INTERNATIONAL REFUGEE LAW (published by Ashgate in 2010)

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INTRODUCTION

In the second edition of his book *The Refugee in International Law* (1996: xi), Goodwin-Gill acknowledged the "extraordinary growth in refugee studies, literature and case law" since the first edition of his book was published (1983). Indeed, international refugee law scholarship already existed at the time of the League of Nations but it truly exploded in recent years helped, no doubt, with the creation of several specialised journals in the field of refugee law (e.g. the *International Journal of Refugee Law*, the *Journal of Refugee Studies*, and the *Refugee Survey Quarterly*). This volume offers a selection of the most influential essays on chosen topics in international refugee law from a range of journals. Many more excellent essays that could not be reproduced in full in this volume due to lack of space, as well as books and chapters in books, are discussed in this Introduction and included in the Bibliography.

The study of international refugee law calls for an examination of key principles and concepts of refugee protection, namely, asylum, *non-refoulement*, non-discrimination, family unity, solutions, and international co-operation (including burden-sharing). Refugee protection also entails the recognition of broad human rights to refugees. This volume is structured around five themes, separated into Parts. Part I, on historical perspectives, discusses the evolution of the term 'refugee' and of the institution of asylum. It also examines the key role of the United Nations High Commissioner for Refugees (UNHCR) in the development of international refugee law, the evolution of the international protection regime, and two alternatives to asylum as durable solutions to refugee flows: regional arrangements and burden-sharing. Part II discusses key provisions of the 1951 Refugee Convention (i.e. the refugee definition and the principle of *non-refoulement*) and issues of implementation at the domestic level (particularly concerning credibility assessment). It also looks at criticism of the Refugee Convention. Part III deals with complementary protection through human rights instruments and cross-fertilization with international humanitarian

law and international criminal law. Part IV examines recent EU developments in the establishment of a common European asylum system based on the full and inclusive application of the Refugee Convention and other human rights law obligations. I have chosen the EU as a theme instead of other regional systems because of the predicted impact that this new European asylum legislation will have on international refugee law and human rights law. Finally, Part V looks at key challenges and perspectives on the future of international refugee law.

Part I Historical Perspectives

Refugees "have existed as long as history" (Feller 2001: 130). For example, in 1492, unconverted Jews were expelled from Spain and soon after from Portugal; similar expulsion carried on during the 16th and 17th centuries (Zolberg 1983: 289). Equally, the French Huguenots left en masse during the forty-year war which ended with Edict of Nantes in 1598. However, the international community only became aware of its responsibility to provide protection and find solutions for refugees during the time of the League of Nations and the election of Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921 (Goodwin-Gill 2008: 11). At the time, refugees were defined "by categories" (UNHCR 1979: para.3), such as Armenians refugees or Turkish refugees. It was only after World War II that the question of international migration (including the stateless and the refugee) became recognised as a one requiring an international solution.

Arendt, in her essay "We Refugees" (Chapter 1), discusses her experience as a "refugee" who, in 1941, emigrated to New York. First published in *The Menorah* journal in 1943, this much cited essay illustrates a critical juncture in the discourse on "refugees" and "ordinary immigrants" and the changing meaning of the term "refugee". Until World War II, the term "refugee" had been used mostly to describe a person driven to seek asylum because of some criminal act committed or some radical political opinion held. Thus, Arendt

writes: "In the first place, we don't like to be called "refugees." We ourselves call each other "newcomers" or "immigrants". … Before this war broke out … We did our best to prove to other people that we were just ordinary immigrants" (1999, 253). This idea that "refugees" are not just "ordinary immigrants" is critical in international refugee law, and is further explored in this volume by Weis (Chapter 2), Shacknove (Chapter 7), Gilbert (Chapter 15), Juss (Chapter 19), and Edwards (Chapter 20).

Directly related to the term "refugee" is the concept of "asylum". Asylum is a peaceful and humanitarian act; it has been defined as "the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it" (Institute of International Law 1950: 167, article 1). Asylum is not included in the main text of the 1951 Refugee Convention[1] or the 1967 Protocol Relating to the Status of Refugees[2] - though it is mentioned in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (which adopted the 1951 Refugee Convention) as well as in the Preamble to the 1951 Refugee Convention.[3] Notwithstanding, the UNHCR has advocated a generous asylum policy within the spirit of the 1948 Universal Declaration of Human Rights (UDHR) and the 1967 Declaration on Territorial Asylum (UNHCR 1979, para.25). Most states parties to the 1951 Refugee Convention have established procedures for eligibility purposes and grant asylum to person protected against *refoulement*.

Traditionally, asylum existed in favour of two groups of individuals: political offenders and common criminals. But asylum as a matter of international law is relatively new (Krenz 1966: 92). Article 14 UDHR proclaims:

[1] UN Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, 189 UNTS 150.
[2] UN Protocol Relating to the Status of Refugees, signed in New York on 31 January 1967, 606 UNTS 267.
[3] Asylum is also not mentioned in the International Covenant on Civil and Political Rights.

> Everyone has the right to seek and enjoy in other countries asylum from persecution.
>
> This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Weis's essay "Territorial Asylum" (Chapter 2), published in 1966, takes a historical perspective on this ancient institution. It traces the roots of asylum in the principles of state sovereignty and territorial supremacy, and discusses its evolution in the light of the development of extradition law during the 19th Century, and the imposition of increased restrictions on the freedom of movement of political refugees during the 20th Century. Under traditional international law, asylum has always been a sovereign right of a state. Yet, this essay also suggests that asylum may be regarded as a right of the individual. The latter view has since been confirmed by Gil-Bazo to the extent that the right to be granted asylum as a subjective right of individuals now exists under EU law (article 18 of the Charter of Fundamental Rights of the European Union), as well as in regional human rights treaties in America and Africa (Gil-Bazo 2008). Furthermore, it has been proposed that the notion of 'responsibility to protect' should include the responsibility to grant asylum and to open borders to those fleeing the most serious international crimes (Barbour et al. 2008; see also Edwards' essay in Chapter 20). Yet, this is not a view shared by everyone. Thus, Goodwin-Gill and McAdam maintain that "the individual still has no right to be granted asylum. The right itself is in the form of a discretionary power … a correlative right of the individual continues to be resisted" (Goodwin-Gill et al. 2007: 414-415). That said, states have certain legal obligations under refugee law, human rights law, and humanitarian law, in particular they have a duty of *non-refoulement* towards persons in need of protection. Hence, developments in these areas of laws are responsible for the setting of important boundaries to the discretion of states in granting (or not) asylum (see Part III below). An important question remains: does asylum constitute the best durable solution to refugee

flows, or should the focus be on root causes, regional solution, and burden-sharing?

The 1951 Refugee Convention does not deal with the causes of refugees' flows, in fact it ignores the state of origin as the source of refugees. Rather, the 1951 Refugee Convention concentrates on the persecution of individuals, the crossing of an international boundary and the lack of protection in the state of origin. Hence, 'early warning' was created as a process consisting in a wide range of activities spanning from "data collection and analysis through to preventive diplomacy" (Gilbert 1997: 209). Other solutions include regional arrangements and burden-sharing.

Regional solutions to the refugee problem have existed alongside the 1951 Refugee Convention and 1967 Protocol since the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa was adopted.[4] This has since been followed by the 1984 Cartagena Declaration in Latin America.[5] In addition, the EU recently adopted its own laws on refugee protection.[6] Rutinwa's essay "The End of Asylum?" (Chapter 3) illustrates the shift from

[4] The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 in Addis Ababa, 1001 UNTS 45.

[5] Cartagena Declaration on Refugees, adopted on 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

[6] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Official Journal L 326 , 13/12/2005 P. 0013 – 0034); Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Official Journal L 304, 30/09/2004 p. 0012 – 0023); Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Official Journal L 050, 06/02/2003 p. 0001 – 0010); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Official Journal L 031, 06/02/2003 p. 0018 – 0025); Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (Official Journal L 062, 05/03/2002 p. 0001 – 0005); and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Official Journal L 212, 07/08/2001 p. 0012 – 0023).

asylum/resettlement to containment in Africa (see also, Aleinikoff 1992). At the time of its adoption, the 1969 OAU Convention was a significant advance from the 1951 Refugee Convention in two respects. First, in addition to incorporating the 1951/1967 refugee definition, it expanded the definition to include victims of violence and generalized conflicts.[7] Second, it acknowledged the security implications of refugee flows by adopting a more specific focus on solutions (namely, voluntary repatriation - in contrast to the integration bias of the 1951 Refugee Convention) and by promoting a burden-sharing approach to refugee assistance and protection (Feller 2001: 133). That said Rutinwa's essay is critical of the changes that have occurred since the mid-1980s, as witnessed in the move from a traditional "open door" policy to a disengagement from commitment to asylum (see also, Okoth-Obbo 2001). He calls for a focus on the root causes of refugee flows in Africa, amongst other solutions.

Hathaway's essay "A Reconsideration of the Underlying Premise of Refugee Law" (Chapter 4) provides a valuable examination of the legislative history of the 1951 Refugee Convention, and of the role of states in the process of refugee determination at the domestic level (see also, Hathaway 1984). It is critical of current refugee law for failing to meet the needs of refugees and establishes a selective approach to burden-sharing (see also, Garvey 1985). Looking back to the 1920s, Hathaway argues that the linkage between refugee law and human rights was selective during the period 1938-1950, "in a way that reinforced the economic and political hegemony of major Western states" (1990, 142). He suggests instead a "regional and interest-driven protection in tandem with a general obligation to share the burden of addressing refugee needs" (1990, 134). More specifically, Hathaway calls for a solution that would accommodate the self-interest of states of potential resettlement, first refuge

[7] Note that a similar expansion of the definition of a refugee occurred in Latin America with the 1984 Cartagena Declaration. In Europe, although the definition of a refugee was not expanded, the scope of beneficiaries of international protection was: see Part IV.

and countries of origin. In this and his two subsequent essays (Hathaway 1991: 127, and Hathaway and Neve 1997: 198-207. See also, Hathaway (ed), *Reconceiving International Refugee Law* (1997)), Hathaway outlines a state-centric approach to refugee law. However, by suggesting a burden-sharing approach to the duty of refugee protection that is based upon "a sufficient level of financial and material assistance" (1990, 182), and later on based on each state's resources and absorptive capacity, Hathaway's approach was subject to forthright legal and moral criticism for being overly state-focused (Chimni, 1998; Juss 1998; Anker et al. 1998).

The 1951 Refugee Convention was drafted at a time when the Cold War began, hence it was labelled as the "child of the Cold War" (Bertrand 1993: 498). As its full name indicates - the Convention Relating to the Status of Refugees – the treaty concerns the definition as to who is a refugee (article 1), and the rights and benefits which persons recognized as refugees are entitled to, including the guarantee against *refoulement* (articles 3-34). In its early days, refugee status was limited to persons who were escaping events that took place before 1951 (essentially in Europe). A 1967 Protocol Relating to the Status of Refugees extended the application of the Refugee Convention to *all* refugees. To maximize accession, both instruments "were carefully framed to define minimum standards, without imposing obligations going beyond those that States can be reasonably be expected to assume" (UNHCR 2001: 29). The definition of a refugee in article 1A(2) of the Refugee Convention is that applied in most states in the world. There are currently (May 2009) 141 states parties to both the 1951 Refugee Convention and the 1967 Protocol (144 states parties to the Convention alone and 144 states parties to the Protocol alone). The underlying values of the Refugee Convention are stated by UNHCR as being: humanitarian, human rights and people oriented, non-political and impartial, international cooperation, and universal and general in character (UNHCR 2001: 2-3).

The 1951 Refugee Convention does not deal with issues of procedures (namely, how to make a decision on eligibility to *non-refoulement* and/or refugee

status) and these were never directly a matter of international law. Refugees and displaced persons from World War II were for the most part already in their new states, and those who were still crossing borders were generally welcomed by European states if only for propaganda reasons. The implementation and interpretation of the 1951 Refugee Convention were therefore left, first and foremost, with the contracting states, helped in their task by the Office of the UNHCR.

UNHCR was created as a subsidiary organ of the UN General Assembly in 1950.[8] It is entrusted with the primary function of ensuring international protection for refugees. This is explored in two essays in this volume. The first, by Lewis ("UNHCR's Contribution to the Development of International Refugee Law", Chapter 5), discusses a key element of the international protection function of UNHCR, namely, its contribution to the development of international refugee law, in cooperation with states (article 35, Refugee Convention). In the absence of an international body competent to monitor states' application of the Refugee Convention and to interpret its provisions (with the exception of the general function of the ICJ), UNHCR necessarily plays a crucial role in this area. Meanwhile, scholars have called for the establishment of an international judicial body independent from states (Fitzpatrick 1996, 243; Chimni 2001, 157; Macmillan et al. 2001; Hathaway 2002; Clark 2004: 607; and North et al. 2008). However, it is unlikely that states will agree to transfer their decision-making power to a central agency. Lewis' examination of the development of international refugee law by UNHCR extends to treaty law, soft-law and customary international law. She finds that recently international refugee law has mostly developed through customary international law and soft-law. She takes the principle of *non-refoulement* (Goodwin-Gill 1986) and the norm of temporary refuge (Perluss et al. 1986: 624) as examples.

[8] UNGA Resolution 428 (v) of 14 December 1950 (UN Doc. A/1775 (1950)).

In contrast to this 'a-political' picture of the UNHCR by Lewis, the second essay by Goodwin-Gill focuses on "The Politics of Refugee Protection" (Chapter 6). In so doing, it looks back to the 1920s and identifies competing interests - states v. individuals interests - in the international protection regime. This regime indeed provides a good example of where state compliance with standards of refugee protection may be motivated by self-interest at certain points in time. That is not to say that other reasons do not also exist. Thus, the norm of providing refuge for those fleeing persecution is arguably constitutive of modern liberal democracy (Gibney 2004). At the same time, states have a strong interest in regulating the cross-border flow of refugees (Hathaway et al. 2001). Historically, the refugee protection regime originated in the need to give some stability to post-war and post-colonial spurts of state building. Cronin argues that

> [The] IPR [international protection regime] for refugees was not created to assist those displaced from war. Rather states constructed the system to address post-war political developments that were related to the construction of new states and new political orders (2003: 156).

Leaders, nonetheless, shared a common sense of responsibility for the welfare of refugees (Garvey 1985). State interest took a new twist during the Cold War, as Western states used the 1951 Refugee Convention as a political tool to embarrass the Soviet bloc and sweep up defectors (Loescher 1986; Loescher 1993). Goodwin-Gill's essay is important because it clearly argues for a prioritization of protection over everything else, in particular solutions and assistance. In doing so, it re-focuses the debate about international protection onto its core values. Thus, international protection must be humanitarian and non-political in character, but more importantly, it also ought to be about individuals' dignity, worth and rights, in other words about *entitlement* to international protection. This issue is considered further by Edwards within the human security framework (Chapter 20).

Part II The 1951 Refugee Convention: Key Provisions and Implementation

During the drafting of the Refugee Convention, more time was spent on article 1 than any other article (of the 46 articles), mainly due to differences amongst states between a restrictive definition of refugee (that would be limited to events that took place in Europe before 1951) and a more general definition that could be applicable to future events. The restrictive view won, and refugee status was limited to pre-1951 events which occurred in Europe (Goodwin-Gill at al. 2007: 35-37). The drafters further restricted refugee status to violations of civil and political rights because these were rights that were beginning to be accepted in 1950.[9] In spite of this, the 1951 Refugee Convention is the first international treaty providing for a general definition of refugees.[10]

Article 1A(2) provides that the term "refugee" shall apply to

> any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Shacknove, in a much cited essay "Who Is a Refugee?" (Chapter 7), advocates a conception of refugeehood (i.e., the theoretical basis for the definition) going beyond the legal definition of a refugee in article 1A(2).[11] The 1951 Refugee Convention definition (which is applied in most states) is based on the existence of a bond between the citizen and the state. In the case of the refugee, this bond has been broken, and persecution and alienage are always the physical manifestations of this broken bond. These manifestations are the

[9] On the exclusion clause, see Michael S. Gallagher, "Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum", 13 *International Journal of Refugee Law* 2001, 310-336.
[10] Another definition of "refugee" is contained in the Statute of the Office of the UNHCR (Weis 1960: 936-938).
[11] For a full discussion of this legal definition see Goodwin-Gill and McAdam 2007: 63-134.

necessary and sufficient conditions for determining refugeehood. The 1969 OAU Convention is an exception: persecution is not the only criterion for refugeehood because of different historical context; external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, are also criteria for refugeehood.[12] Yet, Shacknove argues that both persecution and alienage are sufficient but *not* necessary criteria for refugeehood because both persecution and alienage are only the manifestation of a broader phenomenon: the absence of state protection of the citizen's basic needs (in the case of persecution) and the physical access of the international community to the unprotected person (in the case of alienage). In sum, the necessary conditions for refugeehood, according to Shacknove, are: persons deprived of their basic needs, with no recourse to home government, and with access to international assistance (in or out of the country of origin). Viewed in this way, the concept of a refugee acquires a new ethical dimension. In fine, this essay introduces a useful way of thinking about "who is a refugee?" that would accommodate new categories of people such as internally displaced persons, yet exclude others (e.g., those whose basic rights are protected by the government or who are not in a position to seek international assistance).

Today, many states accept that decisions on eligibility must respect basic procedural standards, such as the right to a comprehensive review of asylum decisions (Legomsky 2000; Gorlick 2003). But applicants often have a difficult task to convince decision-makers of the veracity of their stories. Credibility

[12] 1969 Convention on the Specific Aspects of Refugee Problems in Africa - Article I:
1. For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

determination (i.e., the assessment of oral testimony) rests at the core of refugee protection (Noll 2005). Yet, international refugee law "has failed to develop a body of evidentiary principles that is tailored to the unique dimensions of the testimony of those seeking asylum" (Byrne 2007: 609). The credibility of an asylum seeker may be seriously damaged if it transpires that the asylum seeker has lied. Because an asylum seeker has to show a well-founded fear, asylum procedures (at the early stage of first instance decision-making) generally provide a hearing during which the asylum seeker has to narrate her story, in other words tell about her fear and escape away from such fear. Hearings are usually not provided in cases that are found to be manifestly unfounded. Depending on a number of factors, hearings may play to the advantage or disadvantage of the asylum seeker. Kälin, in a ground-breaking essay "Troubled Communication" (Chapter 8), identifies five obstacles leading to misunderstandings in asylum hearings: manner of expression, interpreter, the cultural relativity of notions and concepts, different perceptions of time, and the cultural relativity of "lie" and "truth". The same barriers were identified in two further path-breaking empirical studies of US and Canadian asylum procedures (respectively, Anker 1992; Rousseau et al. 2002). These impediments to effective determinations of credibility are "unique" to the testimony of asylum seekers and "they challenge the conventional legal approaches to assessing credibility in asylum adjudications" which traditionally relies on four criteria: demeanor, consistency, accuracy, and corroboration (Byrne 2007: 622). One way therefore of dealing with these criteria may be to look at the evidentiary principles relating to the testimony of alleged victims of human rights abuses developed by international war crimes courts (Byrne 2007).

Another key provision of the 1951 Refugee Convention is article 33. Article 33(1) prohibits *non-refoulement*, being:

> [T]he return of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of

> race, religion, nationality, membership of a particular social group, or political opinion.

According to article 33(2), this principle may not however

> be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The principle of *non-refoulement* is enshrined in various other instruments[13] (e.g., the 1969 OAU Convention, the American Convention on Human Rights,[14] and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).[15] *Non-refoulement* has been described as "a cardinal principle of refugee protection" (Lauterpacht & Bethlehem 2003: 107). Its nature, scope and relationship with other key concepts, such as asylum and burden-sharing, have given rise to extensive scholarly debate, some of which is captured in Goodwin-Gill's essay "*Non-Refoulement* and the New Asylum Seekers" (Chapter 9). Many of the arguments in this seminal essay have since been confirmed in what is today the most comprehensive study on *non-refoulement*, namely Lauterpacht and Bethlehem (2003: 87-179; see also Goodwin-Gill 2007: 201-284). Significantly, Goodwin-Gill argues that *non-refoulement* has moved beyond the confine of article 1 to encompass also moral obligations towards "persons in distress", i.e., persons fleeing from situations of violence, violations of human rights, war, civil war, famine, or drought. In practice, therefore, *non-refoulement* has come to apply to a broader category of refugees, such as displaced person; it also applies in situations of mass influx. *Non-refoulement* covers state conduct beyond state territory, e.g., rejection at the border, in international and transit zones, extradition, etc. (Kneebone 1996; Goodwin-Gill 2003).

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[13] For a full list of all relevant instruments in refugee law, human rights law, and extradition law, see Lauterpacht and Bethlehem, at 90-93.
[14] OAS Treaty Series No. 36 (1969).
[15] 1465 UNTS 85.

State practice has thus broadened the scope of article 33 and *non-refoulement* has given rise to binding obligations under both treaty law and customary international law. However, its *jus cogens* nature remains more uncertain (Allain 2001; Duffy 2008). The 'safe country' concept has been presented as "a new notion of *non-refoulement*" one that states were forced to create in order to deal "with the emergence of the *potential* refugee or the asylum seeker and the subsequent burden on asylum administrations" (El-Enany 2007: 6; see also Byrne et al. 1996). *Non-refoulement* has also evolved in a human rights context into a fundamental component of the customary international law prohibition of torture or cruel, inhuman or degrading treatment or punishment (Goodwin-Gill et al. 2007: 345-354; Lambert 1999). In sum, states have been able "to patch together a minimally adequate regime for the protection of forced migrants" through the recognition of extra-conventional norms (Fitzpatrick 1996: 231). Goodwin-Gill's essay thus constitutes an important contribution to scholarship by firmly grounding the *non-refoulement* debate onto the risk or threat to refugees.

Finally, during the 1990s, the 1951 Refugee Convention became the object of strong criticism for being badly outdated and an artifact of a past era. In "Revitalizing the 1951 Refugee Convention" (Chapter 10), Fitzpatrick makes a powerful and convincing argument against such critique (see also, Goodwin-Gill 2001). She argues that "A crisis exists not because the Convention fails to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States parties involved" (Fitzpatrick 1996: 231). She further challenges some of its key weaknesses, i.e., the vagueness of the refugee definition, the lack of a uniform framework for refugee processing, and the lack of explicit provision on crucial substantive issues. Yet, she argues, it may not be timely to abandon the Refugee Convention foundation until states are prepared to assume new binding legal commitments that would address these issues. Hence, Fitzpatrick recognizes the need to do more in the area of cooperation between states in light of recent focus on

"comprehensive cooperation relationships among refugee-producing, first asylum and industrialized States" (1996: 253). In summary, the 1951 Refugee Convention was never meant to provide answers to all the pressing and difficult questions posed by contemporary forced migration. By arguing that the 1951 Refugee Convention is not obsolete and that it continues to guide states responses to the refugee problem, this essay continues to represent the common wisdom today.

Part III Refugee Law and its Relationship with International Human Rights Law, International Humanitarian Law and International Criminal Law

The formal acknowledgment that international refugee law is indeed part of international human rights law has been traced back to the adoption of the Refugee Convention as a treaty (Goodwin-Gill et al. 2007). Yet, a number of factors (such as the lack of a subjective right of asylum, the inclusion of traditional concepts of sovereignty and the Cold War) created a narrow conception of refugee law (Hathaway 1990), one that became "segregated from the development of international human rights law" (Gowlland-Debbas 1995: x). It was not until the 1990s before there were any significant references made to rights in the Conclusions adopted by the Executive Committee (EXCOM) of the UNHCR (UNHCR 2005) and for legal scholarship to articulate fully the relationship between refugee law and human rights law. Today, this relationship is well-documented and notwithstanding some criticism, the human rights approach is currently the dominant one in refugee law (Lambert 2009a). The human rights approach explains that refugee law operates on the premise that a human rights violation has taken place or is going to take place imminently. It also takes human rights law as a benchmark for the quality of protection provided by states (and by the UNHCR) to refugees in countries of origin (e.g., internal protection)

and in countries of refuge (in terms of the rights granted to asylum seekers as well as the rights granted upon recognition of refugee status and complementary protection (McAdam 2007, 2008; Foster, 2007; Goodwin-Gill 2004; Hathaway 2005; Lambert 1999, 2005, 2006).

Article 3 of the 1951 Refugee Convention is particularly relevant here; it guarantees the application of the provisions of the Convention "without discrimination as to race, religion or country of origin". Such a principle is well-recognised in several instruments of international human rights law. Finally, the human rights approach is being used to tackle issues of state's responsibilities (Gil-Bazo 2006: 600) as well as UNHCR's accountability (Pallis 2006). Viewed from this enlarged perspective, the debate about the linkage between refugee law and human rights law has revealed a number of issues that had remained largely unaddressed in refugee law, such as the right to leave, to return, and to remain (see Juss, Chapter 19), the obligations of the receiving state to meet certain standards of treatments (concerning in particular the right to family life and the right to work (Edwards 2005)), the obligations of UNHCR to act in accordance with international human rights law in its refugee status determination activities (Pallis 2006; Kagan 2006; Alexander 1999; Wilde 1998), and the human rights situation in the country of origin (e.g., state responsibility, root causes, see Ziegler 2002; Gilbert 1997).

Two essays were selected to illustrate the relationship between refugee law and human rights. Anker's essay, "Boundaries in the Field of Human Rights" (Chapter 11), considers gender asylum law as paramount in the application and acceptance of the human rights paradigm, and advocates a mainstream human rights approach to interpreting key elements of the refugee definition, such as persecution. A better grounding of the interpretation of refugee law terms (e.g., persecution) in human rights law, coupled with an increase in trans-national dialogue mean that "international human rights law is providing the unifying theory binding different bodies of national jurisprudence" (2002: 136). Looking specifically at the examples of rape and sexual violence, female genital surgery,

and family violence, she argues that both refugee law and human rights law have a lot to learn from each other, and that making the relationship between these two areas of law explicit "creates opportunities for advances within both fields" (2002: 146). In this regard, Edwards argues that human rights law has been found to give meaning to the right 'to enjoy' asylum (article 14 UDHR) going beyond the rights owed to refugees in articles 3-34 of the 1951 Refugee Convention (Edwards 2005, see also Hathaway 2005: 8).

In "Seeking Asylum under the Convention on the Rights of the Child" (Chapter 12), McAdam argues that consideration of the best interests of the child ought to be added onto application of article 1A(2) of the Refugee Convention. In fact, the best interests principle "may also constitute a complementary ground of protection in its own right" (2006: 251), and thus fill the gaps in the application of the Refugee Convention to children. This is an important essay because it discusses a major human rights instrument, i.e., the 1989 Convention on the Right of the Child,[16] that up until then had been largely overlooked.

But human rights law was not alone in playing an important role in the development and evolution of refugee law. It is indeed generally recognized that armed conflict, whether international or internal, is the most important cause of flight. So, international humanitarian law too has impacted on refugee law. More recently, refugee law scholarship has also increasingly started to look at international criminal law in its concern for the development of a fully integrated system for the protection and promotion of refugee rights. Key aspects of the relationship between international humanitarian law and refugee law (but also human rights law) are examined by Jaquemet in "The cross-fertilization of international humanitarian law and international refugee law" (Chapter 13). This essay discusses the concurrent application of refugee law and international humanitarian law (i.e., when refugees are caught up in an armed conflict) and successive application for both regimes (i.e., when prisoners of war released at

[16] 1577 UNTS 3.

the end of hostilities refuse to be repatriated and apply for asylum). It also points to three developments that will (or could) lead to a closer relationship between international humanitarian law and refugee law. First, is the debate concerning persons forced to flee their homes as a result of armed conflict and who remain in their state, i.e., internally displaced persons (IDPs) (Phuong 2000, 2004). Second, is the recent development of international criminal law concepts, principles and rules (through the establishment of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court) and which will increasingly influence refugee law through a process of 'borrowing' (Byrne 2007; see also Smith 2008; Gallagher 2001). Third, is the development of rules on state responsibility for illegal acts (such as graves breaches of international humanitarian law, and the creation of refugee flows) which can entail the payment of compensation (Ziegler 2002; Akhavan et al. 1989).

Part IV EU Dimension of Refugee Law

Since the Tampere meeting of the European Council in October 1999, the European Union (EU) has been developing as a common area of freedom, security and justice. In order to do that, the member states agreed to work towards establishing a common European asylum system by making full use of the provisions in the Amsterdam Treaty 1997 (Title IV).[17] The new legal order in European asylum is being shaped by a number of key legislative measures, including, the Asylum Procedure Directive 2005, the Qualification Directive 2004, the Reception Directive 2003, the Dublin II Regulation 2003, the Eurodac Regulation 2002, and the Temporary Protection Directive 2001.[18] From the

[17] The Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997.

[18] For a full reference to these legislative acts, see footnote 6. The Commission is currently (2009) proposing further amendments to this legislation with the objective of improving

perspective of international law, the Qualification Directive is undoubtedly the most important instrument in the new legal order because "it goes to the heart of the 1951 Convention Relating to the Status of Refugees" (Lambert 2006: 161). This instrument combines refugee protection and subsidiary protection under one umbrella in one of the "most ambitious attempt to combine refugee law and human rights law in this way to date" (Lambert 2006: 162). Issues of procedures (i.e., how to make a decision on qualification) remain outside the scope of the Qualification Directive but these were dealt with in a separate Asylum Procedure Directive (Costello 2005).

Guild's essay on "The Europeanisation of Europe's Asylum Policy" (Chapter 14) provides a powerful critique of the protection provided by EU member states to refugees and of their responsibilities towards refugees. This essay traces the most important steps towards the protection of refugees in the EU, which Guild argues constitute a "process of de-territorialisating protection obligations" for refugees already in, or seeking to enter, the EU. In other words, the geographical EU common territory being no longer the object of sovereign responsibilities, there is now "space for an opportunistic exclusion of protection responsibilities which are tied to sovereignty" (see also, Juss 2005). She finds that this gap has been filled to some extent by human rights law, the 1950 European Convention on Human Rights (ECHR)[19] in particular. Both legal orders complement each other, but they are separate. Hence, the EU member states remain accountable to the European Court of Human Rights for their protection obligations under EU law whenever these obligations involve a right or obligation under the ECHR. There can be no hiding behind notions of common territory and loss of sovereignty before the European Court of Human Rights which "has pushed in the direction of a 'collectivisation' of responsibility" (2006: 630).

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protection. See S. Peers, "Statewatch analysis – the EU's JHA Agenda for 2009", available at http://www.statewatch.org/analyses/eu-sw-analysis-2009-jha-agenda.pdf

[19] ETS No. 5.

Gilbert's essay "Is Europe Living Up to its Obligations to Refugees?" (Chapter 15) complements the picture. Gilbert's fundamental criticism of the EU approach towards refugee protection is that it has inextricably "fused" refugee protection and immigration control; an immigration control mentality is driving refugee policy. Consequently, EU states will continue to choose who should be protected within the EU, and currently this category of people is becoming increasingly small (see also, El-Enany 2007). Like Guild, he points to the ECHR for complementary protection but warns the EU member states against a watering down of their legal obligations outside the states members of the Council of Europe because these states lack the same safety net as the EU member states (see also, McAdam 2005: 516).

Finally, two essays are included in this volume to illustrate a shift in refugee law scholarship (in this case in Europe) from a vertical level to a horizontal or lateral level of analysis.[20] Byrne, Noll and Vedsted-Hansen in "Understanding Refugee Law in an Enlarged European Union" (Chapter 16) focus on the lateral process of refugee law formation, transformation and reform in Europe, and explore its effects on states practice and refugee protection in the Baltic and Central European countries. They reveal a normative process of development and proliferation that is mostly bilateral and domestic-level-driven, and not so dictated by Brussels. They warn against "the myth of vertical transformation" because "in reality, asylum norms are transformed in a constant interplay between domestic, sub-regional and regional forces" (2004: 377). They conclude that "domestic legislation as formed by sub-regional dynamics will remain the ultimate object of study for scholars of international refugee law" (2004: 355). Notwithstanding the role of the European Court of Justice in European asylum law, my essay "Transnational Judicial Dialogue, Harmonization and the Common European Asylum System" (Chapter 17) discusses the key role

[20] For similar initiatives "in the South" (i.e., Africa, Asia, Latin America and the Middle East), see B. Harrell-Bond, 'Starting a Movement of Refugee Legal Aid Organizations in the South', *International Journal of Refugee Law*, 19 (2007), 729-746.

played by national judges in the member states in the creation of a common European asylum system. Based on empirical research as well as semi-structured interviews, my research reveals a surprising lack of trans-national use of national jurisprudence on asylum between judges. It points to a mix of rational and cultural factors that explain this outcome. It recognizes that the Europeanisation of asylum law is likely to encourage transnational judicial dialogue in this area. Nonetheless, my essay highlights the need for a whole new kind of trans-state activities (based on reciprocity and trust between national courts), and which are conducive to dialogue, to occur for the new European asylum system to work.

Chapter V Challenges and perspectives on the future

International refugee law continues to face many challenges from the mass influx of refugees (Durieux and McAdam 2004; Durieux and Hurwitz, 2004) to the international measures adopted against human trafficking and smuggling (Hathaway 2008; Kneebone 2008), the development of rules on states' responsibility for wrongful acts which can entail the payment of compensation (Ziegler 2002; Akhavan et al. 1989), and issues of UNHCR's accountability under international human rights law (Alexander 1999; Kagan 2006; Pallis 2006; Wilde 1998). Three essays have been selected here for their radical and/or forward thinking in developing refugee law. The first concerns the debate on globalization and the North-South divide (Chimni 2001). The second proposes a radically new integrated approach to refugee protection and migration (Juss 2004). The third discusses the potential of the emerging human security framework for refugee rights (Edwards 2009).

Most scholars sympathize with the idea that refugee law should develop through dialogue between a wide range of participants worldwide. In his essay "Reforming the International Refugee Regime" (Chapter 18), Chimni critiques current refugee law and calls for increasing and widening dialogue between

states and other actors, including refugees, in an "emerging global state" (Chimni 2001, 2004). He had previously argued that dialogue is crucial to arrive at "a consensus on the changes to be introduced in the post-war regime" (Chimni 1998: 369). In this essay he explains that such dialogue ought to take place between scholars, lawyers, refugees, states, UNHCR, non-governmental organisations from the North but also include the South, and it should be based on the principles of deliberative democracy (i.e., on the basis of good argument as opposed to one's own interest) (Chimni 2001: 152). Looking at the EU in particular, Chimni finds that such dialogue is absent because the EU is developing its common asylum system without entering into dialogue with other regions (such as North America) or the South, in spite of the influence that this regime will have on these other regions "through redefining the relative obligations of different regions of the world to the global refugee problem" (Chimni 2001: 157).

Juss's essay "Free Movement and the World Order" (Chapter 19) critically examines the framework in which refugee law operates, that is, twentieth century restrictions on free movement rights. He describes these restrictions as a departure from what has been the historical norm in human society. In a most radical departure from general wisdom, he introduces a new way of thinking about states control on entry, namely, legalising free movement rights as a first step towards a 'rational' policy on migration that would benefit both the developing and developed countries, as well as voluntary and involuntary migrants alike. More particularly, Juss is calling for the "concepts of universal equal access, opportunity, and openness", that is, of a right 'to relocate', to be taken more seriously by states, globally (Juss 2004: 308). Looking at the cost involved in controlling freedom of movement and the sheer impossibility of controlling all immigration, particularly in the rich developed countries in the North, Juss explains that "'political realism' is badly needed in international migration policy" (Juss 2004: 309).

Finally, Edwards in "Human Security and the Rights of Refugees" (Chapter 20) draws on international relations theory in exploring the relevance and usefulness of the human security framework for refugee protection. The premise of her analysis – which is largely uncontested - is that the legal protection framework contains gaps and limitations. Edwards notes that there are also criticisms of the concept of human security, in particular, surrounding its lack of a precise definition, lack of a legal framework, "securitization" problems, and poor enforceability. Nonetheless, she embraces the human security approach as having the potential to transform our approach to protection. With its "people-centred" focus on rights and needs, its support on principles of interdependence, multilateralism, international cooperation, and early prevention, Edwards argues "The human security framework already shares many of the central tenets of human rights and refugee protection" (Edwards 2009: **XXX –p. 58 draft manuscript**). Crucially, with its focus on the empowerment as well as protection of individuals, the human security approach has the potential to produce a "conceptual shift from viewing refugees as protection-seekers" to "persons capable of contributing positively to their host communities" (Edwards 2009: **XXX –p.57 draft manuscript**).

In conclusion, the essays in this volume reveal a picture of international refugee law that is dynamic and constantly evolving. From an instrument designed to protect mostly those civilians fleeing the worse excesses of World War II, the 1951 Refugee Convention has developed into a set of principles, customary rules, and values that are now firmly embedded in the human rights framework, and are applicable to a far broader range of refugees (UNHCR 2008: para.3). In addition, international refugee law has been affected by international humanitarian law and international criminal law (and vice versa). Thus, there is a reinforcing dynamic in the development of these complementary areas of law. At the same time, in recent decades states have shown a renewed interest in managing migration, thereby raising issues of how to reconcile such interests

with refugee protection principles. Amongst these principles, the right *to enjoy* asylum, the right to freedom of movement, and the right to an adequate standard of living are becoming increasingly important. In addition, the emergence of concepts of participation (or empowerment) and responsibility (to protect) promises to have an impact on international refugee law.

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