this is ‘manifestly not the case’¹⁵ and draws on Hathaway’s assertion that the emergence of international refugee law in the first few decades of the twentieth century coincided with the withdrawal of the benefit of free movement of persons across international borders.¹⁶ Thus, the creation of refugee categories did not empower those in need of protection ‘to move more freely than they had been in the days before the introduction of refugee status’.¹⁷ Further, the position of those who do not fit within refugee definitions ‘became qualitatively worse’, because they had been stripped of the benefit of ‘free and unfettered’ movement.¹⁸ In sum, the creation of international refugee law was not prompted by a desire to extend a benefit to the included category of refugees, but to remove a benefit previously enjoyed by the excluded category (those who do not meet refugee definitions).¹⁹

Tuitt contends that the definition of a refugee in the Refugee Convention perpetuates the inequities between the Global North and Global South with respect to responsibility for refugees. This is because the refugee definition has a Western or European ‘ideological slant’.²⁰ In particular, the persecution requirement includes as refugees those who can prove that they are the victim of harms ‘thought to emanate from culpable acts’,²¹ but excludes ‘human suffering

¹³ Tuitt, ‘Defining the Refugee by Race’ (n 12) 98.

¹⁴ *Ibid* 98.

¹⁵ *Ibid* 98.

¹⁶ James Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 1, cited in Tuitt, ‘Defining the Refugee by Race’ (n 12) 98.

¹⁷ Tuitt, ‘Defining the Refugee by Race’ (n 12) 98.

¹⁸ *Ibid* 99.

¹⁹ *Ibid* 97.

²⁰ Tuitt, ‘Defining the Refugee by Race’ (n 12) 100. See also Patricia Tuitt *False Images: The Law’s Construction of the Refugee* (Pluto Press, 1996) 14–16 (‘False Images’).

²¹ Tuitt, ‘Defining the Refugee by Race’ (n 12) 101.

caused by accident or natural disaster'.²² (This concern has now been partly addressed by subsequent jurisprudence and legal reforms.²³) Tuitt also argues that the alienage requirement²⁴ disadvantages those who cannot travel to make a claim for international protection, especially women and children.²⁵ Tuitt explains that while 'movement', particularly journeying across borders, is refugees' 'signifier', 'territorial boundaries, cultural perceptions, age and disability all conspire to curtail movement ... and constantly to withhold the "official" designation "refugee" from those most deserving or it'.²⁶

Additionally, even in situations where the Refugee Convention should respond to refugees from the Global South, Western states have interpreted or used it in a way that denies international protection to those from the developing world. Tuitt claims that many of what were seen as the 'new' asylum seekers from Asia and Africa who came to the Global North in larger numbers during the 1990s would have fit within the refugee definition.²⁷ However, Western states did not consider them to be refugees and 'continued to perceive the majority of these refugees according to their excluded status'.²⁸ Similarly, Chimni contends that Western states disavowed the Refugee Convention as anachronistic once the Cold War ended and 'refugees no longer possessed ideological or geopolitical value'.²⁹ The 'new' refugees were not politically valuable

²² Ibid 101.

²³ There is also acceptance that a person will have a well-founded fear of persecution if targeted by non-state actors and the state cannot or will not protect them: see, eg, *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 [29]–[31] (Gleeson CJ), [112]–[114] (Kirby J) ('*Khawar*'); *Directive 2011/95/EU of the European Parliament and of the Council of 13 December on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* [2011] OJ L 337/9–337/26, art 6(c) ('Directive 2011/95/EU'). There is also protection for people fleeing indiscriminate harm: Directive 2011/95/EU arts 2(f), 15(b)–(c) provide protection to those who, if returned to their country of origin, would face a real risk of torture, or inhuman or degrading treatment, or punishment, or a serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

²⁴ To qualify as a refugee, a person must be 'outside the country of his [or her] nationality' or 'not having a nationality' is 'outside the country of his [or her] former habitual residence': Refugee Convention (n 3) art 1A(2).

²⁵ Patricia Tuitt, 'Rethinking the Refugee Concept' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) 106, 116 ('Rethinking the Refugee Concept'); Tuitt, *False Images* (n 20) 11–14.

²⁶ Tuitt, 'Rethinking the Refugee Concept' (n 25) 116.

²⁷ Tuitt argues that they were not new refugees, but only new to Western states: Tuitt, 'Defining the Refugee by Race' (n 12) 103; Tuitt, *False Images* (n 20) 69–71.

²⁸ Tuitt, 'Defining the Refugee by Race' (n 12) 103.

²⁹ BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350, 351 ('Geopolitics'). See also BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) *Refugee Survey Quarterly* 55, 58 ('From Resettlement').

to Western states, because they were no longer people fleeing communist regimes but ‘individuals fleeing the Third World’.³⁰ Global North states created a ‘myth of difference’³¹ by claiming that the ‘new’ asylum seekers coming from developing countries were ‘economic migrants rather than political refugees’.³² (Subsequent to Chimni’s publications, there is now some jurisprudence that responds to these critiques.³³)

With respect to refugee status assessments, Tuitt and Chimni both argue that decision-makers restrict the Refugee Convention’s responsiveness to claimants from third world countries through purported objectivism.³⁴ This is a process, whereby decision-makers undertake an assessment of concepts such as reasonableness, safety or well-founded fear that is supposedly objective, but is ‘tainted with local perceptions and thus fails to be context specific’.³⁵ Chimni and Tuitt contend that ‘objectivism’ eclipses the refugee’s voice and prioritises the state’s subjective views over the refugee’s experiences.³⁶ For example, Chimni suggests that in applying the cessation clause,³⁷ objectivism permits states ‘alone to decide when there has been a sufficient change in the circumstances of the country of origin’ and ignore refugees’ views about whether it is safe for them to return.³⁸

Chimni not only critiques Western governments’ and decision-makers’ politicised use of the Refugee Convention, he has refugee law scholars in his sights. He argues that refugee law

³⁰ Chimni, ‘Geopolitics’ (n 29) 351; Chimni, ‘From Resettlement’ (n 29) 58.

³¹ Chimni, ‘Geopolitics’ (n 29) 351.

³² Ibid 356. Chimni also argues that this shift gave rise to Western states supporting repatriation as the preferred durable solution: Chimni, ‘From Resettlement’ (n 29). He suggests that due to this change in preference, states are able to use the Refugee Convention (n 3) as a containment mechanism through the operation of the cessation clause: at 61–3.

³³ Many jurisdictions recognise that discriminatory denial of economic and social rights can constitute a well-founded fear of persecution: see, eg, *RRT Case No N94/04178* (Unreported, Refugee Review Tribunal, Australia, 10 June 1994) (discriminatory denial of healthcare was found to constitute persecution); *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 170 ALR 553 [31] (‘*Chen Shi Hai*’); *BG (Fiji)* [2012] NZIPT 800091 [90] (‘*BG (Fiji)*’); *MK (Lesbians) Albania v Secretary of State for the Home Department CG* [2009] UKAIT 00036 [353] (‘*MK (Lesbians)*’); Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (Cambridge University Press, 2007) (‘*International Refugee Law*’); Michelle Foster, ‘*Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*’ (2009) *New Zealand Law Review* 257 (‘*Non-Refoulement*’).

³⁴ Chimni, ‘From Resettlement’ (n 29) 62; Tuitt, *False Images* (n 20) 85.

³⁵ Tuitt, *False Images* (n 20) 85.

³⁶ Chimni, ‘From Resettlement’ (n 29) 61–2; Tuitt, *False Images* (n 20) ch 5.

³⁷ Chimni is referring specifically to the Refugee Convention’s (n 3) article 1C(5), which provides that the Refugee Convention, ‘shall cease to apply to any person’ if ‘[h]e [or she] can no longer, because the circumstances in connexion with which he [or she] has been recognized as a refugee have ceased to exist, continue to refuse to avail himself [or herself] of the protection of the country of his [or her] nationality’.

³⁸ Chimni, ‘From Resettlement’ (n 29) 62.

scholarship ‘has been dominated by a positivist tradition which limits the possibility of engagement with politics’.³⁹ He explains that this positivist approach ‘views international law as an abstract system of rules which can be identified, objectively interpreted, and enforced’ and anything ‘outside the system of rules is designated as politics’.⁴⁰ As a result, refugee law scholars ignore the political forces that influenced refugee law’s creation and continue to affect its interpretation and defend ‘principles which are completely out of tune with historical and political realities’.⁴¹

Tuitt and Chimni, in critiquing the Refugee Convention as a mechanism that contains those in need of protection in the Global South, do not consider Palestinian refugees’ specific situation. The only express reference to Palestinian refugees is in Chimni’s critical assessment of durable solutions, in which he does not include Palestinians among the refugees in the developing world trying to seek a place of refuge in the Global North.⁴² Instead, he classifies them as wanting ‘to return to their country of origin’.⁴³ While Palestinian refugees agitate for the right to return,⁴⁴ some journey to states that are signatory to the Refugee Convention to find a genuine place of refuge and confront the application of article 1D, which excludes Palestinian refugees from the Refugee Convention, but also grants *ipso facto* refugee status if United Nations (‘UN’) protection or assistance ceases for any reason. Below, I draw on Chimni and Tuitt’s ideas to guide my analysis of decision-makers’ approaches to Palestinian refugees’ protection from refugee claims.

III ARTICLE 1D AS A CONTAINMENT MECHANISM

Detailed examinations of the circumstances surrounding article 1D’s drafting and states’ disparate interpretations of its meaning and application are available.⁴⁵ Of relevance to this chapter is whether article 1D can be considered a mechanism that contains Palestinian refugees in the UNRWA region and frustrates their attempts to seek protection elsewhere. Below, I position article 1D’s drafting history and courts’ and scholars’ differing interpretations against the backdrop of Tuitt’s and Chimni’s scholarship to illuminate and orient article 1D’s containing effects.

³⁹ Chimni, ‘Geopolitics’ (n 29) 352.

⁴⁰ *Ibid* 352.

⁴¹ *Ibid* 353.

⁴² Chimni, ‘From Resettlement’ (n 29) 73.

⁴³ *Ibid* 73.

⁴⁴ Akram, ‘Palestinian Refugees’ (n 2) 41; John Quigley, ‘Displaced Palestinians and the Right to Return’ (1998) 39(1) *Harvard International Law Journal* 171, 171.

⁴⁵ Akram, ‘Palestinian Refugees’ (n 2) 40–3; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 151–7; James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 509–21 (*The Law of Refugee Status*); Qafisheh and Azarov (n 7).

When the Refugee Convention was being drafted, the overwhelming majority of Palestinian refugees were receiving protection and assistance from UNRWA and the now non-operational United Nations Conciliation Commission for Palestine ('UNCCP').⁴⁶ Representatives from Arab nations took the view that Palestinian refugees should not be part of the Refugee Convention, because the UN was responsible for Palestinians' situation and, thus, bore direct responsibility for them.⁴⁷ They also stressed that Palestinian refugees should be repatriated and the drafters assumed that an early solution would be achieved.⁴⁸ The exclusion of Palestinian refugees from the Refugee Convention was also supported by European and North American states because they were reticent to accept 'a new, large group of refugees'.⁴⁹ Therefore, as a result of an 'uneasy and ironic conformity',⁵⁰ Arab, European and North American states agreed that Palestinian refugees should be excluded from the Refugee Convention and continue to be assisted by UNRWA and UNCCP in the Middle East region.

The Egyptian delegate suggested that, while Palestinian refugees should be excluded from the Refugee Convention, they should automatically receive the benefits of the Refugee Convention if UN protection or assistance ceases without Palestinian refugees' position being definitively settled.⁵¹ The drafters agreed with this proposal on the grounds that it would ensure that Palestinian refugees receive continuity of international protection.⁵² As a result of this compromise, article 1D provides:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the

⁴⁶ The UNCCP still exists and reports annually to the United Nations General Assembly ('UNGA'), but has been inactive since the mid-1960s: Terry Rempel, 'From Beneficiary to Stakeholder: An Overview of UNRWA's Approach to Refugee Participation' in Sari Hanafi, Leila Hilal and Lex Takkenberg (eds), *UNRWA and Palestinian Refugees: From Relief Works to Human Development* (Routledge, 2014) 145.

⁴⁷ Mostafa Bey, Egyptian Representative, United Nations General Assembly, *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Ninth Meeting*, UN Doc A/CONF.2/SR.29 (28 November 1951). For further discussion, see Akram, 'Palestinian Refugees' (n 2) 40; Goodwin-Gill and Akram (n 7) 201–2.

⁴⁸ Bey (n 47) 16; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 153.

⁴⁹ Mr Rochefort, French representative, United Nations General Assembly, *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting*, UN Doc A/CONF.2/SR.19 (26 November 1951) 11. See also Mr Warren, United States representative, *ibid*.

⁵⁰ *Amer Mohamed El-Ali v Secretary of State for the Home Department* [2003] EWCA Civ 1103 [16] ('*El-Ali*').

⁵¹ Bey (n 47) 6.

⁵² Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 154.

General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

Thus, article 1D's first paragraph excludes Palestinian refugees from the Refugee Convention's ambit,⁵³ but its second paragraph provides that they are *ipso facto* entitled to the benefits of the Refugee Convention if their UN protection and assistance ceases for any reason.

Applying Tuitt's ideas to article 1D's drafting history indicates that it is both a containment mechanism for Palestinian refugees (in the sense that it confines them to the UNRWA region) and a provision that frees Palestinian refugees from the Refugee Convention's containing effects. Article 1D disenfranchises Palestinian refugees to a far greater extent than other refugees. The benefit of free movement is removed, they cannot access the 'supposed benefit' of *non-refoulement* and to receive protection and assistance they must remain in an UNRWA area of operation (Jordan, Lebanon, Syria, the Gaza Strip and the West Bank). However, article 1D's second paragraph liberates Palestinian refugees from the refugee definition's Western ideological slant: they are automatically accepted as part of the 'included' category and can journey to a country signatory to the Refugee Convention and receive the benefits of refugee protection without having to satisfy the refugee definition.⁵⁴

Nevertheless, article 1D is a clause 'pregnant with ambiguity',⁵⁵ and where the balance between containment and liberation from containment lies in Palestinian refugees' quests for refuge depends on the manner in which it is interpreted. One of the main debates on the interpretation of article 1D is whether it should have a 'historically bounded' interpretation (it applies only to those receiving UN protection and assistance when the Refugee Convention was drafted in 1951) or a 'continuative' interpretation (it also applies to their descendants and Palestinians displaced as a result of subsequent hostilities).⁵⁶ If the former interpretation is adopted, the group of Palestinian refugees excluded from the Refugee Convention will get smaller over time and article 1D will eventually become redundant.⁵⁷ This was the approach taken by the Court

⁵³ While it does not mention Palestinian refugees specifically, it is well accepted that article 1D applies to Palestinians who were displaced as a result of the creation of Israel: *El-Ali* (n 50) [22]; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 151–2; Hathaway and Foster, *The Law of Refugee Status* (n 45) 510; UNHCR, *Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees*, UN Doc HCR/GIP/16/12 (December 2017) 1–5 ('*Guidelines on International Protection No 13*').

⁵⁴ The UNHCR states that '*ipso facto*' means that the Palestinian refugee is entitled to the rights in the Refugee Convention (n 3) as long as articles 1C, 1E and 1F of the Refugee Convention do not apply: UNHCR, *Guidelines on International Protection No 13* (n 53) [29]–[31].

⁵⁵ *Minister for Immigration and Multicultural Affairs v WABQ* (2002) 197 ALR 35 [18] ('*WABQ*').

⁵⁶ Hathaway and Foster, *The Law of Refugee Status* (n 45) 513.

⁵⁷ *El-Ali* (n 50) [24].

of Appeal of England and Wales in *Amer Mohamed Eli-Ali v Secretary of State for the Home Department*.⁵⁸ The Court held that article 1D only applies to Palestinian refugees in receipt of UN protection or assistance in 1951.⁵⁹ The Federal Court of Australia took a similar position in *Minister for Immigration and Multicultural Affairs v WABQ*.⁶⁰ The Court ruled that the term ‘at present’ refers to the class of Palestinian refugees eligible to receive UN protection or assistance in 1951.⁶¹ Hathaway and Foster support this ‘historically bounded’ interpretation of article 1D.⁶² They explain that:

The ultimate demise of Art. 1(D) exclusion is, in our view, a result that is not only legally correct, but also deeply principled, as it will restore Palestinians to the position of all other groups who are entitled to protection as refugees so long as they meet the requirements of the refugee definition.⁶³

With respect to the Refugee Convention’s constraining effect on Palestinian refugees’ searches for refuge, Australian and United Kingdom courts as well as Hathaway and Foster reach a balanced position. Palestinian refugees not in receipt of or in the class eligible to receive UN protection and assistance in 1951 (the majority alive today) do not need to remain in an UNRWA area of operation to receive protection and assistance. They can, like all persons in need of

⁵⁸ *Ibid*.

⁵⁹ *Ibid* [28]. The Court reasoned that a continuative interpretation of article 1D is inconsistent with its plain language: ‘at present’ cannot be read to mean those who later receive assistance or those who are now receiving assistance: at [33]. Further, the *ipso facto* entitlement to the benefits of the Refugee Convention (n 3) confers on Palestinian refugees ‘highly preferential and special treatment’ and, therefore, ‘the class of persons caught by the first sentence should be identified and fixed by reference to a particular date’: at [36]. In relation to the meaning of ‘ceased for any reason’, the Court determined that this refers to UNRWA ceasing to function as an institution because the drafters did not intend for article 1D’s inclusionary paragraph to apply ‘piecemeal and haphazardly’: at [47]. The Court acknowledged that UNRWA’s protection or assistance can cease for an individual Palestinian refugee, but only in exceptional circumstances such as where the refugee would be prevented from returning to UNRWA’s area of operations: at [48].

⁶⁰ *WABQ* (n 55).

⁶¹ *WABQ* (n 55) [69], [162]–[163]. At [69], the Court was satisfied that the drafters’ intention was that article 1D was only to apply to Palestinian refugees. However, if article 1D had continuative effect, then it would apply to any refugee population where the UN set up alternative agencies for protection, which would be antithetical to the drafters’ intent. Further, article 1D was intended to be a ‘temporary measure’ applied until a permanent solution could be found and the drafters did not contemplate that the situation would become ‘so intractable’. The Court also held that article 1D’s second paragraph does not apply on a case-by-case basis. The Court reasoned that the prospect of an individual Palestinian refugee being *ipso facto* entitled to the benefits of the Refugee Convention (n 3) by simply leaving UNRWA’s area of operation is inconsistent with the *travaux préparatoires* which indicate that European states were concerned about the prospect of ‘a flood of Palestinian refugees’. Also, article 1D was never intended to give Palestinian refugees the choice between special UN protection or assistance or protection as Convention refugees.

⁶² Hathaway and Foster, *The Law of Refugee Status* (n 45) 513–14. They highlight that the Refugee Convention (n 3) was drafted simultaneously with the *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UN Doc A/RES/428(V) (adopted 14 December 1950) (‘UNHCR Statute’), which uses the language ‘continues to receive from other organs or agencies of the United Nations protection or assistance’. However, the Refugee Convention’s drafters rejected the language ‘continue to receive’ and adopted ‘at present receiving’ which indicates a historically bounded interpretation is to be preferred: at 514.

⁶³ *Ibid* 515.

protection, make the journey to a state party to the Refugee Convention. Nevertheless, to obtain refugee protection they must satisfy the refugee definition and are subject to its constraining effects. (As noted above, some of the critiques with respect to the Western bias in the refugee definition have been at least partly addressed by developments in jurisprudence and legal reforms.) Further, Hathaway and Foster, in advocating for this position on both legal and ethical grounds, provide a counterpoint to Chimni's criticism that refugee law scholars analyse the Refugee Convention in a political vacuum.

Other jurisdictions have adopted a different interpretation of article 1D. The Court of Justice of the European Union's position is that article 1D applies to anyone who is presently entitled to UNRWA's protection and assistance as long as they have availed themselves of that protection.⁶⁴ The New Zealand Immigration and Protection Tribunal similarly rejected a historically bounded interpretation of article 1D.⁶⁵ The Tribunal ruled that article 1D continues to apply to all Palestinian refugees entitled to receive UN protection and assistance.⁶⁶ It based its conclusion on a reading of article 1D in its historical context,⁶⁷ the drafters' intentions⁶⁸ and article 1D's object and purpose, which the Tribunal said is to ensure that Palestinian refugees continue to receive protection as a special class and 'avoid overlapping agency competence for the protection of Palestinian refugees'.⁶⁹ These European Union and New Zealand decisions are consistent with the United Nations High Commissioner for Refugees' ('UNHCR') position that article 1D applies to Palestinian refugees displaced from Israel in 1948 and subsequent hostilities and their descendants.⁷⁰ Similarly, Goodwin-Gill and McAdam argue that article 1D should be interpreted as 'persons who were and/or are now receiving protection and assistance'.⁷¹ This is based on a purposive approach to article 1D: its objective is to ensure that Palestinians are

⁶⁴ *Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECR I-05572 [51]. Due to the fact that this judgment is binding on United Kingdom courts, it is now the approach adopted in the United Kingdom: *Article 1D: Interpretation v Secretary of State for the Home Department* [2012] UKUT 00413.

⁶⁵ *AD (Palestine)* [2015] NZIPT 800693-695 [133], [148] ('*AD (Palestine)*'). In relation to Hathaway and Foster's argument regarding the different language between the Refugee Convention (n 3) and UNHCR Statute (n 62) discussed above (n 62), the Tribunal stated that these instruments 'did not proceed entirely in tandem, with the Refugee Convention being subjected to further review at the Conference of Plenipotentiaries' and 'the difference in language may reflect no more than this': at [139]. Also, the Tribunal reasoned that the proposition that the drafters were only prepared to give automatic refugee status to a narrowly defined and ascertainable group of refugees is inconsistent with the fact that while the Refugee Convention was being drafted, 'the actual beneficiary class scope of UNRWA assistance was uncertain and in a state of flux': at [141]. Finally, the Tribunal highlighted that the drafting materials indicate that the treatment of Palestinians as a *sui generis* class of refugees would continue until a definitive solution could be achieved: at [143].

⁶⁶ *Ibid* [154].

⁶⁷ *Ibid* [144].

⁶⁸ *Ibid* [147].

⁶⁹ *Ibid* [159].

⁷⁰ UNHCR, *Guidelines on International Protection No 13* (n 53) [8].

⁷¹ Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 157.

treated as a special and distinct group of refugees and not merged into the general refugee problem.⁷²

As a consequence of this interpretation of article 1D, Palestinian refugees continue to be excluded from the Refugee Convention and must remain in the UNRWA region if they want international protection and assistance. The justifications for this interpretation, in particular, that it preserves Palestinian refugees' special treatment, can be seen through the lens of Chimni's critique that legal positivism obscures historical and contemporary political realities. Ensuring that Palestinian refugees receive a unique form of protection was only one motivating factor for their exclusion. The other factors, as noted above, were that European and North American states did not want Palestinian refugees in their territories and Arab states wanted to limit their responsibilities as hosts by encouraging their repatriation. Further, reference to a special protection regime for Palestinian refugees ignores the fact that UNRWA, due to financial difficulties and funding cuts,⁷³ struggles to offer the protection and assistance it is mandated to provide.⁷⁴

Nevertheless, pursuant to this interpretation, Palestinian refugees retain *ipso facto* entitlement to the benefits of the Refugee Convention in the event that UN protection or assistance ceases for any reason. Therefore, the crucial question is: what is the scope of UN protection and assistance and what factors determine that Palestinian refugees are not in receipt of either? This question has received much less attention than the well-established debate on whether article 1D should have a historically bounded or continuative interpretation. It is also the question that arises in protection from refugee claims made by Palestinian refugees and, therefore, is critical for the investigation undertaken in this thesis. When Palestinian refugees seek *ipso facto* entitlement to the benefits of the Refugee Convention, they must establish that the situation they

⁷² Ibid 158.

⁷³ The New Zealand Immigration and Protection Tribunal discussed UNRWA's difficult financial circumstances but in the context of determining when protection and assistance can be deemed to have ceased, not with respect to the application of article 1D's first paragraph: *AD (Palestine)* (n 65) [168]–[172].

⁷⁴ Funding shortfalls in 2015 forced UNRWA to consider whether it has to delay the academic year for schools in Palestinian refugee camps: Nisreen El-Shamayleh, 'UNRWA Funds Crisis Worries Palestinian Refugees', *Aljazeera* (online at 5 August 2015) <<http://www.aljazeera.com/blogs/middleeast/2015/08/unrwa-funds-crisis-worries-palestinian-refugees-150805155300792.html>>. Lack of funding in 2015 also forced UNRWA to suspend cash assistance for housing to Palestinian refugees from Syria living in Lebanon: UNRWA, 'Lack of Funds Forces UNRWA to Suspend Cash Assistance for Housing Palestinian Refugees from Syria in Lebanon' (Press Release, 22 May 2015) <<https://www.unrwa.org/newsroom/press-releases/lack-funds-forces-unrwa-suspend-cash-assistance-housing-palestine-refugees>>. As result of the United States decision in 2018 to cut 300 million dollars in funding to UNRWA, the 'largest ever reduction in funding UNRWA has faced', UNRWA has discontinued cash for work activities, food assistance programs, community mental health programs and mobile health clinics: UNRWA, 'UNRWA Statement on Implications of Funding Shortfall on Emergency Services in the OPT' (Press Release, 26 July 2018) ('Statement').

faced in, for example, a Palestinian refugee camp in Lebanon, was such that UN protection and assistance can be deemed to have ceased. Thus, through the prism of article 1D, they are seeking protection from a place that is, notionally at least, providing refuge to thousands of other Palestinian refugees.

Depending on the approach decision-makers take to these protection from refugee claims, article 1D's second paragraph can provide a mechanism for large numbers of Palestinian refugees to claim *ipso facto* refugee status in Europe or New Zealand, or it can establish grounds for only a few Palestinian refugees in specific circumstances to do so, perpetuating the containment of most Palestinian refugees in the UNRWA region.

IV A BROAD SCOPE OF REFUGE FOR PALESTINIAN REFUGEES

In examining the scope of refuge set in these decisions, two ideas established in previous chapters carry over: the importance of categorical reasoning and the risks of transjudicial communication in diluting the concept of refuge. At a point in *AD (Palestine)*,⁷⁵ the New Zealand Immigration and Protection Tribunal espoused a broad understanding of the protections available to Palestinian refugees under international law. In doing so, the Tribunal adopted a blended categorical and rights-based approach similar to the reasoning the High Court of Australia employed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff M106/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*').⁷⁶ In *Plaintiff M70*, the lead majority placed significance on the plaintiffs being persons seeking recognition of their refugee status and referred to the rights in the Refugee Convention. In *AD (Palestine)*, the New Zealand Immigration and Protection Tribunal focussed on Palestinian refugeehood and then considered the protections to which Palestinian refugees are entitled. The Tribunal outlined who is a Palestinian refugee and reviewed UNRWA's 'working definition' from 1948 onwards.⁷⁷ It then examined the meaning of the word 'protection' in the specific context of Palestinian refugees.⁷⁸

Through this process, the New Zealand Immigration and Protection Tribunal delineated a wide ambit of protection. Referencing Bartholomeusz's⁷⁹ work on UNRWA's 'multidimensional'

⁷⁵ *AD (Palestine)* (n 65).

⁷⁶ (2011) 244 CLR 144.

⁷⁷ *AD (Palestine)* (n 65) [106]–[110].

⁷⁸ *Ibid* [113]–[116].

⁷⁹ Lance Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28(2–3) *Refugee Survey Quarterly* 452, 452 cited in *AD (Palestine)* (n 65) [114].

and ‘individualised protection activity’,⁸⁰ the Tribunal referred to the UN’s ‘endorsement of UNRWA performing protection-related activities in relevant UN General Assembly resolutions, often with direct reference to applicable international human rights treaties’.⁸¹ In particular, it discussed *Operations of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East*,⁸² in which the UN General Assembly encourages UNRWA to ‘continue making progress in addressing the needs of rights of children, women and persons with disabilities’⁸³ in accordance with the *Convention on the Rights of the Child* (‘CRC’),⁸⁴ the *Convention on the Elimination of all forms of Discrimination against Women* (‘CEDAW’),⁸⁵ and the *Convention of the Rights of Persons with Disabilities* (‘CRPD’).⁸⁶ By setting the scope of protection and assistance for Palestinian refugees with reference to UNRWA’s mandates and, specifically, the human rights instruments in those mandates, the Tribunal adopted a broad understanding of what refuge encompasses for Palestinian refugees. It also acknowledged that this scope of refuge is a malleable one that differs according to factors such as age, gender and disability.

Further, by invoking these legal instruments, the Tribunal positioned the nature of refuge for Palestinian refugees as a right and a duty. The Tribunal did not characterise UNRWA’s humanitarian assistance as an act of charity, discretion or political benevolence, but as a *right* Palestinian refugees are entitled to under international law. The Tribunal classified the humanitarian assistance UNRWA provides as having ‘an inherent protection element’.⁸⁷ It based this on the rights in the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’)⁸⁸ ‘not merely being aspirational in nature’ but ‘fully fledged *rights* with both *duty bearers and beneficiaries*’.⁸⁹ Therefore, ‘UNRWA’s provision of education and health services and activities ... directly and necessarily involves the protection of the *right* of Palestinian refugees to

⁸⁰ *AD (Palestine)* (n 65) [114].

⁸¹ *Ibid* [114].

⁸² GA Res 69/88, 4th Comm, 69th sess, 64th mtg, Agenda Item 50, UN Doc A/RES/69/88 (16 December 2014).

⁸³ *Ibid* [14].

⁸⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸⁵ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁸⁶ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁸⁷ *AD (Palestine)* (n 65) [116].

⁸⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976).

⁸⁹ *AD (Palestine)* (n 65) [116] (emphasis added).

the highest standard of health and education under articles 12 and 13 of ICESCR'.⁹⁰ Recognising UNRWA's humanitarian assistance as a right is particularly important in the context of economic, social and cultural rights. The ICESCR stipulates that developing countries may determine the extent to which they guarantee economic rights to non-nationals.⁹¹ This clause would apply to most Palestinian refugees who are not nationals in their country of refuge (Jordan is the only UNRWA region country that permits Palestinian refugees to acquire citizenship).⁹² By referring to the ICESCR through UN General Assembly resolutions that inform UNRWA's mandate, the New Zealand Immigration and Protection Tribunal situated the humanitarian assistance Palestinian refugees are entitled to as a right that the UN, through UNRWA, has a duty to address.

The importance of a blended categorical and rights-based approach, as opposed to rights-based reasoning alone, can be seen by comparing the Tribunal's understanding of protection and assistance with those of the UNHCR and Goodwin-Gill and McAdam. In its guidelines on article 1D,⁹³ the UNHCR does not define the words 'protection and assistance' in article 1D. Accordingly, it does not consider the nature and extent of protection and assistance Palestinian refugees are entitled to under international law. Instead, in considering when article 1D's inclusionary paragraph is triggered, the UNHCR moves directly to when protection and assistance can 'cease for any reason'.⁹⁴ The UNHCR's position is that UNRWA's protection or assistance may cease if a Palestinian refugee faces a threat to their life, physical security or liberty, or other serious protection concerns such as 'sexual or gender-based violence, torture, inhuman or degrading treatment or punishment, human trafficking and exploitation, forced recruitment, severe discrimination, or arbitrary arrest or detention', or there is a situation of 'civil unrest, widespread insecurity or events seriously disturbing public order'.⁹⁵ While the UNHCR includes human rights concepts in its guidelines on article 1D's contingent inclusion clause, it is not guided by Palestinian refugees' specific situation. The reference to harms such as torture and civil unrest, while not exhaustive, is much narrower than the Tribunal's approach which was to refer to the

⁹⁰ Ibid [116].

⁹¹ ICESCR (n 88) art 2(3). Edwards argues that article 2(3) ought to be interpreted narrowly and in many circumstances will not permit a developing country to limit the extent to which it guarantees economic, social and cultural rights to refugees on its territory: Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum' (2005) 17(2) *International Journal of Refugee Law* 293, 324–5.

⁹² Akram, 'Palestinian Refugees' (n 2) 51.

⁹³ UNHCR, *Guidelines on International Protection No 13* (n 53).

⁹⁴ Ibid 8.

⁹⁵ Ibid 10–11. The UNHCR also stipulates that protection and assistance ceases if UNRWA's mandate is terminated, if UNRWA discontinues its protection and assistance for all Palestinian refugees or if a refugee faces practical, legal or safety barriers in re-availing themselves of UNRWA's protection: at 9–12.

protection and assistance UNRWA is mandated to provide, including provisions of socio-economic rights such as health and education. Similarly, Goodwin-Gill and McAdam do not consider the meaning of the words ‘protection and assistance’ in article 1D, but move straight to determining the circumstances in which protection and assistance cease.⁹⁶ They say that the phrase ‘ceased for any reason’ can encompass many reasons why protection or assistance has come to an end, including ‘persecution, violation of human rights, or violence’.⁹⁷ While their position is broader than the UNHCR’s and their reference to human rights puts their understanding of the scope for refuge for Palestinian refugees in line with that of the New Zealand Immigration and Protection Tribunal, it is not grounded in the specific protection and assistance regime established for Palestinian refugees by the UN.⁹⁸

Applying Tuitt’s ideas on the Refugee Convention as a containment mechanism on top of this analysis suggests that the New Zealand Immigration and Protection Tribunal’s understanding of refuge (at the aforementioned part of its judgment) is a powerful one for Palestinian refugees. As noted above, Palestinian refugees were triply disenfranchised through article 1D: like other refugees, they no longer had the benefit of free movement, but they were also prohibited from accessing the ‘supposed positive benefit’ of *non-refoulement*, and to receive protection and assistance they had to remain in an UNRWA region. By defining the ambit of protection and assistance with reference to UNRWA’s mandate, it could be said that once this special protection and assistance ceases for any reason (for example, UNRWA cannot provide access to education due to funding difficulties), Palestinian refugees are entitled to the benefits of the Refugee Convention on an *ipso facto* basis. This liberates Palestinian refugees from the containment imposed by article 1D’s first paragraph (interpreted by the Tribunal as having continuative effect) as well as the containing effects of the refugee definition in article 1A(2) of the Refugee Convention. It provides grounds for large numbers of Palestinian refugees to be able to leave the UNRWA region, if they wish, and travel in search of refuge elsewhere.

However, while the New Zealand Immigration and Protection Tribunal recognised that protection and assistance for Palestinian refugees must be understood with reference to UNRWA’s evolving mandate, it moved away from this position in determining when article 1D’s inclusionary paragraph is triggered. It referred to the ‘degree of compulsion which must exist in

⁹⁶ Goodwin-Gill and McAdam, *The Refugee in International Law* (n 11) 158–9.

⁹⁷ *Ibid* 159.

⁹⁸ Goodwin-Gill and McAdam refer to UNRWA’s mandate with respect to discerning article 1D’s personal scope, but not the extent of protection and assistance Palestinian refugees are entitled to: *ibid* 157.

order for the second paragraph of article 1D to apply'⁹⁹ and stated that to *ipso facto* obtain the benefits of the Refugee Convention, the Palestinian refugee must have left the UNRWA region 'involuntarily',¹⁰⁰ or, in other words, it must have been a 'forced departure'.¹⁰¹ Where did these ideas of compulsion and involuntariness derive from? They do not sit well with article 1D's text, which refers to UN protection and assistance ceasing 'for any reason'. They also do not align with the Tribunal's reasoning that all Palestinian refugees are beneficiaries of UNRWA's protection and assistance mandate. Ideas of compulsion and involuntary departure creep in to the judgment through the Tribunal's reference to the Court of Justice of the European Union's decision in *Mostafa Abed El Karem El Kott*.¹⁰² In this case, the Court of Justice of the European Union had to determine the same question as the New Zealand Immigration and Protection Tribunal: when does UN protection and assistance cease for Palestinian refugees? In its approach to this question, the Court of Justice of the European Union did not consider the meaning of the term 'protection and assistance' and, in particular, what it may encompass for Palestinian refugees. It did not refer to UNRWA's mandate or international law for guidance. Instead, the Court focussed on the refugee's departure from the relevant UNRWA field of operation and ruled that a 'voluntary decision to leave' cannot amount to cessation of protection or assistance,¹⁰³ but being 'forced to leave for reasons unconnected with that person's will' may indicate that UNRWA's protection or assistance has ceased.¹⁰⁴ The New Zealand Immigration and Protection Tribunal, in seeking to limit the circumstances in which Palestinian refugees can trigger article 1D's inclusionary clause, engaged in horizontal transjudicial communication and brought the European Union's test of involuntariness and forced migration into New Zealand jurisprudence.

Despite the conundrum of 'forced migration' being heavily discussed in refugee studies literature,¹⁰⁵ it has never been a question that refugee law judges have been required to grapple with.

⁹⁹ *AD (Palestine)* (n 65) [180].

¹⁰⁰ *Ibid* [117], [186].

¹⁰¹ *Ibid* [117].

¹⁰² *Mostafa Abed El Karem El Kott v Bevándorlási és Állampolgársági Hivatal* (Court of Justice of the European Union, C-364/11, 19 December 2012) ('*Mostafa Abed El Karem*').

¹⁰³ *Ibid* [59].

¹⁰⁴ *Ibid* [59].

¹⁰⁵ See, eg, Kathy Burrell, *Moving Lives: Narratives of Nation and Migration among Europeans in Post-War Britain* (Ashgate, 2006); Stephen Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 37 *Sociology* 13; Dawn Chatty and Philip Maflet, 'Conceptual Problems in Forced Migration' (2013) 32(2) *Refugee Survey Quarterly* 1; BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22 *Journal of Refugee Studies* 11 ('The Birth of a "Discipline"'); Finn Stepputat and Ninna Nyberg Sørensen, 'Sociology and Forced Migration' in Elena Fiddian-Qasimiyeh et al (eds), *Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 86; David Turton, 'Conceptualising Forced Migration' (Working Paper 12/2003, Refugee Studies Centre, University of Oxford Working Paper Series, 2003).

This is because the refugee definition is prospective. Article 1A(2) of the Refugee Convention asks whether a person would have a well-founded fear of persecution if returned to their country of nationality or habitual residence. At no point must a decision-maker enquire as to whether a person's departure from their country of nationality or habitual residence was voluntary or forced. The Court of Justice of the European Union's requirement of involuntariness or compulsion in article 1D cases, adopted by the New Zealand Immigration and Protection Tribunal, introduced such a consideration into refugee law for the first time.

V FROM RIGHTS PROTECTION TO MERE SURVIVAL: CIRCUMSCRIBING THE AMBIT OF REFUGE FOR PALESTINIAN REFUGEES

By insisting on involuntary departure, decision-makers in the European Union and New Zealand narrow and truncate the scope of refuge for Palestinian refugees. Below, I outline how the involuntariness requirement limits the notion of refuge to physical survival, disregards rights particularly important to women and imports Western ideas of fault into article 1D.

A Refuge as Protection of Life

While the concept of forced migration is widely considered to be a misnomer, because crossing a border is inherently an exhibition of agency,¹⁰⁶ if one accepts that a person can be 'forced to leave for reasons unconnected with that person's will',¹⁰⁷ then the circumstances giving rise to that involuntary departure must be exceptional or extreme. The Court of Justice of the European Union indicated that departure will be deemed involuntary when UNRWA cannot guarantee the living conditions 'commensurate with [its] mission' and the Palestinian refugee's personal safety is threatened.¹⁰⁸ However, UNRWA's protection and assistance mandate is much broader than merely ensuring basic living conditions and protecting physical security. While UNRWA's mandate includes 'basic subsistence support',¹⁰⁹ it also encompasses education and social services and human development programs. Also, while UNRWA's mandate includes undertaking

¹⁰⁶ See, eg, Burrell (n 105) 24; Castles (n 105) 13, 30; Chatty and Mafleet (n 105) 10–11; Chimni, 'The Birth of a "Discipline"' (n 105) 12; Stepputat and Sørensen (n 105) 88; Turton (n 105) 10.

¹⁰⁷ *Mostafa Abed El Karem* (n 102) [59].

¹⁰⁸ *Ibid* [63]. This test was applied in a Hungarian case in which a Palestinian refugee was able to trigger the inclusionary clause in article 1D, but only after proving that he had suffered several physical assaults: *KKF v Bevándorlási és Állampolgársági Hivatal* 15.K30.590/2013/5 (Budapest Administrative and Labour Court, 21 March 2013).

¹⁰⁹ Reference to basic subsistence support is made in UNRWA's 2008–2009 Programme Budget subsequently approved by a UNGA resolution: see UNRWA, *Report of the Commissioner-General of (UNRWA), Programme Budget, 2008–2009*, UN GAOR, 62nd sess, Supp No 13A, UN Doc A/62/13/Add.1 (6 August 2007) [72]. UNGA's approval of the budget specifically mandates all activities contained in the budget: Bartholomeusz (n 79) 462.

effective measures to guarantee Palestinian refugees' safety and security,¹¹⁰ it also extends to addressing their human rights more broadly.¹¹¹ Threats to life and security of the person are serious human rights issues covered by of the *International Covenant on Civil and Political Rights*¹¹² articles 6 and 9 and, of relevance to the Court of Justice of the European Union, articles 2 and 6 of the *Charter of Fundamental Rights of the European Union*.¹¹³ However, by insisting that departure be involuntary and, therefore, predicated by extraordinary circumstances, the Court of Justice of the European Union prioritised protection of these rights above others such as liberty, freedom of movement, education, healthcare and rights to work. By focussing only on living conditions and personal safety, the scope of refuge is limited to physical survival. This curtails the broader aspects of refuge for Palestinian refugees such as gaining an education and building a career in exile. It also restricts decision-makers' assessment of the place of refuge: by limiting consideration of the UNRWA area of operation to the circumstances leading up to departure, the broader aspects of life in, for example, a Palestinian refugee camp, are obscured.

B Women's Physical Security Ignored

Drawing on Tuitt's and Chimni's critique of objectivism, decision-makers have applied their own assessment of whether the departure was involuntary and the refugee's assessment of the reasons for their flight is rendered redundant. This narrows the breadth of protection and assistance Palestinian refugees are entitled to under international law in a way that has gendered consequences. This is evident in a 2013 Belgian case, decided subsequent to *Mostafa Abed El Karem El Kott*, concerning a stateless Palestinian refugee who had spent most of her life in Lebanon's Burj el-Shemali Camp.¹¹⁴ She claimed refugee status in Belgium on the grounds that she was facing forced marriage in Lebanon but, being a Palestinian refugee, was excluded from the Refugee Convention. After reviewing the reasoning in *Mostafa Abed El Karem El Kott*, the Belgian Council for Alien Law Litigation stipulated that article 1D's inclusionary paragraph would only be triggered if the asylum seeker personally found herself in grave danger and UNRWA was unable to offer her living conditions that meet the objectives with which it is

¹¹⁰ *United Nations Relief and Works Agency for Palestinians in the Near East*, GA Res 37/120, UN Doc A/RES/37/120 (16 December 1982) part (J) [1].

¹¹¹ *Ibid.*

¹¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹¹³ *Charter of Fundamental Rights of the European Union*, opened for signature 7 December 2000, [2012] OJ C 326/321 (entered into force 1 December 2009).

¹¹⁴ Belgium, Council for Alien Law Litigation, 2 May 2013, No 102283 (unofficial translation).

tasked.¹¹⁵ The Council acknowledged the harsh living conditions in the camp, but found that the applicant was not personally in grave danger. Accordingly, the Council concluded that the applicant did not leave Lebanon for reasons beyond her control or against her will. In this case, the Belgian Council for Alien Law Litigation inserted its assessment for what constitutes a feeling of grave danger prompting involuntary departure and determined that forced marriage is not a serious enough to be compelled to leave against one's will.

This decision can also be critiqued on the ground that forced marriage raises the prospect of sexual intercourse without consent, which is a threat to personal safety in line with the test in *Mostafa Abed El Karem El Kott*. However, more fundamentally, UNRWA is responsible for addressing women's human rights in accordance with the CEDAW, which includes prohibition of forced marriage.¹¹⁶ By not being able to protect her from forced marriage, UNRWA was not providing her the protection it is mandated to provide. However, she was unable to trigger the inclusionary paragraph in article 1D because she could not satisfy the Belgian authorities that she was personally in grave danger. Thus, the involuntary departure approach truncates the scope for the protection and assistance for Palestinian refugees in a way that has particularly problematic consequences for women facing gendered harms such as forced marriage.

C Discriminatory Denial of Protection

The test adopted in New Zealand imposes additional hurdles for Palestinian refugees wanting to trigger article 1D's inclusionary paragraph. The New Zealand Immigration and Protection Tribunal stated that the circumstances leading to an involuntary departure 'must have some enduring quality and be of a sufficiently serious character so as to perpetuate the claimant's refugee-like character'.¹¹⁷ The Tribunal adopted this test even though it agreed that by virtue of the phrase '*ipso facto*' in article 1D's inclusionary paragraph, Palestinian refugees seeking the benefits of the Refugee Convention are not required to satisfy the refuge definition in article 1A(2).¹¹⁸ While the Tribunal did not specify what circumstances would perpetuate a refugee-like character, the application of the test to the facts indicates that Palestinian refugees have to demonstrate discriminatory denial of human rights. The Tribunal first summarised evidence about the general circumstances in Gaza including high unemployment,¹¹⁹ poverty,¹²⁰ lack of

¹¹⁵ Ibid.

¹¹⁶ CEDAW (n 85) art 16(1)(b).

¹¹⁷ *AD (Palestine)* (n 65) [186].

¹¹⁸ Ibid [183].

¹¹⁹ Ibid [219], [222].

¹²⁰ Ibid [219], [222].

infrastructure,¹²¹ civil unrest,¹²² high levels of violence¹²³ and restrictions on freedom of movement.¹²⁴ The Tribunal also noted that UNRWA was facing ‘its most serious financial crisis ever’.¹²⁵ However, these circumstances were not sufficient for the claimants to establish that UNRWA’s protection and assistance had ceased. The Palestinian refugees in this case were Christians and the Tribunal considered the situation for Christians in Gaza, particularly discrimination in employment¹²⁶ and risks to physical security for Christians who publicly practise their religion.¹²⁷ It was ‘the cumulative effect of these matters’ that satisfied the Tribunal that UNRWA’s protection and assistance had ceased.¹²⁸ Accordingly, the Palestinian refugees in this case were only successful because they could establish, in addition to the general conditions in Gaza, discrimination on religious grounds.

The New Zealand Immigration and Protection Tribunal’s approach to article 1D’s inclusionary paragraph has parallels with Tuitt’s critique that the definition of a refugee in the Refugee Convention’s article 1A(2) has a Western ideological slant due to its insistence on establishing fault. By requiring evidence of something beyond the general living conditions in Gaza and looking to religious discrimination, the Tribunal imported the idea of culpability into article 1D’s second paragraph. It ensured that article 1D’s inclusionary paragraph cannot be triggered by factors such as poverty or generalised violence which are seen as ‘harms of less discriminating origin’,¹²⁹ but that Palestinian refugees must establish a harm that is personally directed towards them for illegitimate reasons. While Tuitt critiques the idea of culpability in the refugee definition, she acknowledges that this ‘conception of fault’ is embedded in the Refugee Convention’s text and is, therefore, not pillorying refugee law judges.¹³⁰ However, the New Zealand Immigration and Protection Tribunal inserted the idea of culpability into article 1D with no textual basis for doing so. The need to demonstrate discriminatory denial of human rights when seeking confirmation of refugee status under article 1A(2) is consistent with the text, context and purpose of the Refugee Convention,¹³¹ but this is not the case for the inclusionary paragraph in

¹²¹ Ibid [219], [220], [222].

¹²² Ibid [221].

¹²³ Ibid [222].

¹²⁴ Ibid [219].

¹²⁵ Ibid [223].

¹²⁶ Ibid [224].

¹²⁷ Ibid [225]–[229].

¹²⁸ Ibid [234].

¹²⁹ Tuitt, ‘Defining the Refugee by Race’ (n 12) 101.

¹³⁰ Ibid 100.

¹³¹ Hathaway argues that the requirement that a refugee have a well-founded fear of being persecuted for reasons of one of the enumerated grounds is justified. While two people may fear deprivation of fundamental human rights,

article 1D. The ordinary meaning of the words ‘when such protection or assistance has *ceased for any reason*’ indicates that a Palestinian refugee should not have to establish that protection and assistance have ceased for reasons of, for example, their religion or political opinion. Also, the purpose of article 1D’s second paragraph is to ensure the continuity of international protection for Palestinian refugees. This is defeated if the inclusionary paragraph can only be triggered by Palestinian refugees who can establish that denial of their fundamental human rights has a discriminatory element.

New Zealand’s fault-based conception of involuntary departure further narrows decision-makers’ approach to the scope of refuge for Palestinian refugees. While the Tribunal acknowledged the difficult living conditions in Gaza, the Tribunal is only satisfied that the Palestinian refugees ‘felt *compelled* to leave Gaza ... because of *fears for their safety* if they were to practice their religion’.¹³² The Tribunal’s focus on physical safety and religious discrimination renders most of UNRWA’s broad protection and assistance mandate, especially with respect to education, healthcare, infrastructure and business development, irrelevant to article 1D decisions. It suggests that Palestinian refugees who travel outside an UNRWA region because they are poor, cannot access adequate healthcare or feel they have no future because of lack of education and employment prospects have not been *forced* to leave due to direct discrimination and attacks. Instead, they exercise choice and cannot trigger the inclusionary paragraph in article 1D.

VI THE INVOLUNTARY REFUGEE

The notion of involuntariness not only curtails ideas about the ambit of refuge for Palestinian refugees, but, as I explain below, makes it almost impossible for Palestinian refugees to use article 1D in their journeys to seek protection outside the UNRWA region except for in exceptional situations.

A Involuntary Flight: An Oxymoron?

Insisting that Palestinian refugees establish involuntary flight magnifies and complicates an already existing injustice in the international refugee regime. Tuitt observes that to trigger refugee protection a person has to cross an international border, but such movement does not mean

if one fears it for reasons of, for example, their political opinion, that person is more likely to be socially marginalised and less likely to be able to obtain state protection: James Hathaway, ‘Is Refugee Status Really Elitist? An Answer to the Ethical Challenge’ in Jean Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer Law International, 1997) 79, 86 (‘Is Refugee Status Really Elitist?’).

¹³² *AD (Palestine)* (n 65) [230].

that their needs are any greater or their claim to international protection is any stronger than those who remain inside territorial boundaries.¹³³ Rather, the alienage requirement exists due to the international legal prohibition of interference with another state's territorial integrity¹³⁴ and is a 'practical impediment to the expansion of refugee law'.¹³⁵ The requirement of movement across international borders disadvantages those who face greater obstacles in attempting such travel, in particular women and children.¹³⁶ Palestinian refugees making protection from refugee claims not only have to make the journey to a country signatory to the Refugee Convention (a practical impediment for many Palestinian refugees), but have to establish that this journey was an involuntary one.

This creates an evidentiary paradox for Palestinian refugees, which limits the circumstances in which they can use article 1D to seek a place of refuge outside the UNRWA region. As noted above, most scholars agree that no matter how serious the danger a person is fleeing from, the decision to cross a border to escape is a demonstration of agency. This is even truer in the case of Palestinian refugees. While life in, for example, a Palestinian refugee camp, may be bleak, continuing to live in the region and resisting local integration lends at least symbolic strength to Palestinians' assertion of the right to return. Also, Palestinian refugees who are stateless face a number of hurdles in gaining documentation that would enable them to undertake transcontinental travel to Europe or the Antipodes. A decision by a Palestinian refugee to leave an UNRWA field of operation and travel across borders to seek protection as a Convention Refugee is a significant and burdensome one. The element of compulsion introduced by the Court of Justice of the European Union and adopted by the New Zealand Immigration and Protection Tribunal places Palestinian refugees in a double bind. The inclusionary aspect of article 1D can only be triggered by leaving an UNRWA field of operation, an act that is inherently an exhibition of agency, yet to obtain the benefits of the Refugee Convention Palestinian refugees must prove that departure was involuntary. This incongruity obscures the difficult and often distressing choices that must be made when leaving a home (albeit for Palestinian refugees, a temporary one), family and community in search of refuge in unfamiliar territory.

¹³³ Tuitt, *False Images* (n 20) 67; Tuitt, 'Rethinking the Refugee Concept' (n 25) 116.

¹³⁴ Tuitt, *False Images* (n 20) 67. See also Hathaway, 'Is Refugee Status Really Elitist?' (n 131) 79.

¹³⁵ Tuitt, *False Images* (n 20) 67.

¹³⁶ Ibid; Tuitt, 'Rethinking the Refugee Concept' (n 25) 116.

When determining whether flight was involuntary, European and New Zealand decision-makers prioritise particular narratives and this limits the circumstances in which Palestinian refugees can draw on article 1D in their searches for refuge. The stories decision-makers favour echo Chimni's and Tuitt's observations on Western states' reactions to the 'new' asylum seekers. Chimni and Tuitt explain that when larger numbers of refugees from the developing world started to arrive in Global North countries, they were perceived as 'bogus' refugees pursuing a better life in the developed world and were distinguished from the authentic refugee fleeing political strife.¹³⁷ Neither the Court of Justice of the European Union or New Zealand Immigration and Protection Tribunal are satisfied that poverty, poor access to healthcare and lack of education and employment prospects are enough to prompt a Palestinian refugee to flee against their will. Rather, according to their decisions, forced departure is predicated by something more than dire humanitarian circumstances. The Court of Justice of the European Union focussed on threats to personal safety and the New Zealand Immigration and Protection Tribunal emphasised discriminatory denial of human rights. By doing so, these decision-makers reproduced, in the article 1D context, the distinction between the genuine refugee fleeing political and religious persecution and the fraudulent economic migrant. These approaches to article 1D indicate that a Palestinian refugee for whom UN protection and assistance has ceased because they do not have the means to survive or access to education or employment may be considered an object of humanitarian concern, but not a person entitled to the benefits of the Refugee Convention. This status is reserved for those who have been the victim of some form of targeted or discriminatory harm.

B Gendered Understandings of Involuntariness

When determining whether targeted or discriminatory harm triggers involuntary flight, decision-makers have favoured harms that emanate in the public sphere and can be considered politically motivated. This limits the ability for female Palestinian refugees to use article 1D to find refuge outside the UNRWA area. This has resonance with Tuitt's observation that refugee status assessment procedures are 'geared towards eliciting evidence of political involvement' and do not encourage evidence of other kinds of harms that may, for example, evidence gender persecution.¹³⁸ Favouring these particular narratives can be seen through comparing the outcome of the Belgian case discussed above regarding a Palestinian woman subject to forced

¹³⁷ Tuitt, *False Images* (n 20) 70; Chimni, 'Geopolitics' (n 29) 351.

¹³⁸ Tuitt, *False Images* (n 20) 44–5. Since this publication, decision-makers have interpreted the Refugee Convention's (n 3) article 1A(2) in a manner that makes it more responsive to gender-based violence. For example, it is

marriage with a subsequent Belgian decision concerning a Palestinian refugee who had worked as a photojournalist in Gaza.¹³⁹ The refugee in the latter case gave evidence that while working as a photojournalist, he was injured by live fire from the Israeli army and received threats from both the Israeli army and Hamas. The Belgian Council for Alien Law Litigation found that, due to these attacks and threats, he left Gaza for reasons independent of his will. The Council noted that he should not be required to retreat from informing the public about the human rights violations occurring in Gaza to avoid these threats to his life. While the Council accepted that a person injured by live fire is compelled against his will to leave an UNRWA field of operation, the same result was not reached with respect to a woman subject to forced marriage. Both the right to physical security and prohibition of forced marriage are protected by international human rights law and covered by UNRWA's mandate. However, it is perhaps easier to persuade a decision-maker that potentially lethal physical harm occurring in a public space would lead to involuntary departure than the prospect of forced marriage, which involves unknown future harms that would most probably occur behind closed doors. It indicates that the element of compulsion, introduced in the European Union and New Zealand, may mean that only those who can demonstrate dramatic and heroic narratives can make use of the inclusionary clause in article 1D in their searches for refuge beyond the UNRWA region.

VII CONCLUSION

This chapter builds on the analysis undertaken in the previous case studies. Despite the legal differences between the protection from refugee claims studied in this and previous chapters, there are a number of similarities. First, this chapter indicates that when decision-makers take a categorical approach by reflecting on the nature of refugeehood (in this case, Palestinian refugeehood), they engage with the concept of refuge and give it a broad and rich meaning. Second, in an effort to limit the legal grounds on which a refugee can seek a different place of refuge, decision-makers partially excise the place of refuge from consideration and focus on the particular protection from refugee claimant and why their circumstances may be exceptional. This produces minimalist understandings of refuge, ensures the continuation of containment mechanisms and inhibits refugees' ability to use courts and other decision-making bodies in their searches for refuge. One difference is that in this case study, there was no clear protection

now accepted in a number of jurisdictions that those fleeing family violence can be refugees within the meaning of article 1A(2): see, eg, *Islam v Secretary of State for the Home Department*; *R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 All ER 545; *Khawar* (n 23).

¹³⁹ Belgium, Council for Alien Law Litigation, 7 August 2015, No 150535 (unofficial translation).

from refuge victory. In previous chapters, judicial engagement with the concept of refuge produced successes likely to apply to large numbers of refugees. In this chapter, there was a moment early in the New Zealand Immigration and Protection Tribunal's decision that outlined a broad scope of refuge for Palestinian refugees, but this was diluted with the Tribunal's reference to involuntary departure and discriminatory denial of human rights.

The additional factor present in this case study is that these protection from refuge claims are grounded in the Refugee Convention and trigger states' concerns that it provides a pathway for refugees to shift their place of refuge from the Global South to the Global North. European Union and New Zealand decision-makers' approaches to these protection from refuge claims entrench article 1D as a containment mechanism. In these jurisdictions, Palestinian refugees continue to be excluded from the Refugee Convention because article 1D is deemed to have continuative effect, but can only trigger the inclusionary second paragraph in limited and exceptional situations. As a consequence, many Palestinian refugees not enjoying the breadth of protection or assistance that UNRWA is mandated to provide will also not be able to secure a genuine place of refuge in other parts of the world. This is particularly significant in the current European context, where many of those seeking protection due to the Syrian civil war are Palestinians refugees.¹⁴⁰ While the Hungarian Helsinki Committee, a human rights focussed non-government organisation, views the Court of Justice of the European Union's decision in *Mostafa Abed El Karem El Kott* as a landmark victory that 'opens the way for tens of thousands of Palestinian refugees to be recognized as refugees in [European Union] countries',¹⁴¹ I suggest that it significantly restricts the circumstances in which Palestinian refugees can obtain international protection pursuant to article 1D of the Refugee Convention.

Through their approaches to article 1D's second paragraph, European Union and New Zealand decision-makers only rescue Palestinian refugees who resemble Cold War-inspired, Western notions of a refugee. They prioritise those who have been specifically targeted with a form of harm manifesting in the public sphere, but disregard those subject to gender-based violence or whose needs emanate from less discriminating circumstances such as hunger, poverty and idleness due to lack of education and employment. As a consequence, these forms of suffering and

¹⁴⁰ Euro-Mediterranean Human Rights Monitor, *Palestinian Syrians: Displaced Again* (2018) <<https://euromed-monitor.org/en/palestinians-in-syria>>.

¹⁴¹ The Hungarian Helsinki Committee, *European Court of Justice Delivers Milestone Judgment on Asylum Claims by Palestinians* (13 January 2013) <<http://www.helsinki.hu/en/important-european-judgment-concerning-fleeing-palestinians/>>.

need remain an ‘extensive unattended moral arena which states seek strategically to avoid’.¹⁴² This is acutely problematic in the Palestinian context. Palestinian refugees were excluded from the Refugee Convention partly because they were seen as a special group of refugees who deserved a unique protection regime, but states agreed to grant them *ipso facto* refugee status once their UN protection and assistance ceased for any reason. UNRWA has been facing a funding crisis for a number of years and the situation has recently deteriorated due to the United States’ (UNRWA’s biggest donor) 2018 decision to cut aid to UNRWA.¹⁴³ In response to these funding cuts, the head of UNRWA, Pierre Krähenbühl, in an open letter to UNRWA staff stressed that Palestinian refugees ‘cannot be simply wished away’.¹⁴⁴ Yet, through these approaches to article 1D in the European Union and New Zealand, decision-makers are washing their hands of this significant humanitarian problem. The only Palestinian refugees who can *ipso facto* secure the benefits of the Refugee Convention are those whose circumstances are deemed to mimic the archetypal political refugee. The rest remain the responsibility of an underfunded and overstretched agency struggling to fulfil its protection and assistance mandate.

¹⁴² Tuitt, *False Images* (n 20) 155.

¹⁴³ UNRWA, ‘Statement’ (n 74).

¹⁴⁴ Pierre Krähenbühl, cited in Jeffrey Heller, ‘UNRWA Chief Defends Refugee Criteria for Millions of Palestinians’, *Reuters* (online at 3 September 2018) <https://www.reuters.com/article/us-usa-palestinians-unrwa/unrwa-chief-defends-refugee-criteria-for-millions-of-palestinians-idUSKCN1LJ179?mc_cid=16df1d1fb4&mc_eid=677b225ed4>.

CHAPTER SEVEN

RESISTING THE PROSPECT OF REFUGE IN AN INTERNALLY DISPLACED PERSONS' CAMP

I INTRODUCTION

After visiting internally displaced persons' ('IDP') camps in Nigeria in 2016, Chaloka Beyani, the United Nations Special Rapporteur on the Human Rights of Internally Displaced People, reflected, 'camps should offer protection for those in need yet I am alarmed to learn that many are in fact the settings for violence, exploitation and abuse of the most vulnerable'.¹ In this chapter, I examine decision-makers' responses to cases in which putative refugees² are resisting the prospect of seeking refuge in an IDP camp. These are protection from refuge challenges, because the putative refugee is wanting protection from a place that, notionally at least, is serving as a place of refuge to hundreds or thousands of IDPs. Such claims arise in internal protection alternative cases where decision-makers consider whether a putative refugee will have protection if they relocate to another part of their home country. In some of these cases, the putative refugee argues that if they internally relocate they will have no option but to live in an IDP camp. Most of these claims have arisen in the United Kingdom but there is one case from New Zealand.³

The purpose of this chapter is to continue my examination of how decision-makers approach protection from refuge claims grounded in the *Convention Relating to the Status of Refugees* ('Refugee Convention')⁴ and give rise to a concern that the Refugee Convention is being used

¹ *End of Mission Statement by the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons, Mr Chaloka Beyani, on His Visit to Nigeria, 23 to 26 August 2016* (22 January 2016) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20427&LangID=E>>.

² As noted in Chapter One, putative refugees are persons outside their country of origin or habitual residence whose circumstances indicate they satisfy one part of the refugee definition (a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion), but who have not yet established another aspect of the refugee definition (that they are unable or unwilling to avail themselves of the protection of their country of origin or habitual residence).

³ As noted in Chapter One, I conducted an extensive search of internal protection case law in Australia, Canada, New Zealand, the United States and European Union member states on *LexisNexis*, *Westlaw* and *Refworld*. The United Kingdom and New Zealand are the only jurisdictions in which the question of relocation to an IDP camp has arisen in cases where protection under the Refugee Convention (below n 4) is being sought. The issue of internal relocation to an IDP camp has arisen in some decisions in which the individuals bringing the case are not entitled to refugee protection. In Chapter One I outlined why these decisions are outside the scope of this thesis.

⁴ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

as a pathway for migration from the Global South to the Global North.⁵ The main difference is that the protection from refugee claimants in the cases examined this chapter are not yet recognised refugees. Rather, they are both putative refugees and prospective IDPs. Thus, I begin this chapter by revisiting Tuitt's scholarship and outline her ideas on why it is the IDP, as opposed to the refugee, that is 'the figure that is most promising of a new political consciousness'.⁶ I then use this idea to explore how decision-makers conceptualise the scope and nature of refuge, respond to the conflict between a person's need for refuge and states' desires to control their borders, and whether, as a result, particular refugees are more likely to be able to secure a place of refuge in the Global North. I argue that decision-makers have approached these claims in a manner that delineates a broad scope of refuge and reflects an understanding with respect to the nature of refuge that it is a shared responsibility. However, in more recent jurisprudence, decision-makers narrow the scope of refuge, ideas of international cooperation are lost and putative refugees must prove that they are exceptional in some way to secure protection in the Global North. This frustrates both women's and men's journeys in search of refuge and compounds the inequities between the developing and developed world in relation to caring for those in need of protection.

II INTERNALLY DISPLACED PERSONS: NEGLECTED IN REFUGEE LAW AND SCHOLARSHIP

In her early scholarship on the Refugee Convention as a containment mechanism, Tuitt argues that there are many different notions of who is a refugee,⁷ but the definition in the Refugee Convention has become the dominant understanding.⁸ This definition 'captures only a tiny portion of the whole corpus of meanings within the notion of refugee'.⁹ In particular, the alienage requirement 'as it is employed in international refugee law clearly helps to contain refugees'.¹⁰

⁵ These concerns are reflected in a United Kingdom House of Lords (now the United Kingdom Supreme Court) judgment in which the Court stressed that the Refugee Convention's (n 4) function is 'not to procure a general levelling-up of living standards around the world, desirable though of course that is': *Secretary of State for the Home Department v AH (Sudan)* [2008] 1 AC 678, [5] ('*SSHD v AH (Sudan)*'). Mathew argues that internal protection alternative case law is part of the larger phenomenon of states containing refugee movements and, in particular, constricting the situations in which refugees can move from the developing to the developed world: Penelope Mathew, 'The Shifting Boundaries and Content of Protection: The Internal Protection Alternative Revisited' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, 2013) 189, 205–6.

⁶ Patricia Tuitt, 'Refugees, Nations, Laws and the Territorialization of Violence' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate, 2004) 37, 48 ('Refugees, Nations, Laws').

⁷ Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press, 1996) 14 ('*False Images*').

⁸ *Ibid* 14–15.

⁹ *Ibid* 16.

¹⁰ *Ibid* 12.

Further, she argues that by requiring refugees to cross an international border, refugee law '[c]onsciously ... separates the strong from the weak', because many of those in need of international protection cannot leave their country of origin or habitual residence due to factors such as age, gender and disability.¹¹ The concept of alienage is a malleable one that allows states 'to retain control over the world refugee map' by introducing *non entrée* mechanisms such as visas and carrier sanctions that inhibit a person's ability to leave their home country in search of refuge abroad.¹² Therefore, IDPs are 'not only disenfranchised within their state of origin or domicile, but disenfranchised from the law'.¹³ Additionally, the alienage requirement has resulted in refugees being 'conceived of as a *moving entity*'¹⁴ and that movement as 'synonymous with humanitarian need and suffering'.¹⁵

In more recent scholarship, Tuitt expands on these ideas and argues that scholars have neglected the figure of the IDP in scholarship on rightlessness¹⁶ and bare life.¹⁷ She contests that the refugee is 'the classic instance of the rightless person'¹⁸ and argues that IDPs are, similar to refugees, excluded from the nation-state except in territorial terms.¹⁹ The refugee does not challenge the idea of the 'nexus of state, territory and identity', but is the 'tangible product of a legal imagination that is all too wedded to the territorially bound nation'.²⁰ Conversely, the IDP, being 'neither meaningfully within, nor formally outside, the nation-state',²¹ threatens the idea of the territorially bounded state and indicates that 'there can be no fixed or impermeable border separating the inside of a nation and its outside'.²² Thus, it is the IDP, rather than the refugee, that can 'radically disrupt the comforting image of secure, stable, bounded nations'.²³ While there have been developments on IDP rights since Tuitt's writings,²⁴ with Cantor going so far

¹¹ Ibid 13. See also Patricia Tuitt, 'Rethinking the Refugee Concept' in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) 106, 113, 116 ('Rethinking the Refugee Concept').

¹² Tuitt *False Images* (n 7) 13.

¹³ Ibid 14.

¹⁴ Tuitt, 'Rethinking the Refugee Concept' (n 11) 107 (emphasis in original). See also Tuitt *False Images* (n 7) 14.

¹⁵ Tuitt *False Images* (n 7) 14.

¹⁶ Hannah Arendt, cited in Tuitt, 'Refugees, Nations, Laws' (n 6) 37.

¹⁷ Giorgio Agamben, cited in Tuitt, 'Refugees, Nations, Laws' (n 6) 37.

¹⁸ Tuitt, 'Refugees, Nations, Laws' (n 6) 38.

¹⁹ Ibid 45.

²⁰ Ibid 47.

²¹ Ibid 46.

²² Ibid 47.

²³ Ibid 51.

²⁴ In 2009, the African Union adopted the *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, opened for signature 23 October 2009, 49 ILM 86 (entered into force 6 December 2012). Twenty-seven countries now have national laws or policies relating to internal displacement: The Internal Displacement Monitoring Centre, *IDP Laws and Policies: A Mapping Tool* (2018) <<http://www.internal-displacement.org/law-and-policy/>>.

as to argue that IDP law is emerging ‘as a distinct field of law’,²⁵ this does not take away from Tuitt’s central thesis. It remains the case that by virtue of the fact that IDPs have not crossed an international border, they cannot access refugee protection.

III REAL AND MEANINGFUL REFUGE

The protection from refugee litigants in the cases examined in this chapter are not IDPs in the precise sense that Tuitt discusses. Rather, they are people who have managed to leave their homeland to seek international protection. However, the figure of the IDP looms large in these decisions and, in particular, decision-makers’ approaches to the nature and ambit of refuge. In United Kingdom cases in the early 2000s and the one New Zealand case to consider this issue, decision-makers position the protection from refugee litigant as a prospective IDP. Decision-makers examine the situation for IDPs in the country of origin, in particular, their specific needs and whether the relevant authorities had capacity to provide protection to them. Similar to the pattern identified in previous chapters, this is an example of categorical reasoning—decision-makers start their analysis by focussing on the predicaments faced by IDPs. For example, in a decision concerning whether an Afghani putative refugee could internally relocate to Kabul, the New Zealand Refugee Status Appeals Authority considered evidence about the challenges faced by IDPs in Kabul. The Authority noted that ‘the current upswing in the insurgency since 2006 has increased the numbers of [IDPs] coming to Kabul which, in turn, has placed strain on the city’s capacity to provide them with basic levels of social welfare’.²⁶ The Refugee Status Appeals Authority cited a report by the Afghan Independent Human Rights Commission, which stated that ‘a lack of basic economic and social rights is the primary cause of ongoing displacement and the main obstacle to durable integration of internally displaced persons’.²⁷ After considering this evidence, the Authority concluded that the ‘likelihood that the appellant would end up in an IDP camp in Kabul is all too real. In no way does this provide *meaningful* protection to him’.²⁸

Similarly, in one of the earliest United Kingdom cases raising the question of internal relocation to an IDP camp, the United Kingdom Asylum and Immigration Tribunal positioned the putative refugee as a prospective IDP. It considered evidence of the difficulties faced by IDPs in the

²⁵ David Cantor, “‘The IDP in International Law’? Developments, Debates and Prospects’ (2018) 30(2) *International Journal of Refugee Law* 191, 192.

²⁶ *Refugee Appeal No 76191* (Unreported, New Zealand Refugee Status Appeals Authority, Member Burson, 12 August 2008), [56].

²⁷ *Ibid* [56].

²⁸ *Ibid* [57] (emphasis added).

relevant country and the relevant authorities' ability to provide protection. This 2002 case concerned whether a 22-year-old man from eastern Sierra Leone could internally relocate to Freetown.²⁹ The Tribunal noted that if he did, he would 'be thrown into the general mele [sic] of expecting support from international agencies, along with the mass of other internally displaced persons and returnees'.³⁰ Despite being a 'young, independent and fit man',³¹ he would be 'at best, placed in a camp where conditions are described as "sub-human" and face medical conditions described as some of the worst in the world'.³² The Tribunal ruled that he would not have 'meaningful protection' in an IDP camp.³³

Taking a categorical approach does not mean that the prospective IDP's individual circumstances are ignored. In early United Kingdom jurisprudence, decision-makers examine the difficulties faced by all IDPs, specifically, the relevant authorities' lack of capacity to provide protection, but also demonstrate an understanding of the ways factors such as age and health concerns can exacerbate challenges associated with internal displacement. For example, in a 2002 decision, the United Kingdom Asylum and Immigration Tribunal considered whether a Kurdish man from Iraq could internally relocate to the Kurdish Autonomous Area, where it was likely that he would end up living in an IDP camp.³⁴ The Tribunal considered evidence of the situation for IDPs in the autonomous area and highlighted that '40% of internally displaced persons in the region under Kurdish administration live in settlements with standards of water and electricity supplies, sanitation, drainage and road access that were below average for the area',³⁵ and IDPs survive only on United Nations ('UN') rations.³⁶ The Tribunal ruled that there was no internal protection alternative, because he would probably end up living in an IDP camp in which the conditions were 'abominable'.³⁷ In coming to this conclusion, the Tribunal also took into account the disadvantage to the man in accessing employment and government facilities due to his lack of Kurdish language skills, the fact that he would have no family support and had medical and psychological problems that would be exacerbated without such support networks.³⁸ In 2005, the Tribunal considered a case concerning whether an 18-year-old man from Southern Sudan could internally relocate to Khartoum, where he may have no choice but

²⁹ *PO (Risk-Return-General) Sierra Leone CG* [2002] UKIAT 03285.

³⁰ *Ibid* [27].

³¹ *Ibid* [27].

³² *Ibid* [27].

³³ *Ibid* [28].

³⁴ *YJ (Non-Kurdish Speakers in KAA) Iraq CG* [2002] UKIAT 05271.

³⁵ *Ibid* [8].

³⁶ *Ibid* [10].

³⁷ *Ibid* [15]–[16].

³⁸ *Ibid* [15]–[16].

to live in an IDP camp.³⁹ The Tribunal referred to evidence from the United Nations High Commissioner for Refugees ('UNHCR') that described the conditions in the camps as 'harsh'⁴⁰ and 'precarious'⁴¹ and stated that inhabitants faced significant threats to their physical security.⁴² The Tribunal ruled that he would not have protection in a camp environment.⁴³ As part of its decision, the Tribunal emphasised that the putative refugee was a young man who had lost all of his family and would 'be returned to an IDP camp in Khartoum' where he would 'have no support network'.⁴⁴

Through positioning the putative refugee as a prospective IDP, decision-makers generate an understanding of the nature of refuge that, to some extent, speaks to Tuit's concerns about the 'unattended moral arena' of internal displacement and the containment of those in need of protection in the Global South. One theme that emerges across these decisions is that the putative refugee, as a prospective IDP, would be returning to a situation in which the relevant care providers are under-resourced. The New Zealand decision stressed that the city of Kabul was facing challenges in providing for IDPs' basic welfare. The United Kingdom Asylum and Immigration Tribunal in the decisions discussed above highlighted that IDPs survive off UN rations and rely on assistance from international agencies. By taking this approach, decision-makers conceptualise refuge as something that involves the state or international community⁴⁵ providing care. Understanding refuge as something bestowed by the state or international community is not necessarily inconsistent with notions of refuge as a process discussed earlier in this thesis. In these cases, decision-makers acknowledge that refuge cannot be entirely self-made, but requires an authority able and willing to provide care and protection. If the relevant authority cannot provide adequate care, then the putative refugee does not have an internal protection alternative and is entitled to refugee status in New Zealand or the United Kingdom. As a consequence of this understanding of what refuge requires, countries in the Global North take responsibility for those with a well-founded fear of persecution who would otherwise be part of the large numbers

³⁹ *MM (Zaghawa – Risk on Return – internal Flight) Sudan* [2005] UKIAT 00069.

⁴⁰ *Ibid* [17].

⁴¹ *Ibid* [37].

⁴² *Ibid* [17].

⁴³ *Ibid* [46].

⁴⁴ *Ibid* [46].

⁴⁵ Under international human rights law, the state bears the duty to protect human rights. Accordingly, the primary focus should be whether the state is willing or able to provide protection. The *Guiding Principles on Internal Displacement* (UN ESCOR, 54th sess, UN Doc E/CN.4/1998/53/Add.2 (22 July 1998)) principle 3(1) confirms that the state has 'the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within [its] jurisdiction'. However, humanitarian organisations have the right to offer their services and states are required to grant these organisations access to IDPs: at arts 25(2)–(3).

of people relying on assistance from overstretched governments or international agencies. This has resonance with Kritzman-Amir's idea, discussed in Chapter Two, that responsibility for refugees should be primarily determined by reference to states' varying capacity to care for refugees.⁴⁶

The ways these decision-makers conceptualise the nature of refuge are significant in the context of debates over the correct test for internal protection alternative cases. New Zealand and the United Kingdom adopt different tests when considering whether a putative refugee can internally relocate. Both agree that the putative refugee must be able to access the internal protection alternative safely⁴⁷ and her or his well-founded fear of persecution must be negated.⁴⁸ Both jurisdictions acknowledge that there also must be affirmative state protection, but the tests for discerning this differ. In New Zealand, the test is whether they can 'genuinely access ... domestic protection which is meaningful'.⁴⁹ This includes consideration of whether 'basic norms of civil, political and socio-economic rights will be provided by the State'⁵⁰ using the rights in the Refugee Convention as a guide.⁵¹ The test in the United Kingdom is whether it would be unduly harsh or unreasonable for the putative refugee to internally relocate.⁵²

Scholars have criticised the reasonableness test on the grounds that it does not prioritise human rights considerations and can lead to inconsistent outcomes.⁵³ Refugee law experts advocate for states to determine internal protection alternatives with reference to the rights in the Refugee

⁴⁶ Tally Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law' (2009) 34(2) *Brooklyn Journal of International Law* 355, 362, 372.

⁴⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) [2011] OJ L 337/9-337/26, art 8(1); *Refugee Appeal No 76044* [2008] NZAR 719, [178] ('*Refugee Appeal No 76044*').

⁴⁸ *Refugee Appeal No 76044* (n 47) [178]; *SSHD v AH (Sudan)* (n 5) [21]. The New Zealand position also stipulates that the putative refugee should not be subject to any new forms of persecution or serious harm: *Refugee Appeal No 76044* (n 47) [178].

⁴⁹ *Refugee Appeal No 76044* (n 47) [178].

⁵⁰ *Ibid* [178].

⁵¹ *Ibid* [178]; *Refugee Appeal No 71684/99* [2000] INLR 165, [60]. This is the approach outlined in First Colloquium on Challenges in International Refugee Law, 'The Michigan Guidelines on the Internal Protection Alternative' (1999) 21(1) *Michigan Journal of International Law* 134, 139 ('Michigan Guidelines on the IPA').

⁵² *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 [21] ('*Januzi*'). A reasonableness test is also used in Australia and Canada: *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, [32]; *Rasaratnam v Canada (Minister of Employment and Immigration)* [1992] 1 FC 706, 711.

⁵³ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 352 ('*The Law of Refugee Status*'); Mathew (n 5) 192; Bríd Ní Ghráinne, 'The Internal Protection Alternative Inquiry and Human Rights Considerations – Irrelevant or Indispensable?' (2015) 27(1) *International Journal of Refugee Law* 29, 46.

Convention⁵⁴ or a slightly broader human rights enquiry.⁵⁵ While these rights-based approaches are consistent with a good faith interpretation of the Refugee Convention,⁵⁶ they do not squarely address the problem of the discrepancies in levels of protection between countries in the Global North and Global South. Most of the rights in the Refugee Convention are not absolute, but relative to what the state of origin provides its nationals or foreigners ‘generally in the same circumstances’.⁵⁷ Similarly, realisation of rights in the *International Covenant on Economic, Social and Cultural Rights*⁵⁸ is measured by a state’s available resources.⁵⁹ Thus, these two instruments acknowledge and permit discrepancies between levels of rights protection in developed and developing countries.⁶⁰ What is noteworthy about the above decisions is that, through conceptualising refuge as something to be bestowed by an appropriate authority, they address the problem of states or international agencies having limited capacity to care for large numbers of people in need of protection. They provide that when the relevant authorities are under-resourced, the putative refugee remains the responsibility of New Zealand or the United Kingdom. Approaching protection from refuge claims in this manner is in line with the notion of international cooperation in the Refugee Convention’s preamble. It also is a counterpoint to Tuitt’s argument that law closes down or discourages enquiries about ‘pressing humanitarian concerns’.⁶¹ In these cases, decision-makers consider evidence of the difficulties IDPs face and the ways they are compounded when the relevant authorities cannot or do not provide protection. Their conceptualisation of refuge as something that must be bestowed by a state or organisation able and willing to do so permits these refugees to continue their quest for refuge. This means that their journeys in search of refuge will not be fragmented by having to return to their home country and seek protection in an IDP camp.

There is only one United Kingdom case from the early 2000s in which it was found that it would not be unreasonable for a putative refugee to internally relocate to an IDP camp.⁶² The case

⁵⁴ ‘Michigan Guidelines on the IPA’ (n 51) 139; Hathaway and Foster, *The Law of Refugee Status* (n 53) 356.

⁵⁵ Mathew (n 5) 193–5.

⁵⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980) art 31(1).

⁵⁷ For a detailed discussion, see James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) ch 3.

⁵⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976).

⁵⁹ *Ibid* art 2(1).

⁶⁰ The Michigan Guidelines on the IPA (n 51) 139 acknowledge that the standards in the Refugee Convention (n 4) are ‘affirmative, yet relative’ and stress that the ‘relevant measure is the treatment of other persons in the proposed site of internal protection, not in the putative asylum country’.

⁶¹ Tuitt, *False Images* (n 7) 155.

⁶² *Appeal No HX51798-2000 14 (Kabul - Pashtun) Afghanistan CG* [2002] UKIAT 05345.

concerned a Pashtun man from Mazar, Afghanistan. The issue was whether he could relocate to Kabul or an area in the south of Afghanistan which was in an exclusively Pashtun area. One issue that arose was that if he internally relocated, he might have no option but to live in a UNHCR refugee camp for Pakistani refugees that also provided protection to Afghani IDPs. The United Kingdom Asylum and Immigration Tribunal reasoned that ‘it would be difficult to regard being under UNHCR protection in a UNHCR camp as being unduly harsh’, because it would be ‘difficult to believe that people would be invited to make use of those camps if they were not basically humanitarian’.⁶³ The Tribunal accepted these camps are ‘basically humanitarian’ without considering any evidence regarding the actual conditions in these camps.⁶⁴ Nevertheless, the focus in this decision was whether the prospective IDP would have protection and there is identification of an international organisation that provided such protection. Thus, this decision relied on an understanding of the nature of refuge as something that must be bestowed by the state or international community.

With respect to the scope of refuge, in none of these cases did the decision-makers discuss what is meant by ‘meaningful protection’ in great depth. This may be because they accepted almost without question that an IDP camp is not a viable internal protection alternative. They did not need to justify their decision beyond reference to the ‘abominable’ and ‘subhuman’ conditions in the camps. Nevertheless, the types of protections identified in the judgments cover a spectrum of breaches of civil and political as well as socio-economic rights such as physical security; social welfare; access to food, water and shelter; and availability of employment and government services. This is in line with the test Mathew proposes for the availability of an internal relocation alternative: whether the putative refugee would have human rights protection in the proposed place of relocation.⁶⁵ Also, the New Zealand case discussed the need for there to be durable solutions to the situation of internal displacement and, in particular, that IDPs should be able to integrate into a new community.⁶⁶ Reference to this array of rights indicates an appreciation that the prospective IDP is not only entitled to a sense of safety and adequate living conditions, they must also have the ability to live a normal life through having access to employment and government services, integrating into the community and eventually finding a solution to displacement. This is a broad understanding of the scope of refuge and reflects ideas

⁶³ Ibid [56].

⁶⁴ This can be contrasted with decisions that have found the conditions in UNHCR-run refugee camps to present a real risk of inhuman and degrading treatment: see *Sufi and Elmi v United Kingdom* [2012] 54 EHRR 9.

⁶⁵ Mathew (n 5) 193–5.

⁶⁶ *Refugee Appeal No 76191* (Unreported, New Zealand Refugee Status Appeals Authority, Member Burson, 12 August 2008) [56].

of refuge's temporality, in particular, that it must enable refugees to imagine and work towards a better future. If a prospective IDP will not enjoy these protections because the relevant authorities are already overburdened with providing care to large numbers of IDPs, they can remain in and lay claim to a place of refuge in New Zealand or the United Kingdom.

When decision-makers take this approach, the figure of the IDP is able to disrupt the boundaries between the Global North and Global South in a way that permits large numbers of prospective IDPs to continue their quest for refuge in a developed country. In these cases, decision-makers position the prospective IDP not as the rightless figure Tuitt describes in her scholarship, but as a rights-bearing subject. They are entitled to live a safe and normal life under the care of an authority that has capacity to provide them with protection. This approach does not address the problem that many people with a well-founded fear of persecution cannot leave their homeland to seek international protection, but it does circumscribe the Refugee Convention's operation as a containment mechanism. These decisions indicate that refugee law can operate as an instrument that enables refugees to continue their search for a genuine place of refuge and help to achieve a fairer distribution of refugee responsibility. In their determination of these protection from refuge cases, decision-makers treat the fact that there are many people in the country of origin who do not have adequate protection in line with Mathew's observation that this 'simply confirms the sad reality that there are many IDPs who are unable to exercise their right to seek asylum'.⁶⁷

IV REFUGE AS THE CHANCE OF MERE SURVIVAL

There has been a shift in the ways United Kingdom decision-makers approach the question of whether an IDP camp can serve as an internal protection alternative. Because of this change, the presence of large numbers of IDPs in the country of origin takes on a different significance. This results in a narrow and impoverished understanding of refuge and the entrenchment of the Refugee Convention as a mechanism to contain those in need of protection in the Global South, impeding refugees' quests for refuge. This turnaround is partly attributable to the 2006 United Kingdom House of Lords decision of *Januzi v Secretary of State for the Home Department* ('*Januzi*').⁶⁸ This case concerned four putative refugees whose claims for protection had been denied on the grounds that they had an internal protection alternative.⁶⁹ The common issue on

⁶⁷ Mathew (n 5) 204.

⁶⁸ *Januzi* (n 52).

⁶⁹ The first appellant was an Albanian Kosovan from Mitrovica in Kosovo. The other three appellants were from Darfur in Sudan. In relation to the appeals, the United Kingdom House of Lords rejected the first appellant's

appeal was whether decision-makers must examine the prospective internal protection alternative with reference to the standards espoused in leading international human rights law instruments including the rights in the Refugee Convention. The prospect of an IDP camp serving as an internal protection alternative was an issue relevant to three of the appellants, but the United Kingdom House of Lords did not make any ruling on this aspect of their case.

Lord Bingham gave the lead judgment. He considered the approach adopted in New Zealand, which involves examining whether the putative refugee would have access to the rights outlined in the Refugee Convention in the internal protection alternative.⁷⁰ Lord Bingham compared this to the approach adopted by the England and Wales Court of Appeal, which involved ‘a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum-seeker’.⁷¹ Lord Bingham preferred the England and Wales Court of Appeal’s approach. He reasoned that there is no logical reason for importing all of the rights in the Refugee Convention into the test for internal relocation—these rights apply to refugees in a host state, not to those within their home country.⁷² Lord Bingham also expressed concern that a broad human rights enquiry may have the ‘unintended’ and ‘anomalous’ consequence of providing a pathway for migration from the Global South to the Global North:

Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He [or she] escapes to a rich country where, if recognised as a refugee, he [or she] would enjoy all the rights guaranteed to refugees in that country. He [or she] could, with no fear of persecution, live elsewhere in his [or her] country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him [or her] to escape, not only from that persecution, but from the deprivation to which his [or her] home country is subject.⁷³

The United Kingdom House of Lords held that decision-makers are not required to undertake a broad human rights enquiry in internal protection alternative cases.⁷⁴ Rather, the test of whether internal relocation would be unduly harsh or unreasonable only requires consideration of whether the putative refugee would be free from persecution and would have the ‘most basic

appeal. The House of Lords upheld the three Sudanese appellants’ appeal and remitted the matters back to the United Kingdom Asylum and Immigration Tribunal for further consideration.

⁷⁰ *Januzi* (n 52) [9].

⁷¹ *E v Secretary of State for the Home Department* [2003] EWCA 1032, [24] cited in *Januzi* (n 52) [13].

⁷² *Januzi* (n 52) [15].

⁷³ *Ibid* [19]. For a discussion of this issue, see Mathew (n 5) 205; Ní Ghráinne (n 53) 44.

⁷⁴ *Januzi* (n 52).

of human rights’,⁷⁵ such as the right to life and right not to be subjected to cruel or inhuman treatment.⁷⁶ The Court stressed that if the putative refugee could ‘lead a relatively normal life’ in the internal protection alternative ‘judged by the standards that prevail in his [or her] country of nationality generally’, it would ‘not be unreasonable to expect him [or her] to move there’.⁷⁷

There are a number of critical examinations of the United Kingdom House of Lord’s decision in *Januzi* that argue that the test it established for internal relocation is not a good faith interpretation of article 1A(2) of the Refugee Convention.⁷⁸ The question for this thesis is how it has affected decision-makers’ conceptualisation of the nature and scope of refuge for putative refugees resisting the prospect of seeking refuge in an IDP camp. As discussed above, when the question of an IDP camp serving as an internal protection alternative first arose in the United Kingdom, decision-makers positioned the prospective IDP as a person in need of protection who is entitled to be under the care of an authority that has the capacity to provide that protection. Immigration judges conceived of refuge as something that must be bestowed and accepted that if the relevant authority is under-resourced, then the putative refugee did not have an internal protection alternative. These decisions are also imbued with an ethic of international cooperation. However, in post-*Januzi* jurisprudence, these understandings of the IDP and ideas of refuge have diminished and decision-makers have determined that an IDP camp is an acceptable internal protection alternative in almost all cases in which the issue has been arbitrated.

This change was first evident in *HGMO (Relocation to Khartoum) Sudan CG* (‘*HGMO*’),⁷⁹ which concerned the three Sudanese appellants who had their matters remitted back to the United Kingdom Asylum and Immigration Tribunal by the United Kingdom House of Lords in *Januzi* and one other Sudanese asylum seeker from Darfur. One issue for the Tribunal was whether the putative refugees could internally relocate to Khartoum where they may have had to seek refuge in an IDP camp. Expert evidence indicated that the Sudanese government provided no protection to those living in IDP camps,⁸⁰ denied humanitarian groups access to the

⁷⁵ *Ibid* [54], [59].

⁷⁶ *Ibid* [54]. For a critique of limiting the focus to non-derogable rights, see Mathew (n 5) 204.

⁷⁷ *Januzi* (n 52) [47] (emphasis added).

⁷⁸ Hathaway and Foster, *The Law of Refugee Status* (n 53) 351–61; Mathew (n 5) 201–6; Ní Ghráinne (n 53) 44–5.

⁷⁹ [2006] UKAIT 00062. The asylum seekers in *HGMO* appealed the United Kingdom Asylum and Immigration Tribunal’s decision to the Court of Appeal: *AH, IG and NM v Secretary of State for the Home Department* [2007] EWCA Civ 297. The appeal was successful. The Secretary of State for the Home Department then appealed to the United Kingdom House of Lords: *SSHD v AH (Sudan)* (n 5). The Secretary of State for the Home Department’s appeal was successful and the United Kingdom Asylum and Immigration Tribunal’s decision in *HGMO* was reinstated.

⁸⁰ *HGMO* (n 79) [74].

camps,⁸¹ actively destroyed the camps⁸² and forcibly relocated their inhabitants.⁸³ One of the expert witnesses concluded that ‘IDP camps and squatter settlements in Khartoum state provide no security for IDPs’.⁸⁴ Other evidence concerning the IDP camps before the Tribunal attested to arbitrary arrest,⁸⁵ arbitrary detention,⁸⁶ acts of violence,⁸⁷ and lack of access to education⁸⁸ and employment.⁸⁹ However, the Tribunal determined that internal relocation to an IDP camp would not be unreasonable or unduly harsh, because the living conditions in the camps were ‘not markedly different from the living conditions in Sudan as a whole’.⁹⁰ The Tribunal noted that ‘we particularly bear in mind the fact that most people in Sudan live at subsistence level and that over 70% of those who live in urban conurbations are slumdweller’.⁹¹

Comparing the putative refugee/prospective IDP to the population at large shuts down investigation of whether the conditions the general population face are due to the state’s difficult economic circumstances or its attitude to human rights protection.⁹² It also disregards the idea that IDPs are entitled to a special form of refuge that must be bestowed by the state. In this decision, the Tribunal ignored the relationship between the state and prospective IDP. Focussing instead on the conditions experienced by the general population and using this as the comparator removes the potential for these decisions to promote ideas of cooperative refuge between the Global South and Global North. That others in the country of origin similarly do not receive protection is no longer a reason to provide the putative refugee with protection, but grounds on which to expel them back to their homeland. Comparison to the rest of the population also diverts judicial attention away from the setting of the camp and whether it can provide a sense of refuge.

Instead of examining whether the state is willing and able to provide protection to the prospective IDP, decision-makers sometimes consider whether the putative refugee has family that can provide assistance. This morphs understandings of refuge from something granted by the state or international community to, at best, something provided privately through family members.

⁸¹ Ibid [30].

⁸² Ibid [29].

⁸³ Ibid [17], [73].

⁸⁴ Ibid [74].

⁸⁵ Ibid [22].

⁸⁶ Ibid [74].

⁸⁷ Ibid [134].

⁸⁸ Ibid [74].

⁸⁹ Ibid [77].

⁹⁰ Ibid [265].

⁹¹ Ibid [265].

⁹² Mathew (n 5) 205.

This is evident in *SK (FGM – ethnic groups) Liberia CG*,⁹³ a 2007 case concerning whether a Liberian woman could internally relocate from a rural to an urban area where she may have had no choice but to live in an IDP camp. The United Kingdom Asylum and Immigration Tribunal noted that there was evidence of sexual violence perpetrated against IDPs living in the camps.⁹⁴ However, the Tribunal did not enquire as to the type and level of protection provided (if any) against the risk of sexual violence in IDP camps. The Tribunal concluded that ‘[w]hilst these may occur, we are unaware of any evidence that suggests that in general, lone women within such camps are as such at real risk of rape’.⁹⁵ One reason the Tribunal ruled that it would not be unduly harsh to expect her to live in an IDP camp was because her partner in the United Kingdom would send her money.⁹⁶ Thus, the Tribunal did not focus on the protection that Liberia provides to IDPs, but what protection the woman could access through family connections.

A similar line of reasoning is evident in *AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG*.⁹⁷ This 2011 case concerned whether a Somali putative refugee could internally relocate to an IDP camp in Somalia’s Afgoye Corridor. The United Kingdom Asylum and Immigration Tribunal stated that relocation to an IDP camp would be unreasonable ‘unless there is evidence that the person concerned would be able to achieve the lifestyle of those better-off inhabitants of the Afgoye Corridor settlements’.⁹⁸ Whether a returnee could achieve such a lifestyle would depend on the putative refugee ‘having family or other significant connections with such better-off elements’.⁹⁹ Without the protection of family or significant connections, the returnee would not be able to ‘eliminate the risks inherent in IDP camps’.¹⁰⁰ In this case, the Tribunal did not consider what (if any) state protection is available to IDPs in camps in the Afgoye Corridor, but the availability of family support.

Focussing on the putative refugee’s family transmogrifies the concept of refuge. Unlike state protection, which is grounded in a state’s international legal obligations, family support and remittances are voluntary. These approaches remove the idea of refuge as a duty the state must honour and delivers a precarious form of refuge hinged on private individuals’ unpredictable

⁹³ [2007] UKAIT 00001 (*SK (FGM)*).

⁹⁴ *Ibid* [63].

⁹⁵ *Ibid* [63].

⁹⁶ *Ibid* [64].

⁹⁷ *SK (FGM)* (n 93).

⁹⁸ *AMM and Others (Conflict; Humanitarian Crisis; Returnees; FGM) Somalia CG* [2011] UKUT 00445 (IAC), [602] (*AMM*).

⁹⁹ *Ibid* [501].

¹⁰⁰ *Ibid* [501].

generosity. It is also a problematic understanding of refuge from a gender perspective, because it ignores the fact that the family is sometimes the source of protection concerns. A person may not be able to leave a dangerous family situation if their family members are the only ones providing protection to them against the dangers of life in an IDP camp.

Decision-makers' approaches to these protection from refuge claims have also narrowed the scope of refuge. While early 2000s jurisprudence in the United Kingdom concerning internal relocation to an IDP camp did not specifically outline the appropriate scope of refuge, decision-makers took into account a range of civil and political and socio-economic rights including physical security and access to employment and government services. In later decisions, the scope has been narrowed to adequate living conditions. This is an understanding of refuge akin to humanitarian assistance in the immediate aftermath of events such as conflict or natural disaster.¹⁰¹ This minimalist conceptualisation of refuge is far removed from the more comprehensive ideas of refuge for putative refugees or IDPs outlined in Chapter Two. A narrow scope of refuge is evident in *HGMO*, in which the United Kingdom Asylum and Immigration Tribunal focussed only on living conditions and ignored the many other human rights concerns raised in the evidence. As noted above, it ruled that relocation to an IDP camp would not be unreasonable or unduly harsh because 'the living conditions' in the camps were 'not markedly different from the living conditions in Sudan as a whole'.¹⁰² This generates a narrow scope of refuge for putative refugees and prospective IDPs. In particular, human rights violations that are of particular concern to IDPs such as forced relocation and restrictions of freedom of movement remain outside the judicial lens.

Another example of United Kingdom decision-makers shrinking the scope of refuge is the United Kingdom Asylum and Immigration Tribunal's decision in *SK (FGM – ethnic groups) Liberia CG*.¹⁰³ The Tribunal placed weight on a United States State Department Report that 'paints a picture of the camps which, whilst clearly not without problems, shows that they generally provide *reasonable living conditions*'.¹⁰⁴ Crucial to the Tribunal's decision was that the living conditions in the camps were acceptable, and the risk of sexual violence was of secondary

¹⁰¹ Durieux argues that this emergency model of refuge is essential to ensure 'basic rescue' in the aftermath of a crisis, but 'too many refugee situations freeze over in emergency mode': Jean-François Durieux, 'Three Asylum Paradigms' (2013) 20(2) *International Journal on Minority and Group Rights* 147, 167.

¹⁰² *HGMO* (n 79) [265].

¹⁰³ [2007] UKAIT 00001.

¹⁰⁴ *SK (FGM)* (n 93) [63] (emphasis added).

importance. Thus, the Tribunal's conceptualisation of adequate refuge was a place where a person can survive because they have access to adequate food, water and shelter.

As a result of decision-makers' dilution of the concept of refuge in these cases, the figure of the IDP has lost its ability to disrupt state boundaries and the Refugee Convention's effect of containing those of need of protection in the Global South is entrenched. By pitting the putative refugee against the country of origin's population at large, the image of the IDP decision-makers conjure up in these decisions is a threatening one: she or he is one of hundreds and possibly thousands that could travel across international national borders and claim refuge in the United Kingdom. Decision-makers rein in the IDP's ability to pierce the boundary between the Global South and Global North by positioning her close to the 'classic instance' of the rightless person Tuitt describes in her scholarship. The IDP is disenfranchised from her state of origin due to having a well-founded fear of persecution, but also disenfranchised from law: she is not understood to be a rights-bearer, but only entitled to the same living conditions as the rest of the population in her homeland. The prospective IDP in these protection from refuge decisions is even further disenfranchised than the IDP Tuitt describes. Tuitt investigates the IDP's situation before she leaves her homeland. While Tuitt emphasises that travelling across international borders is only possible for a select few, it is at least still a potential recourse. The IDPs in these cases have already exercised this option.

V THE RESILIENT REFUGEE

By narrowing the scope of refuge to adequate living conditions and using the country of origin's population at large as a comparator, immigration judges in the United Kingdom sidestep the need to examine the availability of state protection in IDP camps. The prospective IDP with no state protection has nothing but their own abilities, or in some cases family connections, to defend and make a life for themselves in the hostile conditions of an IDP camp. This moves decision-makers' focus to the prospective IDP's personal circumstances. To resist the prospect of life in an IDP camp, the putative refugee must prove that they are exceptional in some way. For example, in *HGMO*, the United Kingdom Asylum and Immigration Tribunal accepted that

while it would generally not be unreasonable for a Sudanese putative refugee to internally relocate to an IDP camp, this may not be the case for those with an ‘extreme and exceptional’ health condition,¹⁰⁵ single women or female-headed households.¹⁰⁶

There is one case in which decision-makers accepted that a prospective IDP’s personal circumstances might render refuge in an IDP camp unreasonable. In *KH (Sudan) v Secretary of State for the Home Department*,¹⁰⁷ the England and Wales Court of Appeal considered whether it would be unreasonable for a 20-year-old Sudanese putative refugee to internally relocate to Khartoum where it was likely that he would live in an IDP camp. The case was on appeal from the United Kingdom Asylum and Immigration Tribunal, which had ruled that it would not be unreasonable for him to seek protection in an IDP camp because he was a ‘young apparently healthy adult’.¹⁰⁸ The England and Wales Court of Appeal acknowledged that *HGMO* indicated that, as a general rule, it would not be unreasonable for a putative refugee to find refuge in an IDP camp in Khartoum.¹⁰⁹ However, the Court confirmed that this general finding must be tempered by the individual’s particular circumstances.¹¹⁰ The Court described the appellant’s circumstances as ‘stark’, because he had ‘lost all his living relatives, killed by those responsible for conditions in those camps’.¹¹¹ The case was remitted back to the United Kingdom Asylum and Immigration Tribunal with the instruction that the decision as to whether internal relocation to an IDP camp would be unduly harsh must take into account that fact that the man would live with ‘the everyday knowledge that those responsible for such conditions are also responsible for the death of his every living relative’.¹¹² Any reconsideration of this case has not been reported. Nevertheless, the England and Wales Court of Appeal’s judgment reflects the idea that refuge must have a palliative role and that a place that would traumatise a putative refugee is not a place that can provide genuine sanctuary.

However, in most cases involving the prospect of having to seek refuge in an IDP camp, immigration judges refer to the putative refugee’s personal circumstances in a way that substantiates the decision that internal relocation to an IDP camp is not unreasonable or unduly harsh. In

¹⁰⁵ *HGMO* (n 79) [260].

¹⁰⁶ *Ibid* [307].

¹⁰⁷ [2008] EWCA Civ 887.

¹⁰⁸ Cited in *KH (Sudan) v Secretary of State for the Home Department* [2008] EWCA Civ 887, [33].

¹⁰⁹ *Ibid* [36].

¹¹⁰ *Ibid* [36].

¹¹¹ *Ibid* [36].

¹¹² *Ibid* [36].

particular, decision-makers refer to personal circumstances in a way that positions the prospective IDP as a person with the talent or fortitude to endure the most hostile conditions. For example, in *SK (FGM – ethnic groups) Liberia CG*, the United Kingdom Asylum and Immigration Tribunal confirmed that it would be unreasonable to expect most single women to internally relocate in Liberia, because they would face economic destitution.¹¹³ Nevertheless, the Tribunal found that internal relocation was not unreasonable in this case, because the putative refugee was a ‘healthy and obviously resourceful woman of some intelligence’.¹¹⁴ Due to her good health, capabilities and being a woman ‘of some intelligence’, the Tribunal was satisfied that it was possible that she may not have to resort to living in an IDP camp and she would not have to prostitute herself to survive financially.¹¹⁵ Thus, the Tribunal portrayed the putative refugee as having the personal strength and ability to survive in hostile conditions.

A similar approach is evident in *Petition of GAO*,¹¹⁶ concerning a Sudanese woman who faced the prospect of life in an IDP camp if she internally relocated. The immigration judge reasoned that she may not need to live in an IDP camp, because she was a ‘single woman who is fit, able to work and able to support herself in a relatively troubled environment’.¹¹⁷ However, in the event that she had to live in an IDP camp, it would not be ‘such a traumatic change of lifestyle that she would be unable to adapt to life in an IDP camp, should that prove necessary’.¹¹⁸ The judge also took into account that ‘she has previously traded in the market’ and this ‘would give her a wider experience than those who were only farmers’.¹¹⁹ The judge relied on the petitioner’s previous trade experience in determining that ‘refuge in an IDP camp, should it be required, would not be unreasonable’.¹²⁰ Again, the decision-maker depicted the prospective IDP as different from and more capable than other single women in Liberia due to her prior work experience and being ‘fit’.

Further examples of this type of reasoning are evident in cases involving male putative refugees who face the prospect of life in an IDP camp if they internally relocate. Decision-makers often refer to male refugees’ gender and innate or acquired abilities in justifying why it would not be unduly harsh for them to endure even the most brutal camp environments. For example, in *JK*

¹¹³ *SK (FGM)* (n 93) [69].

¹¹⁴ *Ibid* [64].

¹¹⁵ *Ibid* [63]–[64].

¹¹⁶ [2010] CSOH 92.

¹¹⁷ Initial decision cited in *Petition of GAO* [2010] CSOH 92, [5].

¹¹⁸ *Ibid* [5].

¹¹⁹ *Ibid* [5].

¹²⁰ *Ibid* [5].

(*Serbia*) v *Secretary of State for the Home Department*, the United Kingdom Asylum and Immigration Tribunal found that a putative refugee had an internal relocation alternative in an IDP camp in Kosovo and this ruling was upheld on appeal.¹²¹ The decision-maker emphasised the putative refugee's 'marketable skills' (a metalworking qualification and fluency in several languages) and that he was 'single and in good health'.¹²² However, in some cases, decision-makers deem an IDP camp an appropriate internal protection alternative for male putative refugees solely on the grounds of youth and gender. For example, in *NO v Secretary of State for the Home Department*,¹²³ it was held that a 30-year-old Sudanese man could internally relocate to an IDP camp in Khartoum despite conditions being 'grim'.¹²⁴ The immigration judge reasoned that he was 'a young man with no dependants [sic]' who must have had considerable resources to come to the UK.¹²⁵ While not having any education, he could survive economically in a camp environment by performing physical labour.¹²⁶ Another example is a case concerning whether a Chechen putative refugee could internally relocate to Ingushetia where many Chechens were living in IDP camps.¹²⁷ Evidence in the case attested to human rights abuses in the camps occurring on a 'significant scale'¹²⁸ and that the living conditions 'vary from difficult to unbearable, with many inhabiting overcrowded, dank, dilapidated buildings that enable diseases like tuberculosis and pneumonia to flourish'.¹²⁹ Nevertheless, the United Kingdom Asylum and Immigration Tribunal found that the conditions in the camps were not 'so severe as to render internal relocation for a *young Chechen male* unreasonable or unduly harsh'.¹³⁰

Characterising prospective IDPs in this manner serves to justify and sanitise the act of refusing international protection to a person with a well-founded fear of persecution knowing that they may have no choice but to seek refuge in an IDP camp. The subtext of these judgments is that while life in an IDP camp would be insufferable for most, we are only returning those with the resilience and fortitude to protect and provide for themselves. This is the antithesis of Tuitt's

¹²¹ *JK (Serbia) v Secretary of State for the Home Department* [2007] EWCA Civ 1321, [34] ('*JK Serbia*').

¹²² Initial decision cited in *ibid* [20].

¹²³ [2008] CSIH 19 XA152/06.

¹²⁴ Initial decision cited in *ibid* [5].

¹²⁵ *Ibid* [5].

¹²⁶ *Ibid* [5].

¹²⁷ *RM (Young Chechen Male – Risk – IFA) Russia CG* [2006] UKAIT 00050.

¹²⁸ *Ibid* [42].

¹²⁹ *Ibid* [41].

¹³⁰ *Ibid* [47] (emphasis added). Three years later, the Tribunal considered a case concerning whether it was unreasonable for a Chechen woman to internally relocate to an IDP camp in Ingushetia: *OY (Chechen Muslim women) Russia CG* [2009] UKAIT 00005. The Tribunal found that a Chechen woman, 'could not now relocate to an IDP camp' because the local Ingush authorities were no longer accepting new IDPs in the camps and were pressuring Chechen IDPs to return to Chechnya: at [68]–[70]. Therefore, the distinguishing factor in this case was not the conditions in the camps, but that the putative refugees would no longer be able to access the camps.

contention that it is the moving entity (a person who crosses international borders) who is seen as ‘synonymous with humanitarian need and suffering’.¹³¹ In these cases, decision-makers depict those who have travelled to the Global North as courageous and resilient and, on this basis, able to forge protection for themselves in even the most adverse and hostile environments. This usurps the main way in which those with a well-founded fear of persecution can trigger refugee protection—crossing international borders. It creates a double bind similar to the one present in article 1D cases: a putative refugee will only be protected from an IDP camp if they have no ability to protect themselves, but the very act of travelling long distances to make an asylum claim is demonstrative of fortitude and resilience. Female refugees are especially disenfranchised by this conundrum. They are less likely than their male counterparts to be able to make the journey to the Global North to seek protection, but those who do are deemed strong and capable enough to protect themselves.

VI CONCLUSION

This is this thesis’ final case study examining how decision-makers approach and determine protection from refuge claims. Similar to previous chapters, I observed that decision-makers have employed a categorical approach by conceptualising refuge by first considering the position or predicament of the person seeking international protection. As shown in this chapter, some decision-makers position the putative refugee as a prospective IDP and imagine what their life would be like in an IDP camp. This gives rise to a broad understanding of the scope of refuge, but also a sensibility of international solidarity unseen in any other protection from refuge claims. However, in line with other case studies in this thesis, there has been a transition in which decision-makers produce rudimentary notions of refuge, remove the place of refuge from consideration and focus on the particular protection from refuge litigant and ask whether they are exceptional in some way. In the United Kingdom, where the overwhelming majority of these protection from refuge claims have arisen, in earlier jurisprudence there is a recognition that refuge involves a nation-state or other authority bestowing protection but in later judgments refuge is understood as something an individual can forge themselves. Protection from refuge will only be granted when the putative refugee can establish that they are exceptionally vulnerable, but decision-makers characterise these putative refugees as resilient because they have made long journeys to claim asylum.

¹³¹ Tuitt *False Images* (n 7) 14.

Portraying the protection from refugee claimant as strong and courageous denotes an understanding that refuge can be self-made and obscures the perversity of expecting a putative refugee to seek refuge in an IDP camp. It also solidifies the boundaries between the Global North and Global South by distorting the one method available to those with a well-founded fear of persecution to secure a remedy: mobility. For decision-makers in these protection from refugee claims, the refugee as a moving entity is not 'synonymous with humanitarian need and suffering'. Rather, the fact that the putative refugee has travelled to the United Kingdom and provided for themselves as an asylum seeker is evidence that they can contend with the vicissitudes of life in an IDP camp. This trajectory—decision-makers first approaching protection from refugee claims in a way that imbues the concept of refuge with a sophisticated and rich meaning and facilitates searches for genuine places of sanctuary, but later changing to an approach that dilutes the notion of refuge and inhibits these journeys—is evident across all case studies in this thesis.

CHAPTER EIGHT

CONCLUSION: ELUSIVE REFUGE

I INTRODUCTION

I began this thesis by looking at refugees' journeys in search of refuge. Some of these journeys are relatively short ones, where those in need of international protection seek refuge in a neighbouring country. Others are much longer and involve multiple international border crossings and transcontinental travel. Refugees' voyages to find a place of refuge are often fragmented due to containment mechanisms and challenges imposed by factors such as gender, age, care responsibilities and disability. To be able to continue their quests for refuge, many refugees and asylum seekers turn to courts and other decision-making bodies. The aim of this thesis was to understand the role this litigation plays in refugees' searches for a place of genuine refuge. Accordingly, the research question asked how decision-makers approach and determine protection from refugee claims. I also examined how decision-makers conceptualise refuge, respond to contests between refugees' need for a place of genuine refuge and states' interests in controlling refugees' movements, and whether the determination of these legal challenges prioritises particular refugees in their search for refuge. While there is a large body of literature on how decision-makers approach refugee definitions, this thesis assessed how decision-makers approach the remedy: refuge.

Throughout each of the case studies, there is a period or moment in which decision-makers engage with the concept of refuge. Through adopting what I identified in Chapter Two as categorical reasoning (sometimes in conjunction with experiential and rights-based reasoning), decision-makers use domestic, regional and international legal frameworks as prisms to outline robust ideas about refuge's functions, nature, threshold and scope. These conceptualisations of refuge prevail over states' desires to constrain refugees' movement within and across borders. These judicial approaches provide grounds for large numbers of refugees to continue their quest for refuge, but decision-makers also demonstrate an understanding of particular refugees' needs. However, these protection from refuge victories are ephemeral. In each type of protection from refuge scenario, decision-makers transition from a categorical approach to exceptionality reasoning and remove or partially remove the place of refuge from the judicial lens. This produces minimalist and impoverished notions of refuge and means that protection from refuge challenges are determined in a way that defers to states' interests. Not only do these decisions

obstruct refugees in their searches for refuge, decision-makers often neglect difficulties faced by women, children, sexual minorities and refugees with care responsibilities and disabilities.

This chapter's purpose is to highlight the significance of these findings for refugee law scholarship and the international protection regime more broadly, as well as indicate the questions they raise for future research. First, I discuss how my analysis of judicial approaches that give a rich meaning to the concept of refuge responds to scholars' identifications of current dilemmas in refugee law and advances the literature on refuge. Second, I consider how the judicial dilution of the concept of refuge poses risks to the future directions of refugee law. Third, I highlight how the analysis in this thesis adds new dimensions to scholarly assessments of the progress of decision-makers' approaches to and understandings of gender. Overall, I argue that the trajectory of decision-makers' approaches to protection from refuge claims has rendered refuge elusive.

II REFUGE AS A POTENT CONCEPT

One pattern evident throughout all the case studies in this thesis is that when decision-makers approach the concept of refuge in a purposive manner or give it a broad or rich meaning, they start their reasoning by focussing on refugees' or internally displaced persons' ('IDPs') predicament or position. The refugee or IDP figure initially conjured up in these judicial approaches is an abstract one. In Chapters Three and Four, I argued that European, African and United Nations decision-makers identified irreducible experiences of refugeehood such as having to forge an existence on a foreign land and suffering from past trauma. In Chapter Five, I noted that the High Court of Australia positioned refugees as persons entitled to special protections under international law. In Chapter Six, I observed that the New Zealand Immigration and Protection Tribunal identified who was a Palestinian refugee and enquired as to the protection and assistance they were entitled to under international law. In Chapter Seven I discussed decision-makers in the United Kingdom and New Zealand who considered the difficulties faced by IDPs, in particular, that the authorities providing care were overburdened and under-resourced.

I labelled this approach to protection from refuge claims as 'categorical', because it is informed by the categories of people who need international protection. This type of reasoning is not unique to adjudicative decision-makers. As outlined in Chapter Two, scholars from a number of disciplines use this method to outline and defend ideas of refuge. However, it is powerful

and significant in the judicial context, because it enables decision-makers to mould legal frameworks in a way that responds to refugees' needs and entitlements. For example, in Chapter Three, I highlighted how decision-makers used the right to be free from inhuman and degrading treatment to address refugees' needs to establish a bond with their host state. In Chapter Four, I showed that Kenyan courts used the right to dignity to respond to refugees' need to build a meaningful life in a new country. In Chapter Five, I observed how the High Court of Australia, through domestic legislation, referred to the refugee-specific rights regime in international law to position refuge as a duty owed to refugees by nation-states and set a high threshold for adequate refuge. In Chapter Six, I described the New Zealand Immigration and Protection Tribunal's conceptualisation of refuge in the Palestinian context as a right and duty and highlighted how it responded to refugees' need to build a life in exile. In Chapter Seven, I discussed how decision-makers in New Zealand and the United Kingdom used their different legal tests to create an understanding of refuge as a shared endeavour.

Some refugee law scholarship positions refugee law as 'relentlessly local' and argues that 'we tend to frame questions and answers within national or regional frameworks'.¹ This thesis indicates that, despite divergent legal frameworks, there are similarities in judicial ideas of refuge across international borders. In Chapter One, I outlined that one significant aspect of this thesis was that it could provide an indication of the contours of refuge as a legal concept in situations where refugees are requesting or resisting transfer within and across borders. By employing categorical reasoning, decision-makers in different jurisdictions use distinct legal frameworks to respond to refugees' needs and entitlements. Through this approach to protection from refugee claims, decision-makers across the globe are adopting shared notions of refuge. Throughout the case studies, decision-makers understand refuge to have restorative, regenerative functions and palliative functions that address refugees' present, future and past; as a remedy, right, duty, process and shared responsibility; to have an identifiable threshold; as having a broad scope encompassing a range of civil and political and economic, social and cultural rights; and as a flexible concept that can take into account particular refugees' needs.

Some aspects of these judicial understandings of refuge cement or advance ideas of what refuge is or should be when compared to the literature discussed in Chapter Two. With respect to refuge's functions, African and European decision-makers have recognised that one of refuge's

¹ Efrat Arbel, Catherine Dauvergne and Jenni Millbank, 'Introduction, Gender in Refugee Law – From the Margins to the Centre' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 1, 11 ('Introduction').

objectives is to enable refugees to heal from past trauma. This palliative aspect of refuge is present in studies in psychology, anthropology and history, but it is not a central idea in legal understandings of refuge. The decision-makers in the protection from refuge victories discussed in Chapters Three and Four made the palliative function of refuge a primary consideration in protection from refuge claims. In relation to the nature of refuge, Kenyan courts understood refuge as a process between the refugee and host country. This is a notion of refuge common in anthropological literature, but Kenyan decision-makers made it part of legal notions of refuge. In relation to refuge's threshold, the High Court of Australia is the only court to have recognised that states must be guided by the broader rights in the *Convention Relating to the Status of Refugees* ('Refugee Convention')² beyond *non-refoulement* when transferring refugees to another state and those rights must be guaranteed in law and practice. With respect to the scope of refuge, the New Zealand Immigration and Protection Tribunal was the first decision-making body to refer to the United Nations Relief and Works Agency for Palestinians in the Near East's ('UNRWA') mandate to discern the content of refuge for Palestinian refugees. Finally, in this thesis's last case study, I highlighted instances in which decision-makers conceptualised refuge as a responsibility that must be shared between the developed and developing world. Kritzman-Amir is one of the few scholars to argue that responsibility for hosting refugees should primarily be determined by which state is best resourced to care for them.³ These internal relocation alternative decisions brought ideas of a more equitable distribution of those in need of protection into jurisprudence by indicating that Global North states must provide refugee protection when the relevant authorities in the Global South are already overstretched.

Another aspect of protection from refuge victories is that decision-makers approach the dispute in a way that allows them to consider refuge as a concept and place. By doing so, they consider the disjunctures between the idea of refuge and the place in which the refugee is or will be located. For example, in Chapter Three I highlighted that the United Kingdom Upper Tribunal took ideas of refuge's restorative, regenerative and palliative functions and examined the ways life in the Jungle refugee settlement inhibited these objectives. The High Court of Kenya considered these same functions and emphasised why they could not be achieved in a camp environment. The High Court of Australia focussed on some of the rights in the Refugee Convention

² *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

³ Tally Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law' (2009) 34(2) *Brooklyn Journal of International Law* 355, 362, 372.

and explained why they would not be guaranteed in law or practice in Malaysia. The New Zealand Immigration and Protection Tribunal emphasised the need for IDPs to have durable solutions and determined that this could not be realised in an IDP camp in Kabul. By juxtaposing the idea and reality of refuge, decision-makers position refugees as being entitled to a legal remedy, but living in a world that all too often denies them these protections.⁴ This creates a potent tension between refuge as a concept and place that refugees can wield to continue their quests for refuge.

Studies of refugees' perspectives of refuge indicate that a sense of refuge is something gradually attained through the refugee building relationships in the host country—it is not achieved immediately upon entering a country of refuge.⁵ Therefore, I am not suggesting that the refugee litigants who were successful in their protection from refuge claims would have immediately achieved a feeling of refuge. This is unlikely as there is evidence of human rights concerns for asylum seekers and refugees in countries many refugees are trying to access such as Australia, Canada and the United Kingdom.⁶ Nevertheless, by determining protection from refuge challenges in a way that enables, rather than impedes, refugees' journeys, decision-makers enliven the prospect that refuge can be realised. These decisions empower refugees to continue to work towards a different and better future, which is an important aspect of refuge.

The identification of judicial use of categorical reasoning and comparisons between the concept and place of refuge responds to Betts and Collier's call for scholars to investigate the conditions under which law can be used to reshape the current refugee system.⁷ In Chapter One, I outlined that this thesis would shed light on the ways courts cement or alter the current inequities in location of and responsibility for refugees. Many of the decisions discussed in this thesis disrupt

⁴ This has parallels with Rancière's observation that human rights arguments are potent when persons can show that they 'have not the rights they have and have the rights they have not': Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103(2–3) *South Atlantic Quarterly* 297, 302.

⁵ Catherine Besteman, *Making Refuge: Somali Bantu Refugees and Lewiston, Maine* (Duke University Press, 2016); Georgina Ramsay, *Impossible Refuge: The Control and Constraint of Refugee Futures* (Routledge, 2018).

⁶ See, eg, Jennifer Allsopp, Nando Sigona and Jenny Phillimore, 'Poverty Among Refugees and Asylum Seekers in the UK: An Evidence and Policy Review' (Working Paper No 1/2014, Institute for Research into Super Diversity Working Paper Series, 2014); Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (Second Edition)* (2017) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/asylum-seekers-refugees-and-human-rights-snapsho-0>>; Jesuit Social Services, *The Living Conditions of People Seeking Asylum in Australia* (December 2015) <http://jss.org.au/wp-content/uploads/2015/12/Asylum_Seeker_Position_Paper_-_December_2015.pdf>; Cécile Rousseau et al, 'Health Care Access for Refugees and Immigrants with Precarious Status: Public Health and Human Rights Challenges' (2008) 99(4) *Canadian Journal of Public Health* 290; John Van Kooy and Dina Bowman, "'Surrounded by So Much Uncertainty'": Asylum Seekers and Manufactured Precarity in Australia' (2019) 45(5) *Journal of Ethnic and Migration Studies* 693.

⁷ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017) 209.

containment mechanisms and provide grounds for a more equitable refugee protection system. When decision-makers employ categorical reasoning by contemplating refugees' predicament or position and mould legal frameworks in a way that responds, they engage with ideas of refuge. When they then use these understandings of refuge as a concept to cast judgment on places of refuge within or outside their borders, they draw out the disparities between refuge as a concept and place. This juxtaposition of ideas and realities of refuge provides powerful grounds to challenge laws designed to obstruct refugees' movements within and across borders. For example, the High Court of Kenya's decision in *Kituo Cha Sheria v Attorney General*⁸ used ideas about refuge's restorative, regenerative and palliative functions to strike down the Kenyan government's forced encampment policy. The European Court of Human Rights similarly employed ideas of what refuge is designed to achieve in its rulings that refugees cannot be sent to Libya⁹ and Greece,¹⁰ rendering inoperable Italy's bilateral agreement with Libya and significantly affecting the Dublin Regulation's operation. The High Court of Australia drew on ideas of refuge as a duty in its decision that the Australian government's asylum seeker transfer agreement with Malaysia was invalid.¹¹ United Kingdom and New Zealand tribunal members provided strong grounds for Global North countries to continue to host those in need of protection who would otherwise add to the burden of already overstretched developing states and international organisations.

These initial judicial approaches to protection from refuge claims facilitate journeys for refugees who traditionally face the greatest impediments when travelling in search of refuge. In Chapter One, I stated that this thesis could indicate whether courts and other decision-making bodies can provide a forum to make refugees' journeys in search of refuge more realisable for refugees from more marginalised backgrounds. While in all of these protection from refuge victories decision-makers commence by conjuring up an image of an abstract refugee or IDP, in many cases, decision-makers then consider the ways refuge must respond to refugees with specific needs. For example, the Human Rights Committee, through the prism of the right to be free from inhuman and degrading treatment, recognised that refuge must be adapted to address the difficulties faced by single mothers. The High Court of Kenya, through the right to fair administrative action, stressed that refuge must cater to people with disabilities. The High Court

⁸ [2013] Kenya Law Reports (High Court of Kenya, Constitutional and Human Rights Division).

⁹ *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97.

¹⁰ *M S S v Belgium and Greece* [2011] I Eur Court HR 255.

¹¹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Plaintiff M106/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

of Australia, through its emphasis on the right to education in the Refugee Convention, handed down a decision of particular value for child refugees. Thus, judicial approaches to early or initial protection from refugee claims render refuge a dynamic concept: it is not a static idea fixed according to predetermined notions of refugees' needs, but a malleable one that can respond to refugees of different genders, ages and sexualities as well as refugees with disabilities and care responsibilities.

These observations raise a number of questions for further research. First, how do decision-makers' conceptualise refuge in other contexts? I have focussed on cases in which a refugee was seeking rescue from or transfer to a place of refuge. This is because I wanted to explore the ways judicial ideas of refuge facilitate or impede refugees' journeys. However, ideas of refuge may also be embedded in other types of claims refugees bring before courts and other decision-making bodies. For example, when refugees challenge changes to their host states' laws and policies on access to healthcare or welfare.¹² What ideas of refuge are reflected in these decisions? Do they differ from the concept of refuge emerging in protection from refugee challenges? Do they respond to the particular needs of refugees from more marginalised backgrounds? Also, I only examined protection from refugee decisions in cases where reasons for decision are publicly available. Whether unreported first instance judgments or initial decision-makers (often public servants) adopt a similar approach is an issue for future investigation.¹³

The identification of categorical reasoning and decision-makers' construction of the 'abstract' refugee or IDP may provide the basis for future enquiries in the field of refugee law and other areas more broadly. Can this judicial approach provide an antidote to refugee law's parochialism in other contexts? Is it an approach observable in rights claims made, not by refugees, but others with shared or 'irreducible' experiences and does it deliver similar legal victories? Further, is the adoption of categorical reasoning influenced by the ways legal advocates or *amici curiae* frame their submissions or engage in legal argument with decision-makers?

¹² See, eg, *Canadian Doctors for Refugee Care, The Canadian Association of Refugee Lawyers, Daniel Garcia Rodrigues, Hanif Ayubi and Justice for Children and Youth v Attorney General of Canada and Minister of Citizenship and Immigration* [2014] FC 651.

¹³ Arbel, Dauvergne and Millbank highlight that this is a methodological challenge in researching decision-making in refugee law: Arbel, Dauvergne and Millbank, 'Introduction' (n 1) 7–8. This would most likely arise with respect to the case law discussed in Chapters Three, Six and Seven.

III DIMINISHING REFUGE

The robust ideas of refuge adopted in the decisions discussed above have been replaced with minimalist notions of refuge. In protection from refugee claims made in the European context, decision-makers' conceptualisations of refuge changed from a legal remedy that has restorative, regenerative and palliative functions to a scarce commodity to be given to the most vulnerable. African decision-makers also switched from approaching refuge as a legal remedy designed to enable refugees to rebuild a meaningful life and heal from past trauma to one that is reserved for those judged the most vulnerable or most deserving. In direct challenges to bilateral and regional containment agreements, ideas about the nature of refuge shifted from a duty to a discretion, and the idea that there needs to be a threshold for adequate refuge dissipated from the jurisprudence. For Palestinian refugees, the concept of refuge was diluted from a right to an act of charity, and the ambit of refuge was narrowed from broad human rights considerations to protection of physical security. For prospective IDPs, notions of refuge withered to encompass only living conditions. The idea that refuge requires a state or international organisation willing and able to provide protection and that refuge is a shared duty also disappeared. Decision-makers later understood refuge as something that could be self-made and insisted that Global North states were not obligated to provide protection when states or international organisations in the Global South were under-resourced.

Another aspect of these protection from refugee challenges that promulgate impoverished notions of refuge is that decision-makers partially or completely excise the resisted place of refuge from the judicial lens. European decision-makers limited their consideration to the circumstances the refugee will face immediately on arrival in the prospective place of refuge and ignored the continuing relationship between the refugee and host state. Kenyan decision-makers paid no heed to the harms of camp life. Courts in Australia and Canada manoeuvred juridical borders in a manner that renders irrelevant the protection conditions in other nation-states. In the Palestinian context, the lens narrowed to consider the circumstances surrounding departure, thus removing from consideration many aspects of life for a Palestinian refugee in an UNRWA area of operation. For prospective IDPs, decision-makers no longer focussed on what life would be like in an IDP camp, but widened their gaze to consider the conditions experienced by the population in general.

By disengaging from the concept of refuge and removing or partially removing the place of refuge from the judicial lens, decision-makers defuse the tension in protection from refugee claims. Protection from refugee litigants can no longer draw on ideas of refuge to establish that they are entitled to special protection, but also point to the resisted place of refuge to highlight the non-existence of this care. It is only in the Australian context that these shifts are partly due to legislative change. In all other protection from refugee situations, decision-makers disengage with ideas of refuge and move away from a full examination of the resisted place of refuge without legislators' influence.

By circumscribing the concept of refuge and limiting consideration of the resisted place of refuge, decision-makers also disrupt refuge's temporality. As noted in Chapter Two, ideas about refuge's functions, nature, threshold and scope address refugees' past, present and future. What is lost in this jurisprudence is the idea that refuge should offer a sense of hope to refugees and allow them to imagine and build a future. Decision-makers in the European context drifted away from ideas of hope for the future by examining only the circumstances the refugee would face immediately on return and disregarding the future relationship between the host state and refugee. This lost focus on the future is evident in forced encampment jurisprudence when decision-makers shifted from using human rights law to address refuge's regenerative functions and instead used it to identify vulnerable or deserving refugees. It occurred in challenges to bilateral containment agreements where decision-makers no longer assessed the conditions of refuge in foreign countries with reference to the rights in the Refugee Convention and refugees became trapped between multiple and misaligned borders, unable to use legal processes to continue their journeys in search of refuge. It is evident in Palestinian cases in which decision-makers examined whether they were forced to leave an UNRWA area operation as opposed to the life they would live if they had to return. It can be observed in cases in which decision-makers satisfied themselves that an IDP camp did not present living conditions markedly worse than the rest of the population, rather than considering whether the prospective IDP would be able to regain a semblance of a normal life. By approaching protection from refugee decisions in this manner, decision-makers erase hope for a different and better future.

Decision-makers' dilution of the notion of refuge risks refugee law developing in an asymmetrical fashion: widening the categories of people entitled to international protection, but diminishing the protection to which they are entitled.¹⁴ Over the last few decades, courts and other decision-making bodies have demonstrated 'extraordinary judicial engagement with the [Refugee] Convention definition'.¹⁵ For example, courts have declared that women and sexual minorities can constitute a particular social group;¹⁶ that harm by non-state actors can amount to persecution if the state cannot or will not provide protection;¹⁷ and that persecution can encompass denial of economic, social or cultural rights as well as civil and political rights.¹⁸ This jurisprudence has evolved understandings of who is a refugee and enabled a wider range of people to enjoy refugee status. While courts have contributed to a dynamic interpretation of the refugee definition,¹⁹ this thesis suggests that subsequent to initial protection from refuge victories there has not been the same approach to the remedy, refuge. What can be observed are the beginnings of a misaligned development between questions of who qualifies for protection and the nature and extent of protection states must provide. A dynamic approach to the refugee definition alongside a minimalist approach to the idea of refuge risks expanding the circumstances in which international protection is triggered, but narrowing and truncating the protection owed.

As a result of these changes to decision-makers' approaches to protection from refuge claims, adjudicative bodies no longer provide fora to facilitate refugees' journeys in search of refuge. Rather, courts and other decision-making bodies have become another mechanism that impedes these voyages. Decision-makers have stopped using the different legal frameworks pleaded in protection from refuge claims to help to create a more equitable system of responsibility sharing. Instead, they employ these legal frameworks in a manner that perpetuates existing inequities. The only way refugees can continue their search for refuge through the institutions of

¹⁴ Kate Ogg, 'Protection from "Refuge": On What Legal Grounds will a Refugee be Saved from Camp Life?' (2016) 28(3) *International Journal of Refugee Law* 384, 414.

¹⁵ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 4–5.

¹⁶ *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 All ER 545 at 556–7 (Lord Steyn), 563–4 (Lord Hoffman), 569 (Lord Hope); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [32] (Gleeson CJ), [130]–[131] (Kirby J) ('*Khawar*').

¹⁷ *Khawar* (n 16) [29]–[31] (Gleeson CJ), [112]–[114] (Kirby J).

¹⁸ For example, in *RRT Case No N94/04178* (Unreported, Refugee Review Tribunal, Australia, 10 June 1994) discriminatory denial of healthcare was found to constitute persecution. See also *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19, [31]; *BG (Fiji)* [2012] NZIPT 800091, [90]; *MK (Lesbians) Albania v Secretary of State for the Home Department CG* [2009] UKAIT 00036, [353].

¹⁹ Hathaway and Foster (n 15) 4–5.

courts and other decision-making bodies is through establishing that they are atypical in some way.

I do not address why courts and other decision-making bodies across various jurisdictions have made this about-turn, but throughout the thesis I have offered some speculations and suggestions for future research. It may be that what has been dubbed the European refugee ‘crisis’²⁰ has affected decision-makers’ approaches to protection from refugee claims made by refugees in European countries. A study of the political environments in which forced encampment litigation takes place may shed some light on why Kenyan decision-makers have changed their approaches to these legal challenges. An understanding of how diplomatic ties between nation-states may influence judicial decisions could be useful in the context of direct challenges to bilateral containment agreements. Such a study would be particularly timely in the Canadian context, with a new challenge to the agreement between Canada and the United States²¹ prompted by President Donald Trump’s changes to refugee law and policy.

While the reasons for this shift in judicial approaches to protection from refugee claims are beyond the scope of this thesis, the fact that there has been a pronounced change is significant. In Chapter One, I highlighted that legal concepts do not only serve pragmatic ends, but are a reflection of norms and values. There are always ‘conflicting visions’ about how a state and/or the international community must or should treat refugees and asylum seekers.²² Adjudicative bodies (courts in particular) play an important role in contributing to both the legal and normative debate, because they often clash with the executive and legislature²³ and provide an ‘alternative narrative’.²⁴ That decision-makers have shifted from broad and comprehensive to minimalist understandings of refugee suggests that courts and other adjudicative bodies are becoming less inclined to counter states’ positions on appropriate standards of refugee protection. What

²⁰ The influx of refugees from the Syrian civil war into Europe is often referred to as a ‘crisis’, especially by politicians and the media, but some refugee law scholars resist the term ‘crisis’ on the grounds that the number of refugees are manageable for the European Union: Geoff Gilbert, ‘Why Europe Does Not Have a Refugee Crisis’ (2015) 27(4) *International Journal of Refugee Law* 531, 531. For an examination of the use of the term ‘crisis’ in international human rights law, see Benjamin Authers and Hilary Charlesworth, ‘The Crisis and the Quotidian in International Human Rights Law’ (2013) 44 *Netherlands Yearbook of International Law* 19.

²¹ *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, signed 5 December 2002, TIAS 04-1229 (entered into force 29 December 2004).

²² Mary Crock, ‘In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 12(1) *Pacific Rim Law and Policy* 49.

²³ Mary Crock, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ (2004) 25(1) *Sydney Law Review* 51; Marinella Marmo and Maria Giannacopoulos, ‘Cycles of Judicial and Executive Power in Irregular Migration’ (2017) 5(1) *Comparative Migration Studies* 16, 16–18.

²⁴ Marmo and Giannacopoulos (n 23) 4.

has occurred through this transition is the loss of a powerful conflicting vision or alternative narrative on how a state or the international community should respond to those who come in search of refuge.

IV THE GENDERED EXCEPTIONAL REFUGEE

Arbel, Dauvergne and Millbank provide the most recent examination of gender, refugee law and decision-making in 2014. They suggest that refugee law jurisprudence has moved on from a situation where women's experiences are ignored.²⁵ In the 1980s, decision-makers understood the 'classic refugee' to be a political dissident fleeing state oppression, which 'was a much better fit for men than for women'.²⁶ After decades of sustained feminist engagement with refugee law, policy-makers and decision-makers now 'put gender on the tick-box list of topics for consideration'.²⁷ Arbel, Dauvergne and Millbank's study is an 'international comparative project on gender-related persecution and [refugee status determination]'.²⁸ This is a reflection of the literature on gender and decision-making in refugee law more broadly that overwhelmingly focusses on decision-makers' approaches to refugee definitions, as opposed to their understandings of refugee protection.

This thesis indicates that decision-makers' approaches to gender in some protection from refugee contexts is far behind the progress made in consideration of gender in refugee status assessments. For example, in their employment of the exceptional refugee trope in protection from refugee claims made by Palestinian refugees, decision-makers reproduce the archetypal refugee fleeing physical harms emanating from the public sphere. These judgments are gender blind in the sense that they ignore or discount risks women are more likely to face in places of so-called refuge such as forced marriage. They are also gendered in that they create precedents more likely to assist male Palestinian refugees in their searches for refuge. There are also gender-blind decisions in jurisprudence from the European Court of Human Rights, where decision-makers do not consider factors such as gender, pregnancy and previous experience of sexual violence in their consideration of whether a return under the Dublin Regulation would pose a risk of inhuman or degrading treatment. By switching the focus from the refugee definition to the remedy (refuge), this thesis illustrates that, in some contexts, refugee law decision-makers

²⁵ Arbel, Dauvergne and Millbank, 'Introduction' (n 1) 3.

²⁶ *Ibid* 3.

²⁷ *Ibid* 1.

²⁸ *Ibid* 9. There is only one chapter in Arbel, Dauvergne, and Millbank's edited collection concerning what I call protection from refuge challenges, Arbel's study of litigation on the bilateral agreement between Canada and the United States, which I drew on in Chapter Five.

have not made the basic progression from gender-blind decisions that create legal tests more fitting for men than women to including gender as an important unit of analysis.

While some protection from refugee challenges are arbitrated in this manner, in others decision-makers acknowledge that gender, as well as factors such as sexuality, youth and disability, are important factors that must be considered. This puts these protection from refugee decisions in line with refugee status assessments where decision-makers ‘routinely’ consider questions of gender.²⁹ However, this thesis reveals that many decision-makers are not engaging with questions of gender in any substantive way, but are approaching them in a perfunctory manner. This comes across most strongly in the chapters on European protection from refugee claims (Chapter Three) and internal relocation (Chapter Seven), where decision-makers acknowledge that, for example, single women may be more vulnerable in certain places of refuge, but determine that they will have adequate protection because of assistance provided by non-government organisations or family members. There is no assessment as to the nature of assistance provided and whether and how this may insulate the woman from the particular risks to which she may be exposed.

These desultory approaches to gender in protection from refugee claims raise the same query Arbel, Dauvergne and Millbank ask in the refugee status assessment context: when ‘the argument can no longer be for jurisprudential inclusion’, how do we facilitate ‘more meaningful, more complicated, more substantive analysis’?³⁰ This thesis provides some insights on this question. As discussed above, protection from refugee claims are more successful for all refugees (including refugees from more marginalised backgrounds) when decision-makers start their reasoning by considering the irreducible aspects of refugeehood, rather than focussing on the specific refugee litigant’s circumstances. This finding is a controversial one in the context of refugee jurisprudence. Scholars and the UNHCR encourage refugee law judges to take account of factors such as gender, sexuality, age and disability in their decisions,³¹ and this is a position

²⁹ Arbel, Dauvergne and Millbank, ‘Introduction’ (n 1) 1.

³⁰ Ibid 6.

³¹ See, eg, Deborah Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133; Alice Edwards, ‘Age and Gender Dimensions in International Refugee Law’ in Erica Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 46; Constance MacIntosh, ‘When “Feminist Beliefs” Became Credible as “Political Opinions”’: Returning to a Key Moment in Canadian Refugee Law’ (2005) 17(1) *Canadian Journal of Women and the Law* 135; UNHCR, *Guidelines on International Protection No 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/GIP/02/01 (7 May 2002); UNHCR, *Guidelines on International Protection No 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context*

I have advocated for in previous research.³² However, this thesis indicates that when decision-makers move directly to these considerations without first considering the notion of refugeehood, the result is ‘invidious comparisons between categories’, and Arbel, Dauvergne and Millbank warn of this.³³ For example, the idea of the ‘peculiarly vulnerable’ refugee in European protection from refugee decisions disadvantages male refugees, because, by virtue of their gender, decision-makers do not deem them to be peculiarly vulnerable. Even refugees whom jurisprudence identifies as vulnerable often cannot make successful protection from refugee claims, because decision-makers do not consider them as vulnerable as others. For example, there is jurisprudence in the United Kingdom that indicates that most single women would not be expected to seek refuge in an IDP camp, yet decision-makers find reasons why the particular female refugee bringing the claim would not be vulnerable in a camp setting. Conversely, in cases where decision-makers start from a general understanding of the predicament of refugeehood and then add to that an appreciation of the ways factors such as gender and age heighten the risks intrinsic to seeking refuge, decision-makers engage with a person’s gender, age or disability in more meaningful, substantive and complicated ways. For example, in Chapter Three I observed that the United Kingdom Upper Tribunal has explored the risks of unaddressed psychological trauma for unaccompanied minors and connected it to the importance of family reunification. In the same chapter, I discussed how the Human Rights Committee, through the prism of the right to be free from inhuman and degrading treatment, has acknowledged the difficulties faced by single mothers in many places of supposed refuge. In Chapter Four, I highlighted that the High Court of Kenya emphasised the importance of healthcare for refugees with disabilities and used this in its assessment of why forced encampment is a violation of the right to fair administrative action. These decisions illustrate the ways decision-makers can use legal frameworks to construct robust and intricate understandings of refuge that respond to refugees’ specific needs.

By asking the gender question in the context of protection from refugee challenges, this thesis raises new questions for research. One dynamic that arises in protection from refugee scenarios that is not encountered in refugee status assessments is that decision-makers can remove or partially remove the resisted place from judicial view. This does not arise in refugee status

of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/GIP/12/01 (23 October 2012) (‘*Guidelines of International Protection No 9*’).

³² Kate Ogg, ‘Separating the Persecutors from the Persecuted: A Feminist and Comparative Examination of Exclusion from the Refugee Regime’ (2013) 26(1) *International Journal of Refugee Law* 82.

³³ Arbel, Dauvergne and Millbank, ‘Introduction’ (n 1) 6.

assessments where decision-makers are required to consider the harms in the refugee's country of origin or habitual residence. When decision-makers do this, they place the gendered harms that occur in places of so-called refuge outside the court's purview. For example, this is evident in M68's failed bid in the High Court of Australia to resist her transfer to Nauru.³⁴ Excising the resisted place of refuge from the judicial gaze gives rise to a situation where protection from refuge can only be obtained through risky or extra-legal means. In Chapter Five, I noted that, despite M68 being unsuccessful in the High Court of Australia, a broad section of the Australian community successfully rallied to prevent M68 and other refugees from being transferred to Nauru. An important question for future research is the role that gender plays in these extra-legal attempts to obtain protection from refuge. The discourse surrounding the Let Them Stay campaign indicates that gender is an important variable in these extra-legal campaigns to protect refugees from places of only nominal refuge. For example, the Australian Council of Trade Unions' 2017 statement on the Let Them Stay campaign advocates that pregnant women, children and families should be allowed to stay in Australia.³⁵ A survey conducted by the Australian Broadcasting Commission in 2016 suggests that M68's story and, in particular, her role as mother to a child born in Australia led to a 'softening in the hardline stance voters have on asylum seekers'.³⁶ This prompts questions as to why there has not been the same level of sustained community engagement with respect to single men in Australia's offshore processing centres and why there was no such campaign raised for S99, a woman who had been raped on Nauru and wanted access to a country in which it would be safe for her to terminate the pregnancy.³⁷

Another research gap this thesis indicates is the lack of decision-maker guidance on questions of gender, age, sexuality and disability for situations in which refugees are using courts and other decision-making bodies to seek rescue from or transfer to a place of refuge. The United Nations High Commissioner for Refugees ('UNHCR') has published guidance for decision-makers on questions of gender and sexuality in refugee status assessments.³⁸ Canada has also

³⁴ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

³⁵ Australian Council of Trade Unions, *Let Them Stay* (2017) <<https://www.actu.org.au/media/1033413/actu-release-170828-let-them-stay.pdf>>.

³⁶ Lewis, Peter, 'Babies of Asylum Seekers Have Stirred Our Conscience', *ABC News* (online at 17 February 2016) <<http://www.abc.net.au/news/2016-02-17/lewis-babies-of-asylum-seekers-have-stirred-our-conscience/7175138>>.

³⁷ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] 243 FCR 17.

³⁸ UNHCR, *Guidelines on International Protection No 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/GIP/02/01 (7 May 2002); UNHCR, *Guidelines on International Protection No 9* (n 31).

published gender guidelines for decision-makers when interpreting the refugee definition.³⁹ Creating decision-maker guidance for protection from refugee scenarios would be challenging due to the different legal frameworks governing these actions. Nevertheless, neither the UNHCR's guidelines on effective protection,⁴⁰ or bilateral and multilateral containment agreements,⁴¹ or the internal protection alternative,⁴² all of which are relevant to the legal challenges in this thesis, mention gender. Similarly, the Michigan Guidelines on Protection Elsewhere⁴³ and Michigan Guidelines on the Internal Protection Alternative⁴⁴ are also silent on gender. The only guidance given to decision-makers on the role gender can play in protection from refugee challenges is the UNHCR's guidelines on article 1D, which briefly mentions that gender and sexual orientation and sexual and gender-based violence should be relevant to article 1D decisions.⁴⁵ It is important to provide guidance to decision-makers about the concept of refugee and the ways it must take account of different refugees' needs.

A further question for future research that this thesis points to is the role of gender in decision-makers' approaches to men's protection from refugee claims. In Chapters Three and Seven (European protection from refugee claims and international protection alternative jurisprudence), I unearthed a number of cases where decision-makers' characterisation of the refugee or asylum seeker litigant as a young, healthy, single man is part of the reasons why the claim is rejected. There is some consideration of male refugee law litigants from a gender perspective, but most focus on refugee status assessment and, in particular, gender-related persecution.⁴⁶ This reflects Spijkerboer's observation that 'in both academic and non-academic (refugee) legal discourse,

³⁹ Canadian Immigration and Refugee Board, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (13 November 1996).

⁴⁰ UNHCR, *Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum Seekers (Lisbon Expert Roundtable, 9-10 December 2002)* (February 2003) <<http://www.refworld.org/docid/3fe9981e4.html>>.

⁴¹ UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (May 2013) <<http://www.refworld.org/pdfid/51af82794.pdf>>.

⁴² UNHCR, *Guidelines on International Protection No 4: 'Internal Flight or Relocation Alternative' Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/03/04 (23 July 2003).

⁴³ Fourth Colloquium on Challenges in Refugee Law, 'The Michigan Guidelines on Protection Elsewhere' (2007) 28(2) *Michigan Journal of International Law* 207.

⁴⁴ First Colloquium on Challenges in International Refugee Law, 'Michigan Guidelines on the Internal Protection Alternative' (1999) 21 *Michigan Journal of International Law* 134.

⁴⁵ UNHCR, *Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees*, UN Doc HCR/GIP/16/12 (December 2017) [22], [24] <<https://www.refworld.org/docid/5a1836804.html>>.

⁴⁶ See, eg, Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013); Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2/3) *International Journal of Human Rights* 391; Caitlin Steinke, 'Male Asylum Applicants Who Fear Becoming the Victims of Honor Killings: The Case for Gender Equality' (2013) 17(1) *City University of New York Law Review* 233.

the dominant view is that gender is relevant only to a particular set of cases, if at all. That is, only a limited number of “gender specific” applications for asylum are assumed to raise issues of gender’.⁴⁷ Decision-makers’ reference to a person’s gender as a reason to conclude that he can be sent to or kept in a place ostensible refuge that poses serious harms is a concerning development and one antithetical to feminist engagement with refugee law which aims to develop a more gender-sensitive interpretation of refugee law for people of all genders, sexualities and ages. In resetting the agenda for analysis of gender in refugee law, Arbel, Dauvergne and Millbank outline a number of important issues for future research.⁴⁸ I would add to this agenda an increased focus on decision-makers’ approach to gender in men’s claims for protection beyond gender-related persecution claims and refugee status assessment.

V CONCLUSION

In this thesis, I explored how decision-makers approach and determine protection from refugee claims and whether their approaches facilitate or undermine refugees’ (or only certain refugees’) searches for places of genuine sanctuary. Scholars of refugee and forced migration studies often use metaphors or images to reflect the ways law positions refugees. Refugees are described as ‘between sovereigns’,⁴⁹ ‘beyond the pale of law’,⁵⁰ in a situation of ‘liminality’⁵¹ or in a ‘state of exception’.⁵² These depictions do not capture the relationship between law and refugee journeys discussed in this thesis. Refugees searching for safe havens are not suspended in an in-between space, placed in a legal vacuum or exist outside law’s reach. Rather, there are instances in which decision-makers approach protection from refugee claims in ways that build a powerful picture of refuge. In doing so, they deliver refugees significant legal victories that enable them to continue their search for refuge within and across borders. However, there has been a shift in decision-makers’ approaches to these claims, atrophying ideas of refuge and inhibiting refugees’ ability to seek a place of genuine sanctuary.

An image or metaphor that encapsulates this trajectory is the character of Tantalus from Greek mythology. As punishment for his crimes, Zeus condemned Tantalus to stand in a pool of water underneath the branches of a fruit tree. Perpetually hungry and thirsty, every time he reached

⁴⁷ Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate, 2000) 9.

⁴⁸ Arbel, Dauvergne and Millbank, ‘Introduction’ (n 1) 11–14.

⁴⁹ Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge University Press, 2009).

⁵⁰ Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of Law* (Ashgate, 2014).

⁵¹ Efrat Arbel, ‘Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States’ (2013) 25(1) *International Journal of Refugee Law* 65, 83.

⁵² Giorgio Agamben, *State of Exception*, tr Kevin Attell (University of Chicago Press, 2005).

for the fruit the branch would retract just out of reach and each time he bent down to drink the water it would recede. While refugees have not committed any crimes by searching for safe havens, like the figure of Tantalus they are reaching for something that they can envisage, but remains elusive. Decision-makers play a role in elucidating vivid images of refuge through judgments in which they outline powerful ideas about its functions, nature, threshold and scope. However, when refugees approach courts and other decision-making bodies, adjudicators position refuge just out of grasp. This is first brought about by ephemeral protection from refugee victories: while decision-makers initially create powerful precedents that overturn or disrupt containment policies and practices, they claw them back in later decisions. Just when refugees and their advocates think that the pathway to refuge has been opened, decision-makers circumscribe these legal avenues for facilitating refugees' searches for refuge. Second, decision-makers remove the possibility of realising refuge through their shift to impoverished ideas of what refuge is. This means that, while robust notions of refuge exist in jurisprudence, refugees cannot take hold of them when they come to courts and other decision-making bodies. Third, this image arises because even those refugees who should be in a position to make successful protection from refugee claims (those whom jurisprudence identifies as exceptional in some way) are rarely able to use these legal frameworks to continue their search for a place of genuine refuge. Decision-makers create tests that indicate that refugees from more marginalised backgrounds can use litigation to seek protection from a place of so-called refuge, but in individual cases find reasons for why these refugees cannot avail themselves of these legal protections. Finally, Tantalus is an apt simile because decision-makers approach these challenges in a way that cements the current global inequities in refugee responsibility. For many refugees, the place of refuge is achingly close—across a land border, over a stretch of water, outside the confines of a camp or even in the country in which the refugee is currently located. Decision-makers' approaches to these refugees' legal claims diminish, rather than enliven, the prospect of realising refuge in these places.

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