Part II The Treaty Regimes of International Migration Law, 3 Refugees

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The universal treaty regime of refugee protection is primarily governed by two specific instruments: the UN Convention Relating to the Status of Refugees of 28 July 1951 and its 1967 Protocol. Currently ratified by 147 states across the world, they establish a sophisticated body of international rules based on three parameters: the refugee definition (section 3.1), the refugee status (section 3.2), and the principle of non-refoulement (section 3.3). Each of them discloses a subtle balancing act between the competence of the state to control access to its territory and the protection of victims of human rights’ violations. This foundational tension represents the existential dilemma of refugee protection which underlies the design of the Geneva Convention as adopted after the Second World War and the subsequent development of international law.

3.1 The Refugee Definition

From the perspective of general international law, identifying foreigners who deserve protection is the normative corollary to the absence of a generalized freedom of movement. It is not by coincidence that the emergence of modern refugee law occurred with the generalization of migration controls during the interwar period. International refugee law constitutes an exception to the migration control paradigm and, as such, the former legitimates the latter within a self-referential logic. Hence, defining who is a refugee not only identifies persons in need of protection, but also determines the correlative extent of states’ international obligations under the Geneva Convention. This duality informs the very structure of the refugee definition (section 3.1.1) and reveals some of its most obvious limits (section 3.1.2).

3.1.1 The structure and rationale of the refugee definition

The refugee definition has always been considered the ‘crux of the entire matter’ and ‘the cornerstone on which the entire edifice of the Convention rested’. At the same time, during the 1951 Conference of Plenipotentiaries, state representatives stressed that they ‘could not sign a blank cheque and assume unlimited and indefinite commitments in respect of all refugees’. Given such anxiety, ‘the Convention definition was tailored to fit an approximately foreseeable number of prospective beneficiaries who fell within acceptable categories’. This reflects the original premise of refugee protection. As Jaqueline Bhabha observes, ‘from the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violations. It was always clear that only a subset of forced transnational migrant persecutees were intended beneficiaries.’

The selectivity of the refugee definition is inherent in its very structure, which is composed of three different layers of requirements, commonly labelled as the inclusion, exclusion, and cessation clauses. Article 1(A)(2) of the Geneva Convention spells out the inclusion criteria on the basis of four cumulative conditions: first, a refugee is outside his/her country of origin; second, he/she is unable or unwilling to avail himself/herself of the protection of his/her country; third, such inability or unwillingness is attributable to a well-founded fear of persecution; and fourth, persecution or the lack of protection therefrom is linked to at least one of five limitative grounds (race, religion, nationality, membership of particular social group, or political opinion).
The exclusion clauses further reinforce the selectiveness of the refugee definition in line with the typical concerns of states. Even if a person duly satisfies all (p. 171) the conditions spelt out in Article 1(A)(2), he or she is excluded from the Geneva Convention under two different sets of circumstances. First, a person cannot enjoy the surrogate protection offered by the refugee status if he or she already benefits from some form of international or national protection, be it UN protection (Article 1(D)) or the rights and obligations attached to the possession of nationality in the country of residence (Article 1(E)). Second, Article 1(F) additionally excludes those who have committed particularly serious crimes. According to the French delegate during the 1951 Conference, this provision was introduced for the very purpose ‘of separating the wheat from the chaff’. As acknowledged by subsequent state practice, ‘the rationale... is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees’. Their exclusion is nevertheless limited to the most severe crimes that are exhaustively enumerated in Article 1(F), namely crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and acts contrary to the purposes and principles of the United Nations.

The cessation clauses enumerated in Article 1(C) further underline the temporary nature of the protection granted by the Refugee Convention. The refugee status is terminated as soon as the need thereof is no longer justified. The Geneva Convention thus sets out the criteria for considering that a person has ceased to be a refugee, either because of voluntary acts on the part of the concerned individual or due to a fundamental change in circumstances in the country of origin.

As epitomized by the three layers of requirements governing inclusion, exclusion, and cessation of the refugee status, the Geneva Convention was not conceived as a comprehensive instrument aimed at protecting all persons who are forcibly displaced from their own country. This restrictive stance permeates all the components of the definition adopted in 1951. Nonetheless, the subsequent development of international law has considerably shaped its meaning and rationale. As with any other conventional rules, the Geneva Convention must be construed and applied within the normative context prevailing at the time of its interpretation, including, therefore, in light of the human rights treaties adopted since its entry into force. Such an evolutive interpretation has proved to be essential to adapt the 1951 (p. 172) Convention to the ever-changing reality of forced migration. Human rights law also provides a universal and uniform set of standards which constitutes a persuasive device for harmonizing the unilateral and frequently diverging interpretations of States Parties to the Refugee Convention.

As acknowledged by domestic courts, the term ‘refugee’ is ‘to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights ... and the International Covenant on Civil and Political Rights’. The five limitative grounds of persecution provide an obvious illustration: the grounds of religion and political opinion are clearly based on freedoms of thought, opinion, and expression, while the other ones—race, nationality, and membership in a particular social group—are anchored in the principle of non-discrimination. Although gender is not explicitly listed among the grounds of persecution, human rights law has played a crucial role in developing a gender-sensitive approach to the refugee definition. More generally, the very notion of persecution is nowadays conventionally defined as a serious violation of human rights. To give one instance among many others, the EU Qualification Directive defines persecution as acts which must ‘(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights’; or ‘(b) be an accumulation of various measures, including violations of
human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).\textsuperscript{15}

Human rights law has thus become the ultimate benchmark for determining who is a refugee. It has been instrumental in instilling a common and dynamic understanding of the refugee definition more consonant with, and loyal to, the evolution (p. 173) of international law and the changing realities of forced migration. This human rights-based approach to the refugee definition has also informed the whole rationale of the Geneva Convention. Its primary function is to provide a protection of substitution when the state of origin fails to fulfil its duty of protection towards its own citizens. The UK Supreme Court observed in the landmark case of Horvath that ‘the general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community’.\textsuperscript{16} It further underlined that:

\begin{quote}
What [the Geneva Convention] seeks to achieve is the preservation of those rights and freedoms for individuals where they are denied them in their own state. Another state is to provide a surrogate protection where protection is not available in the home state. The convention assumes that every state has the obligation to protect its own nationals. But it recognises that circumstances may occur where that protection may be inadequate. The purpose of the convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination and which he cannot enjoy in his own state.\textsuperscript{17}
\end{quote}

From this stance, international refugee law cogently constitutes a right to have rights, when victims of human rights’ violations have no other option than to leave their own country and ask for the substitute protection of another state. As asserted by James Hathaway and Michelle Foster, ‘refugee law may be the world’s most powerful international human rights mechanism’.\textsuperscript{18} However, the systemic function assigned to refugee protection still collides with the specific ethos of the Geneva Convention and the limits inherent in its definition.

\subsection*{3.1.2 The limits of the refugee definition}

Even though human rights law has expanded its interpretation and shaped its rationale, the refugee definition is far from covering all types of forced migration. The most obvious instance of its restrictive stance is provided by the prerequisite condition to be outside the country of origin. This requirement excludes the vast number of forcibly displaced persons within the territory of their own states despite their manifold similarities with refugees. The exclusion of those who were called ‘internal refugees’ was primarily due to historical reasons. During the drafting of the 1951 Convention, the treatment of nationals within the territory of their own country was deemed to fall under the sovereignty of each state because at the time no human rights treaty had been adopted by the UN to protect them from abuses by their own governments. The French delegate stressed at the Geneva Conference that:

\begin{quote}
Whatever formula might ultimately be chosen [to define the term ‘refugee’], it would not and could not in any event apply to internal refugees who were citizens of a particular country and enjoyed the protection of the government of that country. There was no general definition (p. 174) covering such refugees, since any such definition would involve an infringement of national sovereignty.\textsuperscript{19}
\end{quote}

Albeit not covered by the Geneva Convention, internally displaced persons are protected under contemporary international law by one specific regional treaty, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa concluded in 2012. They are also covered by the general normative framework established
by international human rights law and international humanitarian law, as notably restated in the UN Guiding Principles on Internal Displacement adopted in 1998.\footnote{20}

Furthermore, even for those who manage to cross an international border, the refugee definition and its focus on persecution exclude many other typical drivers of forced migration, such as natural disaster, famine, extreme poverty, or pandemic. Clearly, the Geneva Convention was not conceived to obviate any failure of protection from the state of origin.\footnote{21} The Canadian Supreme Court observed in the famous \textit{Ward} case that:

\begin{quote}
The international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for ‘persecution’ in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the (p. 175) home state is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.\footnote{22}
\end{quote}

This restrictive stance of the Geneva Convention was thus premeditated. Even apart from persons fleeing natural disasters and extreme poverty, states were well aware that the narrow definition would only include a subset of refugees. Accordingly, the Conference of Plenipotentiaries recommended in its Final Act that States Parties should apply the Geneva Convention beyond ‘its contractual scope’ to other refugees ‘who would not be covered by the terms of the Convention’. This call for a broadening of the refugee definition spurred the subsequent adoption of regional instruments in Africa, Latin America, and Europe.

However, the regionalization of the refugee definition has witnessed two diametrically opposed approaches that mirror the emblematic divide between the Global South and the Global North. In the Global South, a pioneering regional instrument was adopted quite early, in 1969, by the then Organization of African Unity. Article 1(2) of the Convention governing the Specific Aspects of Refugee Problems in Africa considerably expands the scope of the universal definition:

\begin{quote}
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 nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.\footnote{23}
\end{quote}

Beyond the explicit inclusion of refugees from armed conflicts,\footnote{24} the main added value of this enlarged definition relies on the very notion of ‘events seriously disturbing public order’. This broad and objective understanding of the term ‘refugee’ has the potential to capture the great diversity of drivers underpinning forced migration. Indeed, the main contemporary causes of forced displacement, whether triggered by natural disaster, extreme poverty, or pandemic, seriously disturb public order either in part of or in the whole country of origin. This enlarged and updated definition of refugees has been endorsed in Latin America by the Cartagena Declaration on Refugees adopted in 1984. This regional instrument includes among refugees ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed (p. 176) public order’.\footnote{25} A similar definition was also adopted in 2001 by the Asian-African Legal Consultative Organization (AALCO) through the 1966 Bangkok Principles on Status and Treatment of Refugees.\footnote{26} However, compared to the
Cartagena Declaration, this expanded definition has not been as well received by states as testified by the reservations some have made to the concerned provision.27

The extensive and protective definition adopted in Africa and Latin America starkly contrasts with the minimalist approach followed by the EU. The EU Qualification Directive simply restates the refugee definition of the Geneva Convention, while clarifying, nonetheless, its close relationship with international human rights law.28 Rather than broadening the refugee definition, the Directive extends protection to other forcibly displaced persons through the creation of a new status of subsidiary protection. Subsidiary protection is circumscribed to three specific and rather narrow situations. They consist of ‘(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.29 The reach of subsidiary protection is not only limited when assessed with reference to the contemporary forms of forced migration across the world. It also overlaps to a great extent with the refugee definition under the 1951 Convention. This has raised (p. 177) longstanding controversies whether the EU subsidiary protection is supplementary to, or concurrent with, the universal definition.30

3.2 The Refugee Status

The very purpose of the refugee definition adopted in 1951 is to identify the beneficiaries of the legal status detailed in the Geneva Convention. Contrary to human rights treaties adopted later on, this Convention does not simply enumerate rights without distinction as to their beneficiaries. Moreover, the vast majority of its provisions are framed as states’ duties instead of individual rights. Such normative digression was inevitable in light of the historical context in which the Geneva Convention was drafted. In 1951, individuals did not have human rights conventionally binding at the universal level.31 One would have to wait 15 years after the adoption of the Geneva Convention for the UN Covenants to give a conventional basis to the rights proclaimed in the Universal Declaration of Human Rights. Furthermore, any attempt to draft a true Bill of Rights for refugees would have impinged upon the ongoing negotiations of the forthcoming UN Covenants. This particular normative context explains the byzantine complexity of the refugee status, when it comes to its content and rationale.

3.2.1 The content of the refugee status

The refugee status can be compared to a mathematic equation based on two variables. With some exceptions, the content of refugee status is subordinated to the superposition of two cumulative conditions. The first governs the criteria of entitlement (the (p. 178) applicability of the norm) and the second relates to the standard of treatment (the content of the norm).32

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

While all refugees benefit from these core guarantees, additional entitlements are determined by the existence of a territorial bond with the asylum state, whose degree of intensity varies from one right to another. The two other levels of applicability respectively require the presence or residence of the refugee, further depending on its physical or lawful nature. Concerning the second level, on the one hand, mere physical presence within the territory entails the benefit of freedom of religion (Article 4), the delivery of identity
papers (Article 27), and the prohibition of penalties on account of illegal entry (Article 31(1)). A *lawful presence* is further required for other sets of rights such as to engage in self-employment (Article 18), to freely move within the host territory (Article 26), and to be protected against expulsion (Article 32).

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

Once these entitlement criteria are fulfilled, the precise content of applicable norms is determined according to the traditional distinction between nationals and non-nationals since, at the time of the Convention’s drafting, no (p. 179) other normative framework of reference existed. Accordingly, the content of the benefits attached to the refugee status hinges upon three standards of treatment: nationals of the asylum state, most-favoured foreigners, and ordinary aliens. First, refugees benefit from the *same treatment accorded to nationals* regarding freedom of religion (Article 4), artistic and industrial property (Article 14), legal assistance (Article 16(2)), rationing (Article 20), elementary education (Article 22(1)), public relief (Article 23), labour legislation and social security (Article 24), and fiscal charges (Article 29). Second, refugees benefit from the *most favourable treatment accorded to nationals of a foreign country in the same circumstances* concerning the right of association (Article 15) and wage-earning employment (Article 17). Third, the Convention grants a *treatment not less favourable than that accorded to aliens generally in the same circumstances* regarding movable and immovable property (Article 13), self-employment (Article 18), liberal professions (Article 19), housing (Article 21), education other than elementary education (Article 22(2)), and freedom of movement within the asylum state (Article 26).

The superposition of various entitlement criteria with different standards of treatment is subject to one notable exception. A core content of specific guarantees is not contingent upon one of the three standards of treatment, but it applies as soon as the entitlement criteria are fulfilled (refugee, presence, residence). This concerns non-discrimination between and among refugees (Article 3), their personal status in host states (Article 12), access to courts (Article 16(1)), administrative assistance (Article 25), the issuance of identity papers (Article 27) and travel documents (Article 28), the transfer of assets in event of resettlement (Article 30), the prohibition of penalties for illegal entry or presence (Article 31), the protection from expulsion (Article 32), and from *non-refoulement* (Article 33), as well as the facilitation of their naturalization by asylum states (Article 34). The fact that these provisions do not depend upon a particular standard of treatment unveils two fundamental characteristics: these guarantees are specific to refugees, which, in turn, highlights the unique nature of ‘refugeehood’. At the same time, they also benefit from an autonomous content that is not contingent upon the treatment accorded by States Parties to nationals or aliens.

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The overall picture of the refugee status remains overwhelmingly complex if not puzzling. Table 3.1 intends to bring some clarity to the complicated scheme of refugee rights inherited from the Geneva Convention. The rows identify the entitlement criteria (ie refugee, presence, residence), whereas the columns specify the relevant content which may be either autonomous or relative (ie depending on whether or not it is contingent upon a particular standard of treatment).

**Table 3.1 Gradual protection of refugees under the Geneva Convention**

![View full-sized figure](p. 181)

(3.2.2) The *ratio legis* of the refugee status

The refugee status with its various entitlement criteria and different standards of treatment remains extremely complex. The rationale underlying such a patchwork of standards is all but obvious and one can surely raise doubts about the practical interest of this sophisticated differentiation. A possible way to conceptualize the *ratio legis* of the gradual protection granted by the Geneva Convention is to equate the refugee status with an ‘assimilative path’ as elaborated by James C Hathaway in his seminal book on *The Rights of Refugees under International Law*. Following this assimilative approach, the progressive entitlement to rights and benefits encapsulates and determines the applicable law at the three essential stages of refugees’ life cycle.

At the outset of this incremental protection regime, the declaratory nature of the refugee status presupposes that asylum-seekers are entitled at a minimum to the core benefits applicable to all refugees without further territorial qualification, as well as, depending on the circumstances, those that are contingent on the physical and lawful presence in the state territory. As underlined by the UNHCR, ‘the gradations of treatment allowed by the Convention ... serve as a useful yardstick in the context of defining reception standards for asylum-seekers’. From this angle, the limited range of benefits is grounded in the assumption that the presence of asylum-seekers is bound to be a temporary one for the sole purpose of examining their claims. At the second stage, once a refugee is formally recognized as such, an additional range of entitlements will be granted to then facilitate his or her progressive integration in the new country of residence. At the end of this assimilative process, Article 34—the last provision devoted to the refugee status—
encourages States Parties to naturalize refugees. Accordingly, naturalization ensures the full range of rights entitled to nationals and, by the same token, marks the end of the interim protection provided by the refugee status.

Albeit attractive, this conceptualization of the refugee status as an assimilative process remains an *a posteriori* and essentially doctrinal reconstruction.\(^{37}\) Although some support can be found in the drafting history of the Geneva Convention, the position of plenipotentiaries was neither clear nor unanimous.\(^{38}\) Besides the limited utility of the (p. 182) *travaux préparatoires*, the actual practice barely reflects such an assimilative approach as states remain reluctant to acknowledge the plain applicability of the refugee status to asylum-seekers beyond Articles 31 and 33.\(^{39}\) More importantly, even for those who have been officially recognized as refugees, the assimilative approach fails to capture the whole picture of the refugee status. Indeed, while this approach remains useful for explaining the first parameter regarding the territorial bond with the asylum state, it says nothing about the second one concerning the relevant standards of treatment.

Furthermore, if the assimilative approach constituted the *ratio legis* of the refugee status, one would expect a causal relation between the criteria of entitlement (refugee, presence, or residence) and the standards of treatment (ordinary aliens, most favoured aliens, or nationals). In other words, the longer a refugee remains in the territory of the State Party, the more protective ought to be the standard of treatment he or she should be able to enjoy. As such, the same treatment accorded to nationals should be equally applicable to a refugee residing lawfully or habitually within the country, whereas the mere presence of the refugee in the territory of States Parties should have triggered the same treatment as for ordinary aliens. This is, however, not the case for there is no correlation between the entitlement criteria and the standards of treatment. Even worse, the two parameters of the refugee status may be different for the same right or subject-matter; such as, for instance, in the field of employment. A lawful stay is required for both wage-earning employment (Article 17) and liberal profession (Article 19), while self-employment activities only depend on a lawful presence (Article 19). In any case, there is no causal link between the entitlement criteria and the standards of treatment since refugees are assimilated to most-favoured aliens for the purpose of wage-earning employment, whereas self-employment and liberal profession are determined in reference to the minimum treatment accorded to ordinary aliens.

Against such a background, one should concede that the content of the refugee status does not result from a deliberate nor coherent design of its drafters.\(^{40}\) Beyond any possible conceptualization of the rationale underlying the refugee status, the historical normative context prevailing at the time of the drafting of the Geneva Convention played a decisive role in framing the refugee rights regime. This explains both the complexity and specificity of the refugee status. From such a retrospective viewpoint, the refugee status appears as a hybrid legal creation caught in-between the traditional law of aliens and the emerging law of human rights.

While the objective proclaimed by the preamble of the Geneva Convention is ‘to assure refugees the widest possible exercise of ... fundamental rights and freedoms’, most of the legal categories underlying the 1951 Convention have been borrowed from the law of aliens. Indeed, the two variables of the refugee status are directly inspired by the legislation on aliens, the conventions of establishment, and other related bilateral agreements adopted during the first half of the 20th century.\(^{41}\) The analogy (p. 183) with the law of aliens is obvious with regard to the first parameter of the refugee status, since the notions of presence and residence are the traditional entitlement criteria to define the legal status of aliens.\(^{42}\) Likewise, the standards of treatment are typically determined with
The refugee status has thus been forged on the basis of the legal categories inherited from the law of aliens which were refined and adapted to the specific situation of refugees. This explains why a core content of specific guarantees applies to refugees regardless of any standard of treatment as soon as the entitlement criteria are fulfilled. These guarantees are specific to refugees and they did not have any exact equivalent under the law of aliens because refugees are by definition unprotected by their own states.

Likewise, the need to adapt the law of aliens is further required by the notion of reciprocity, another traditional principle governing the status of foreigners. While acknowledging that reciprocity ‘is at the root of the idea of the juridical status of foreigners’, the Ad-Hoc Committee underlined that ‘[s]ince a refugee is not protected by any State the requirement of reciprocity loses its raison d’être’. After longstanding discussions between state representatives, however, the final version of Article 7 does not entirely exclude reciprocity. Its second paragraph provides an exemption from legislative reciprocity after a relatively substantial residence period of three years. In order to mitigate this last condition, Article 7(4) recommends States Parties to consider favourably the possibility of extending this exemption to refugees who do not fulfil the requirement of a three-year residence.

Among other instances, the filiation between the law of aliens and refugee law is particularly apparent in Article 7(1), according to which ‘except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally’. Article 7(1), in this sense, functions as a safeguard securing a minimum standard which cannot fall below the treatment accorded to other aliens. As noted by the US representative during the drafting of the Geneva Convention, one can still argue that ‘when the Convention gave refugees the same privileges as aliens in general, it was not giving them very much’. Nevertheless, Article 7(1) retains its relevance by restating that refugees cannot be excluded from the rights and benefits granted to other aliens under domestic and international law. This general referral can be traced back to the law of aliens and the normative context prevailing at the time of the drafting of the Geneva Convention. In 1951, the law of aliens provided a normative framework of reference as there was no other equivalent until the subsequent development of human rights law, which profoundly reshaped the basic tenets of the refugee status.

### 3.2.3 The enlargement of the refugee status by human rights law

Since the adoption of the Geneva Convention, human rights law has become a crucial source of refugee rights. Its added value has been instrumental at four main levels. First, human rights law extends the personal scope of international protection beyond the category of refugees to cover all individuals, including asylum-seekers and other migrants who might face risks of human rights’ violation in their own country. As notably acknowledged by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the two UN Covenants clearly apply to asylum-seekers. They provide an essential source of protection for this category of persons who are excluded from the Geneva Convention due to States Parties’ restrictive and disputable interpretation of its provisions. The impact of human rights law, however, stretches far beyond the legal status of asylum seekers.

Second, even for formally recognized refugees, human rights law has considerably enriched the material scope of international protection by granting a broad range of supplementary rights. For instance, although the Refugee Convention is not indifferent to civil and political rights, it contains a fairly limited range of these fundamental rights, covering non-discrimination, freedom of religion, freedom of association, access to court, freedom of movement, and due process guarantees governing expulsion. At the outset, the drafters of the Geneva Convention were aware of this apparent lacuna. During the travaux...
préparatoires, the Belgian delegation proposed an explicit reference to Articles 18 and 19 of the UDHR (devoted to freedoms of thought and expression respectively) in the text of the Geneva Convention. This proposal was finally withdrawn after the UK representative explained that ‘a Convention relating to refugees could not include an outline of all the articles of the UDHR; furthermore, by its universal character, the Declaration applied to all human groups without exception, and it was pointless to specify that its provisions applied also to refugees’.\footnote{51}

The continuing applicability of human rights law is thus essential to ensure an additional set of crucial rights that are not guaranteed by the Geneva Convention. As far as the ICCPR is concerned, it includes the right to an effective remedy for any violations of the rights recognized in the Covenant (Article 2(3)), the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant (Article 3), the right to life (Article 6), the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 7), freedom from slavery and forced labour (Article 8), the right of all persons deprived of their liberty to be treated with humanity (Article 10), the prohibition of detention on the ground of inability to fulfil a contractual obligation (Article 11), the right to return to one’s own country (Article 12(4)), the right to a fair trial (Article 14), the prohibition of retroactive application of criminal law (Article 15), the right to hold opinions and freedom of expression (Article 19), the right of peaceful assembly (Article 21), the protection of children (Article 24), the right to equality before the law (Article 26), and the cultural rights of persons belonging to ethnic, religious or linguistic minorities (Article 27).

Third, human rights law is not only broader than refugee law with regard to its personal and material scope, but more fundamentally, the former supplants the latter even when their respective norms overlap on the same subject matter. This is notably exemplified by the prohibition of discrimination under Article 3 of the Geneva Convention which is limited by three substantial qualifications: 1) this provision only prohibits discrimination between and among refugees (thereby excluding any other discrimination between refugees and other foreigners or nationals); 2) the prohibited grounds of discrimination are restricted to ‘race, religion or country of origin’; and 3) the scope of Article 3 is circumscribed to the application of the provisions of the Geneva Convention.

By contrast, the principle of equality before the law, as notably enshrined in Article 26 of the ICCPR, provides a free-standing and autonomous protection against discrimination which extends beyond the rights provided by the ICCPR. It further enumerates a non-exhaustive list of prohibited discriminatory grounds that covers both forms of discrimination between refugees and those between refugees (p. 186) and nationals. As such, Article 3 of the Geneva Convention has for the most part—if not totally—been neutralized by Article 26 of the Covenant.\footnote{52} The same observation can be made with regard to many other overlapping norms governed by both human rights treaties and the Geneva Convention, such as detention and freedom of association, among others.\footnote{53} The fact that human rights law prevails over refugee law is still in line with the Geneva Convention itself, since its Article 5 ensures that ‘nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’.

Fourth and finally, human rights law provides a vital source of protection for all refugees and asylum-seekers who are living in states which have not ratified the Geneva Convention or its Protocol. Forty-three UN Member States have neither signed nor ratified either of them. Although refugee lawyers frequently overlook this basic fact, some of these non-
parties are among the largest countries of asylum. According to UN estimates, they notably include Jordan (2.9 million refugees), Lebanon (1.6 million), and Pakistan (1.4 million).

3.3 The Principle of Non-refoulement

The functional link between the definition and the status of refugees as conferred by the Geneva Convention is ensured by the principle of non-refoulement. According to Article 33(1), ‘no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. This principle is commonly hailed as ‘the cornerstone of international refugee law’. Article 42 further endorses the cardinal importance of such an elementary rule by prohibiting any reservation to Article 33.

3.3.1 The scope and content of the principle of non-refoulement: an overview

The scope of the non-refoulement duty is conceived by the Geneva Convention in relatively broad terms. As further confirmed by subsequent state practice, the inclusive language of Article 33—through the generic expression ‘in any manner whatsoever’—clearly acknowledges that the prohibition of refoulement applies to any act of forcible removal or rejection that puts the person concerned at risk of persecution. According to the drafters of the Geneva Convention, it means in pith and substance (p. 187) that ‘refugees fleeing from persecution ... should not be pushed back into the arms of their persecutors’. The legal nature of the act is therefore not relevant, whether it is labelled deportation, extradition, non-admission at the border, maritime interception, transfer, or rendition.

The decisive consideration for the purposes of Article 33 is the consequence of this act, namely whether one’s life or liberty would be threatened on account of a Convention reason. Following this stance, the prohibition of refoulement applies to both asylum-seekers and recognized refugees, provided that they are within the jurisdiction of a State Party. The primary function of this principle is twofold. On the one hand, Article 33 ensures asylum-seekers access to protection in order to assess whether they fulfil the refugee definition under Article 1(A)(2). On the other hand, it guarantees the stability of the refugee status for those who have been formally recognized as refugees. The applicability of Article 33 to asylum-seekers is firmly based on two main grounds: the declaratory nature of the refugee status and the basic principles governing interpretation of treaties. As acknowledged by the UNHCR Handbook on Procedures:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Because of the declaratory nature of the refugee status, Article 33 applies to refugees who have not been formally recognized but are claiming protection. UNHCR rightly stresses that:

Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be...
rejected at borders or otherwise returned to persecution on the grounds that their
claim had not been established.59

This well-established understanding is confirmed by the principle of effectiveness (effet
utile), which constitutes ‘one of the fundamental principles of interpretation of treaties’.60
According to this basic notion, amongst several possible interpretations, the one that best
guarantees the practical effect of the relevant provision shall prevail. Any other
interpretation that excludes asylum-seekers from non-refoulement would defeat the very
object and purpose of the Geneva Convention as a whole in blatant contradiction with the
basic principles of interpretation codified in Article 31 of the Vienna Convention on the Law
of Treaties. The plain applicability of Article 33 to asylum-seekers has been further
acknowledged by States Parties in their subsequent interpretation of the Convention.61

The impact of its application to asylum-seekers is particularly straightforward for the mere
act of asking for protection triggers the benefit of non-refoulement in order to assess
whether the applicant actually corresponds to the definition of refugees. Furthermore,
contrary to many other provisions of the Geneva Convention, Article 33 is not dependent on
the presence—whether regular or irregular—of asylum-seekers. It thus applies as soon as
asylum seekers are within the territorial or extraterritorial jurisdiction of States Parties.
The notion of extraterritorial jurisdiction is traditionally understood in international law as
extending to ‘anyone within the power or effective control of that State Party, even if not
situated within the territory of the State Party’,62 such as in the case of maritime (p. 189)
interception.63 This explains the powerful attraction exercised by the principle of non-
refoulement over the traditional competence of states in carrying out migration controls,
whether outside or within their borders.64

The extensive scope of this duty of non-refoulement is, however, qualified by two exceptions
spelt out in Article 33(2) of the Refugee Convention. According to this provision, the
principle of non-refoulement cannot be claimed by a refugee or an asylum-seeker ‘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 judgement of a particularly serious
crime, constitutes a danger to the community of that country’. Each exception follows its
own rationale and purpose: the first is aimed at safeguarding the security of the state and
its institutions, while the second one focuses on the protection of the host society against
criminality.

As with any exception to a principle (especially when fundamental rights are at stake), ‘it is
clear that Article 33(2) exception must be interpreted restrictively’.65 While states retain a
substantial margin of appreciation, the threshold of these two exceptions remains relatively
high. Regarding the first one, ‘[t]he wording of the provision … requires the person him or
herself to constitute a danger to national security’.66 That a person be able to threaten the
security of a whole country confines such a hypothesis to highly exceptional circumstances,
mainly limited to terrorism, military operations, espionage, and other related activities
aimed at overthrowing its institutions. In any event, ‘the threat must be “serious”, in the
sense that it must be grounded on objectively reasonable suspicion based on evidence and
in the sense that the threatened harm must be substantial rather than negligible’.67

The second exception is also quite restrictive as exemplified by the cautious wording of
Article 33(2). It is circumscribed by three cumulative conditions: first, (p. 190) the refugee
must have been ‘convicted by a final judgement’, presupposing thus the exhaustion of all
judicial remedies; second, this conviction has been pronounced for ‘a particularly serious
crime’, thereby requiring a case-by-case assessment of the nature of the crime, the gravity
of the inflicted harm and the circumstances surrounding its perpetration; and third,
because of his/her criminal record and the risk of subsequent offence, the refugee represents him or herself 'a danger to the community' as a whole.\textsuperscript{68}

As exemplified by these exceptions, the principle of \textit{non-refoulement} operates as a pragmatic attempt to reconcile two competing values. It preserves a subtle—and sometimes insecure—compromise between the inescapable competence of states to control access to their territory and the imperious protection of refugees threatened in their life and liberty. This balancing act explains in turn the complex interaction between \textit{non-refoulement} and asylum.

\subsection*{3.3.2 The relations between asylum and \textit{non-refoulement}}

Although its scope and content are well settled, the principle of \textit{non-refoulement} retains some ambiguous relations with the very notion of asylum. From both a conceptual and legal perspective, \textit{non-refoulement} must be distinguished from asylum. At the conceptual level, \textit{non-refoulement} is a negative notion, prohibiting states from sending any person back to a country of persecution. As underlined during the drafting of the Geneva Convention, ‘[i]t imposed a negative duty forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow a refugee to take up residence’.\textsuperscript{69} By contrast, asylum is a positive concept, which entails the admission to a new residence and a long-lasting protection against the jurisdiction of another state.\textsuperscript{70} This conceptual distinction between asylum and \textit{non-refoulement} is further grounded on their respective legal nature: \textit{non-refoulement} is an obligation of states, whereas asylum is a right of states. As stressed by several domestic courts, ‘it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual’.\textsuperscript{71}

As a result of this normative disjuncture, and although the content of the refugee status is spelt out in considerable details, the Geneva Convention does not contain any provision on asylum.\textsuperscript{72} The silence on this crucial issue may be surprising for ‘to speak of refugees is to speak of asylum, the very condition of their existence’.\textsuperscript{73} Such normative hiatus between the right of asylum and the obligation of \textit{non-refoulement} was, however, intentional. The Geneva Convention was carefully drafted to make sure that no obligation to grant asylum was explicitly imposed on States Parties. The UK delegate made clear at the 1951 Conference that ‘[t]he right of asylum … was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him’.\textsuperscript{74} Nevertheless, he admitted that ‘the only article which had any bearing on that aspect of the matter was the article [33] prohibiting the expulsion of a refugee to a country where his life or freedom would be in danger’.\textsuperscript{75}

The principle of \textit{non-refoulement} plays indeed a pivotal role in the absence of a human right to asylum. The Universal Declaration of Human Rights has failed to enshrine an individual right to be granted asylum. Its Article 14 refers instead to a vague and permissive proclamation without any correlative obligation of admission. It declares in minimalist terms that ‘[e]veryone has \textit{the right to seek and to enjoy} in other countries asylum from persecution’.\textsuperscript{76} Lauterpacht described this formula as ‘artificial to the point of flippancy’, for ‘there was no intention to assume even a moral obligation to grant asylum’ and, accordingly, ‘no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving (p. 192) it’.\textsuperscript{77} In fact, the right of asylum shares the same fate as the right to property, being the only rights proclaimed in the Universal Declaration that were not restated in the UN Covenants.\textsuperscript{78}

The traditional distinction between the state obligation of \textit{non-refoulement} and its sovereign right to grant or refuse asylum does not reflect, however, their close intermingling for the former frames and constrains the latter. In other words, the right for a state to grant or refuse asylum shall be exercised in accordance with its duty of \textit{non-refoulement}. From this angle, the distinction between \textit{non-refoulement} and asylum appears highly artificial in practice.\textsuperscript{79} Although \textit{non-refoulement} is primarily an obligation of result,
asylum is generally the only practical means to respect and ensure respect for Article 33. Indeed, how can a state remove an asylum-seeker without first and foremost assessing whether his or her life or liberty is threatened in the country of destination? Such a constructive ambiguity was the price to pay for preserving the appearance of state sovereignty with due regard to the most essential right of refugees.

In practice, states have two options for complying with their duty of non-refoulement: granting temporary asylum in order to examine whether the asylum-seeker is a refugee under the Geneva Convention, or sending him or her to a different country where there is no risk of persecution.\(^{80}\) Even in the latter case, the removal to a safe third country requires some form of temporary admission to assess that the third country is not a country of persecution and provides effective protection against any subsequent refoulement in breach of Article 33.\(^{81}\) It further presupposes (p. 193) that the asylum-seeker would be admissible in the safe third country. This requirement is hardly satisfied in the absence of readmission agreements or other related schemes for allocating the responsibility of examining the asylum request (such as the Dublin Regulation for European Union Member States and Associated States).\(^{82}\) In sum, whatever option taken by states to implement Article 33, due respect for the principle of non-refoulement implicitly requires ‘a de facto duty to admit the refugee’ whether formally recognized or not.\(^{83}\) This obligation is, however, not absolute and may be refused in accordance with the exceptions contained in Article 33(2).

Despite its qualified and implicit nature, the duty to grant temporary admission to asylum-seekers finds additional support in Article 31(1) of the Geneva Convention, which prohibits the imposition of penalties for irregular entry or stay in the territory of States Parties.\(^{84}\) This provision is specifically aimed at exempting asylum-seekers from the entry requirements generally imposed on immigrants. The drafters of the Geneva Convention were indeed plainly aware that:

> A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely presents himself as soon as possible to the authorities of the country of asylum and is recognized as a \textit{bona fide} refugee.\(^{85}\)

As confirmed by domestic courts afterwards, the purpose of Article 31 is ‘to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law’ of States Parties.\(^{86}\) The principle of non-refoulement, (p. 194) combined with the duty of non-penalization, considerably challenge the traditional prerogative of states in the field of migration control.\(^{87}\) The Australian High Court acknowledges in this sense that ‘the Convention represents a significant but qualified limitation upon the absolute right of the member States to admit those whom they choose’.\(^{88}\)

As a result of the twofold obligation of non-refoulement and non-penalization, states are committed to grant temporary admission in order to assess the claims for protection submitted by any persons at risk of persecution. They still retain, at the domestic level, a particularly broad margin of appreciation in assessing asylum requests, because the Geneva Convention is silent on the procedures for recognizing refugee status. In practice, domestic asylum procedures have increasingly become a stand-alone migration control tool rather than a proper means for identifying persons in need of international protection.\(^{89}\) States accordingly recapture at the implementation level a portion of the sovereignty they have alienated at the normative level by agreeing to a detailed regime of refugee protection.
3.3.3 The principle of non-refoulement under human rights law

Similarly to the refugee status examined above, the normative development of human rights law has considerably reinforced and consolidated the principle of non-refoulement as a fundamental tool of protection. At the universal level, this basic principle has been expressly endorsed in the 1984 UN Convention against Torture (Article 3) and the 2006 UN International Convention for the Protection of All (p. 195) Persons from Enforced Disappearance (Article 16). At the regional level, numerous conventions have similarly done so, most notably in the 1969 American Convention on Human Rights (Article 22(8)), the 1985 Inter-American Convention to Prevent and Punish Torture (Article 13(4)), the 2000 Charter of Fundamental Rights of the European Union (Article 19(2)), and—to some extent—the 2004 Arab Charter on Human Rights (Article 28).

Besides these explicit endorsements, most general human rights treaties have been construed by their respective monitoring bodies as inferring an implicit prohibition of refoulement. As early as 1961, the European Commission of Human Rights considered that the removal of foreigners may raise an issue under the general prohibition of torture, inhuman, and degrading treatment. This purposive interpretation was notably endorsed in 1965 by the Parliamentary Assembly of the Council of Europe, before being finally confirmed in 1989 by the European Court of Human Rights in the landmark Soering case. Since then, this implied duty of non-refoulement has been endorsed by the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, the Inter-American Commission of Human Rights, and the African Commission on Human and Peoples’ Rights.

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

Following that stance, the human rights principle of non-refoulement coincides in substance with its refugee law counterpart. While the notions of degrading treatment and of persecution retain their own autonomous meanings, defining them by (p. 197) reference to a serious violation of human rights significantly erodes their distinctive character. Already in 1984, the European Commission acknowledged that:

Although the risk of political persecution, as such, cannot be equated to torture, inhuman or degrading treatment, ... it may, in a particular case, raise an issue under Art. 3 if it brings about a prejudice for the individual concerned which reaches such level of severity as to bring it within the scope of this provision e.g. an arbitrary sentence ... or inhuman detention conditions.
Conversely, from the perspective of the Geneva Convention, a degrading treatment equates with a persecution under the refugee definition. The same material convergence may be observed with regard to the assessment of the risk. Whether it is phrased as ‘a well-founded fear of being persecuted’ or ‘a real risk of being subjected to torture, inhuman or degrading treatment’, both are prospective in nature. Although the different formula used by treaty bodies and refugee status decision-makers have raised disproportionate attention among commentators, the difference of wording is largely semantic. The reality of the risk under the Refugee Convention and the human rights treaties requires a case-by-case assessment grounded on two prognostic factors: the personal circumstances of the applicant as well as the general situation prevailing in the country of origin. In both cases, assessing the alleged risk is by essence a hypothetical projection to predict what might happen if the applicant is returned to his or her country of origin.

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

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

Following this stance, the human rights principle of non-refoulement stands out as a practical and powerful means to ensure the effective respect for fundamental rights. It is an integral part of the broader enforcement device of human rights law. William Schabas rightly observes in this sense that ‘[i]t may be better to see it as a piece in the international struggle for the enforcement of fundamental rights. Approached in this way, States should not expel persons to a place where they may be threatened with torture, or the death penalty, or other serious abuses, because this is a method of promoting global observance of human rights.’

Even though the duty of non-refoulement is well acknowledged by human rights law, states have not yet drawn all the consequences of this principle as a vehicle of refugee protection. This ambiguity is well reflected by the Global Compact for Migration. On the one hand, states have reaffirmed in clear and broad terms the prohibition of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and
degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law”.\footnote{1} On the other hand, this principle is acknowledged merely as an obstacle to removal and not as a ground of international protection on its own.\footnote{116} The confinement of the human rights principle of non-refoulement is further exacerbated by the Global Compact on Refugees in which it is not referred to. Although human rights law has considerably shaped and refined refugee law, it is not yet fully taken into account by states for updating and reinforcing refugee protection.

Footnotes:

2 See the statement of Mr Leslie of Canada in UN ECOSOC ‘Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Second Meeting’ (17 January 1950) First Session (1950) UN Doc E/AC.32/SR/2, 6.
3 See the statement of Mr Giraldo-Jamarillo of Colombia in UNGA ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-first Meeting’ (26 November 1951) UN Doc A/CONF.2/SR/21, 8.
6 J Bhabha, ‘Internationalist Gatekeepers? The Tension between Asylum Advocacy and Human Rights’ (2002) 15 Harv Hum Rts J 151, 155, 167. States’ concern is also evidenced by the fact that the refugee definition was originally limited to persons fleeing events occurring before January 1951 and States Parties were able to further restrict its scope to events occurring in Europe. These temporal and geographical limitations were removed by the 1967 Protocol, thereby giving the Geneva Convention a universal coverage.
8 For the statement of Mr Rochefort of France, see UNGA ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting’ (26 November 1951) UN Doc A/CONF.2/SR/19, 5.
The circumstances exhaustively enumerated in Article 1C(1)-(4) include voluntary re-availment of the protection of the country of origin, voluntary reacquisition of nationality, acquisition of a new nationality, and voluntary re-establishment in the country of origin.

According to Article 1C(5), the Convention shall cease to apply if a refugee ‘can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality’.

As restated by the International Court of Justice, ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’: ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971) ICJ Rep 16, 31. Furthermore, human rights treaties constitute ‘any relevant rules of international law applicable in the relations between the parties’ under Article 31(1)(c) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331). Their relevance is confirmed by the very object and purpose of the Refugee Convention as underlined in its preamble: ‘the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’.


Article 9 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337. Article 9(2) also provides an illustrative list of human rights violations amounting to persecution, such as ‘acts of physical or mental violence, including acts of sexual violence’ and ‘legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner’. Although these violations are traditionally framed by reference to civil and political rights, other serious breaches of economic, social, and cultural rights (including discriminatory treatments in the benefit of those rights) can be considered persecution. For further discussion, see the comprehensive and stimulating book of M Foster, *International Refugee Law and Socio-Economic Rights* (CUP 2009).

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

ibid 508 (Lord Clyde).

Hathaway and Foster, *The Law of Refugee Status* (n 7) 1.
See the statement of Mr Rochefort in UN ECOSOC ‘Summary Record of the 172nd meeting held at the Palais des Nations, Geneva, on Saturday, 12 August 1950’ (24 August 1950) UN Doc E/AC.7/SR/172, 4. The US delegate, Mrs Roosevelt, also explained that ‘internal refugee[s] [... ] were separate problems of a different character, in which no question of protection of the persons concerned was involved. All credit was due to the Governments which bore the heavy burdens of those movements of people unilaterally, but those problems should not be confused with the problem before the General Assembly, namely, the provision of protection for those outside their own countries, who lacked the protection of a Government and who required asylum and status in order that they might rebuild lives of self-dependence and dignity’ in UNGA, Third Committee, ‘UN General Assembly Official Records’ Fourth Session, Summary Records (2 December 1949) 473.


See, for instance, Anor v Minister for Immigration and Ethnic Affairs [1997] 2 BHRC 143, 160 (Dawson J); and Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18, 73 (McHugh J).


The protection of refugees who have fled armed conflicts is not as such an added value of the OAU Convention as the refugee definition set out in the Geneva Convention is also fully capable of covering refugees having fled armed conflicts (see UNHCR, Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions (2 December 2016) UN Doc HCR/GIP/16/12). However, in practice, a restrictive interpretation of the Geneva Convention has often been made to exclude those fleeing indiscriminate/generalized violence. For further discussion see notably H Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw” ’ (2012) 31(2) RSQ 1.

See Article 1(2) of the Bangkok Principles on the Status and Treatment of Refugees, adopted at the Asian-African Legal Consultative Organization’s (AALCO) 40th Session (31 December 1966) in New Delhi. The first and third paragraphs of Article 1 build otherwise on the refugee definition of the Geneva Convention, although the former expands the five reasons for persecution by including colour, ethnic origin, and gender. However, rather than constituting a broadening of the refugee definition, these additions confirm the evolutive interpretation of the Geneva Convention made in light of the development of international human rights law. See above section 3.1.1. A similar definition is also endorsed in Article 1 of the Arab Convention on Regulating the Status of Refugees in the Arab Countries, providing that the refugee definition extends to ‘[a]ny person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country of any part thereof’. While adopted by the League of Arab States in 1994, the Convention is still, however, not into force.

See the notes, comments, and reservations made by states on Article 1(2) of the Bangkok Principles, and more particularly by Bahrain, Singapore, and India.

See especially the definitions of persecution and reasons of persecution respectively provided in Articles 9 and 10 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (n 15).


For further discussion see notably: C Bauloz and G Ruiz, ‘Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?’ in V Chetail, P De Bruycker, and F Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Brill Nijhoff 2016); LH Storgaard, ‘Enhancing and Diluting the Legal Status of Subsidiary Protection Beneficiaries under Union Law. The CJEU Judgment in Alo and Osso’ (EU Law Analysis, 9 March 2016) available at <http://eulawanalysis.blogspot.com/2016/03/enhancing-and-diluting-legal-status-of.html> accessed 17 October 2018; C Bauloz, ‘The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive’ in J-F Durieux and D Cantor (eds), Refuge from Inhumanity: Enriching Refugee Protection Standards Through Recourse to International Humanitarian Law (Martinus Nijhoff 2013); H Battjes, ‘Subsidiary Protection and Other Alternative Forms of Protection’ in V Chetail and C Bauloz (eds), Research Handbook on Migration and International Law (n 26); J McAdam, Complementary Protection in

31 At this time, the Charter of the United Nations was the only one to have proclaimed in its Article 1 the ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’, without identifying the rights and freedoms in question. The 1948 Universal Declaration of Human Rights was adopted as a non-binding resolution of the General Assembly and only specific treaties focusing on some particular aspects were adopted at the time, mainly under the auspices of the ILO and with regard, for instance, to the prohibition of forced labour. At the regional level, only one regional human rights instrument was adopted in 1950, but it entered into force in 1953 after the adoption of the Geneva Convention. See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols 11 and 14) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR).


33 Hathaway, The Rights of Refugees under International Law (n 32) 237.


35 Hathaway, The Rights of Refugees under International Law (n 32) 156.


37 In this sense, see also Carlier, ‘Droit d’asile et des réfugiés’ (n 7) 288–89.

38 For discussion between delegations, see UN ECOSOC ‘Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Fifteenth Meeting’ (27 January 1950) First Session (6 February 1950) UN Doc E/AC/32/SR.15; and UN ECOSOC ‘Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Forty-Second Meeting’ (24 August 1950) Second Session (28 September 1950) UN Doc E/AC.32/SR.42.

39 See, for instance, R v Secretary of State for the Home Department, ex parte Jammeh [1998] INLR 701 (CA) 710-711; Krishnapillai v Canada (Minister of Citizenship and Immigration) [2002] 3(1) FC 74, para 25.

40 In this sense, see also Carlier, ‘Droit d’asile et des réfugiés’ (n 7) 288–89.

41 For further discussion, see V Chetail, ‘Les relations entre droit international privé et droit international des réfugiés: Histoire d’une brève rencontre’ (2014) 141(2) JDI 447–75. Historically speaking, the Refugee Conventions concluded in 1933 and 1938 were
influenced by the law of aliens, before the same technique was used for the drafting of the 1951 Geneva Convention.

42 See, for instance, Convention of Establishment between Iraq and Turkey (signed 9 January 1932) 139 LNTS 263; Convention of Establishment between Luxemburg and the Netherlands (signed 1 April 1933) 179 LNTS 11; Convention of Establishment between Belgium and Siam (signed 5 November 1937) 190 LNTS 163.

43 Ibid. See also Treaty of Commerce between Japan and the Czechoslovak Republic (signed 30 October 1925) 58 LNTS 263; Treaty of Friendship, Commerce and Navigation between the United States of America and Siam (signed 13 November 1937) 192 LNTS 247.

44 See, for instance, art 6 of the 1951 Convention relating to the Status of Refugees.

45 The Ad-Hoc Committee in charge of preparing the first draft of the Geneva Convention explained that ‘Refugees do not enjoy the protection and assistance of the authorities of their country of origin. Consequently, even if the Government of the country of asylum grants the refugee a status which ensures him treatment equivalent to or better than that enjoyed by aliens, he may not in some countries be in a position to enjoy the rights granted him.’ See UN ECOSOC ‘Report of the Ad Hoc Committee on Statelessness and Related Problems (Corrigendum)’ (2 April 1950) UN Doc E/AC.32/5, 53.

46 Ibid 41. See also, the statement of the US representative in UN ECOSOC ‘Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Twenty-Third Meeting’ (3 February 1950) First Session (10 February 1950) UN Doc E/AC.32/SR.23, 2.

47 UN ECOSOC ‘Ad Hoc Committee on Refugees and Stateless Persons: Summary Record of the Thirty-Seventh Meeting’ (16 August 1950) Second Session (26 September 1950) UN Doc E/AC.32/SR.37, 7.


51 UN ECOSOC ‘Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Eleventh Meeting’ (1 February 1950) UN Doc E/AC.32/SR1, 8.

For further discussion, see Chetail, ‘Are Refugee Rights Human Rights?’ (n 48).


UN ECOSOC ‘Ad Hoc Committee on Refugees and Stateless Persons, Statement of the Chairman, Mr Chance of Canada’ (2 February 1950) UN Doc E/AC.32/SR.21, 7, para. 26. See also UN ECOSOC, ‘Ad Hoc Committee on Refugees and Stateless Persons, Memorandum by the Secretary General’ (3 January 1950) UN Doc E/AC.32/2, Comments on Article 24 of the preliminary draft, para 3.


UNCHR ‘Note on International Protection: Submitted by the High Commissioner’ (31 August 1993) UN Doc A/AC.96/815, 5. See also, among others, UNCHR EXCOM Conclusion No 6 (XXVIII) ‘Non-Refoulement’ (1977) UN Doc A/32/12/Add.1, para e; UNCHR EXCOM Conclusion No 79 (XLVII) ‘General Conclusion on International Protection’ (1996) UN Doc A/AC.96/878 and A/51/12/Add.1, para j.

*Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, para 51.

UN Doc A/RES/59/172, para 13. At the regional level, see also, EU Qualification Directive (n 21), art 21 and Bangkok Principles on the Status and Treatment of Refugees, adopted at the Asian-African Legal Consultative Organization’s (AALCO) 40th Session (31 December 1966) art III(3); Parliamentary Assembly of the Council of Europe, Recommendation 293 on the Right of Asylum (29 September 1961) art 1(3). See also among other domestic restatements: R v Secretary of State for the Home Department, ex parte Adan & Aitseguer [2001] 1 All ER 593 (HL), 603 (Lord Steyn).


64 See the next section for further discussion about the interaction between non-refoulement and asylum.


69 See the statement of Mr Weis of the International Refugee Organization in UN ECOSOC ‘Ad Hoc Committee on Refugees and Stateless Persons: Summary Record of the Fortieth Meeting’ (22 August 1950) Second Session (27 September 1950) UN Doc E/AC.32/SR40, 33.
More generally, the notion of asylum is much broader than the one of refugee protection under the Geneva Convention since the former includes all types of protection, whether discretionary or not, granted by states under domestic or international law. According to the generic definition adopted in 1950 by the Institute of International Law, asylum means 'the protection that a state grants on its territory or in other place subject to certain of its organs to an individual who comes to seek it' (translation from the author). See Institut de droit international, Session de Bath, _L’asile en droit international public (à l’exclusion de l’asile neutre)_ (1950) art 1. For further discussion, see notably M-T Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27(1) IJRL 3–28; R Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 Duke J Comp & Int’l L 1–33; G Gilbert, ‘Right of Asylum: A Change of Direction,’ (1983) 32 ICLQ 633, 637; A Grahl-Madsen, _Territorial Asylum_ (Almqvist & Wiksell International 1980); SP Sinha, _Asylum and International Law_ (Martinus Nijhoff 1971).

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

The only explicit reference to asylum can be found in the preamble of the Geneva Convention in rather pejorative terms, ‘considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation’.


Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) (emphasis added). Even formulated in such evasive terms, the right to seek and to enjoy asylum is further restricted by the traditional exception based on criminal behaviour and other related acts. According to art 14(2), ‘[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’. On this last provision, see S Kapferer, ‘Article 14(2) of the Universal Declaration and Human Rights and Exclusion from International Refugee Protection’ (2008) 27(3) RSQ 53–75.

H Lauterpacht, ‘The Universal Declaration of Human Rights’ (1948) 25 BYIL 354. The 1967 Declaration on Territorial Asylum restates in the same vein as the Universal Declaration that ‘[a]sylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States’ (art 1(1)), and ‘[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum’ (art 1(3)).
At the regional level, however, the American Convention on Human Rights ((adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123) and the African Charter on Human and Peoples’ Rights ((adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217) have explicitly endorsed ‘the right to seek and be granted asylum’. This straightforward endorsement is still mitigated by the requirement to be exercised ‘in accordance with the [domestic] legislation of the state’. See art 22 (7) of the American Convention and art 12(3) of the African Charter.

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

These two alternatives are acknowledged in state practice and they may be inferred from Article 31(2) of the Geneva Convention, which provides that ‘restrictions [to the movement of refugees] shall only be applied until their status in the country is regularized or they obtain admission into another country’.

The very notion of safe third country remains however a highly debatable and ambiguous practice. Under international law, the Geneva Convention neither explicitly authorizes nor formally prohibits the contested notion of safe third country. On the one hand, no provision of the Geneva Convention requires asylum seekers to ask for protection in the first safe country they have reached. On the other hand, removal toward safe third countries is not prohibited by the principle of non-refoulement (Article 33), while asylum seekers coming from third states are not immune from penalty on account of their illegal entry (Article 31). The notion of safe third country is accordingly built on the silence of the Geneva Convention for the very purpose of refusing any assessment of asylum claims and deflecting such responsibility onto other states. For further discussion see: V Moreno-Lax, ‘The Legality of the Safe Third Country Notion Contested: Insights from the Law of Treaties’ in GS Goodwin-Gill and P Weckel (eds), Migration and Refugee Protection in the 21st Century: International Legal Aspects (Martinus Nijhoff 2015) 665–721; M-T Gil-Bazo, ‘The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited’ (2006) 18(3-4) IJRL 571–600; M Foster, ‘Responsibility Sharing or Shifting? ‘Safe’ Third Countries and International Law’ (2008) 25(2) Refuge 64–78; Chetail, ‘Le principe de non-refoulement’ (n 57) 25–34.


Hathaway, The Rights of Refugees under International Law (n 32) 301. See also among many others: Carlier ‘Droit d’asile et des réfugiés’ (n 7) 85; Goodwin-Gill and McAdam The Refugee in International Law (n 7) 384.

‘The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’
Memorandum by the Secretary General (n 56) Comments on Article 24 of the preliminary draft, para 3.

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

One should stress that, while irregular entry is utterly irrelevant for benefiting from the principle of non-refoulement, the prohibition of penalties is much more limited in scope. It does not apply to all asylum-seekers but only to those who satisfy the three following conditions: they come directly from a country of persecution; they present themselves without delay to the national authorities; and show good cause for their illegal entry or presence. See on the scope and content of Article 31(1): G Noll, ‘Article 31 (Refugees Unlawfully in the Country of Refuge)’ in A Zimmermann (ed), The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol (n 7) 1243; Hathaway, The Rights of Refugees under International Law (n 32) 385-412; GS Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection’ in E Feller, V Türk, and F Nicholson (eds), Refugee Protection in International Law (n 14) 185; R Dunstan, ‘United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention’ (1998) 10 IJRL 205.

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

The EU directive governing asylum procedures did not change this basic pattern, as it mainly endorses restrictive national practices. For instance, the accelerated asylum procedure leaves a considerable margin of appreciation to Member States. Although this kind of procedural devices is not stricto sensu incompatible with international law, the discretion left to decision-makers can increase the risk of refoulement in breach of the Refugee Convention. Such a risk is all but virtual, given the subjectivity inherent in the grounds justifying an accelerated procedure. See art 31 of the 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, 60–95.

‘1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987)1465 UNTS 85 (CAT).

‘1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.’ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.
‘In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.’ American Convention on Human Rights (n 78).

‘Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.’ Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67.

‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’ Charter of Fundamental Rights of the European Union (18 December 2000, entered into force 1 December 2009) OJ C 326.

Article 28 refers to the prohibition of extradition instead of the more generic term of refoulement: ‘Political refugees may not be extradited.’

X v Belgium (1961) 6 CD 39.

Parliamentary Assembly of the Council of Europe ‘Recommendation 434 on the Granting of Asylum to European Refugees’ (1 October 1965) paras 3–4.


106 See in particular: Omar Othman (Abu Qatada) v the United Kingdom ECHR 2012-I 249; Al Saadoon and Mufdhi v The United Kingdom ECHR 2010-II 61; Z and T v the United Kingdom, App No 27034/05 (ECtHR, 28 February 2006); Tomic v the United Kingdom, App No 17387/03 (ECtHR, 14 October 2003); Ould Barar v Sweden, Admissibility Decision, App No 42367/98 (ECtHR, 19 January 1999).

107 C v Netherlands (1984) DR 38, 224. Besides the specific examples mentioned by the Commission, assessing whether the level of severity amounts to a degrading treatment requires an in concreto examination of all the circumstances of each case. According to a well-established jurisprudence, ‘ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’ Ireland v the United Kingdom, ECHR (1978) Series A No 25, para 162. Moreover, an accumulation of human rights violations may cross the threshold under Article 3. Such a conclusion flows from the common understanding of degrading treatment defined as an ill-treatment which ‘humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance’. MSS v Belgium and Greece ECHR 2011-I 255, para 220; Pretty v the United Kingdom ECHR 2002-III 155, para 52; Ireland v the United Kingdom ECHR (1978) Series A No 25, para 167.

108 Among an abundant case-law, see for instance: Cheung v Canada (Minister of Employment and Immigration) (1993) 1 CF 314, 324; SZ and JM (Iran CG) v The Secretary of State for the Home Department (2008) UKAIT 00082, paras 168–69.


110 Despite its far-reaching effects, this last characteristic has not yet given rise to a substantial practice of treaty bodies. See however: ECHR, Al-Saadoon v United Kingdom ECHR 2010-II 61, paras 141–44, where the European Court held that the transfer carried out by the UK forces to the Iraqi police within the territory of Iraq was a violation of Article 3. For further discussion, see also: Wouters, International Legal Standards (n 57) 217–21, 375–76, and 533; G Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17 IJRL 542.


113 In France, for instance, exclusion from refugee status only represents around 0.25 per cent of the judicial decisions delivered each year on the basis of Article 1 of the Geneva Convention: Alland and Teitgen-Colly, Traité du droit (n 7) 520.


116 The principle of non-refoulement is only mentioned in the objective of the Compact that is dedicated to return, but not in the other relevant objectives related to pathways for regular migration, the vulnerability of migrants, and border management.