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*'Non-refoulement, Temporary Refuge, and the "New" Asylum Seekers'*

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## ***Non-Refoulement, Temporary Refuge, and the 'New' Asylum Seekers***

*Guy S. Goodwin-Gill*

In 1986, I published an article with a title very similar to this chapter, but here I have added the phrase 'temporary refuge', and placed the word 'new' between quotation marks.<sup>1</sup> The asylum seekers are not new after all, but neither were they in 1986; on the contrary, they had always been there, certainly since that day in July 1951 when States imagined that they could confine the refugee definition by reference to time and space.<sup>2</sup>

The 1986 article also emerged in a particular historical context. I was then a staff member of the office of the United Nations High Commissioner for Refugees (UNHCR) and had recently spent five years in Australia during the Indo-China refugee crisis. I was peripherally involved in the Australian initiative to develop the notion of temporary refuge,<sup>3</sup> and I had found myself in opposition to the old school, for whom the only sort of refuge was permanent asylum. This was the Cold War, after all, and although most refugees had political capital, not everything was cut and dried. The Indo-China crisis drove people to flee in their tens of thousands, which immediately generated debate about 'status', and then about admission and treatment and solutions, in a region where few States were party to the 1951 Convention relating the Status of Refugees (Refugee Convention) and the 1967 Protocol. Australia's geopolitical situation was thought to expose it to large-scale arrivals, with little prospect of international support, and its temporary refuge initiative was intended, in part but seriously, to forge an institutional link between admission and burden-sharing within the existing refugee protection regime.

The UNHCR Executive Committee first called for 'at least temporary refuge' in cases of large-scale influx in 1979. Australia followed up and called for an expert group to consider all aspects of this issue in 1980, and in 1981 the

1 G.S. Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers' (1985-1986) 26 Virginia J Int'l L 897.

2 On the original time and geographical limitations to the definition in the 1951 Convention relating to the Status of Refugees, see G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn OUP 2007) 35-37.

3 Ibid, 286-296, 335-339.

Executive Committee adopted its seminal Conclusion No 22 (XXXII) (1981) on the protection of asylum seekers in situations of large-scale influx.<sup>4</sup> This Conclusion can rightly be called 'seminal', because it recognised that such movements include not only Convention refugees, but also those who seek refuge owing to external aggression, occupation, foreign domination or events seriously disturbing public order; because it declared that such asylum seekers, 'should always' be admitted, 'at least on a temporary basis', without discrimination, and provided with protection; because it affirmed that, '[i]n all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed'; and because of the protection standards which the Executive Committee then set out, together with its conclusions on solidarity and burden-sharing.

This statement of principles cannot be divorced from its historical, political and international legal context, but neither should it be undervalued for the contribution which it then made to the evolution of international protection. Indo-China was the driver, but Cartagena was just two years off, State practice in Africa was coalescing around Article I (2) of the 1969 OAU Refugee Convention, and Europe was slowly coming to terms with the obligations that might, after all, be due to the *de facto* refugee.<sup>5</sup> Not surprisingly, however, there was opposition from several quarters to the notion of a duty to grant 'at least' temporary refuge to refugees outside treaty-defined categories. Despite historical precedent, it was objected from within UNHCR that 'codifying' temporary refuge might endanger basic protection principles, and a number of States tended to the same position, although they were often more motivated simply to resist any extension of their international obligations.

This chapter limits itself to reviewing the customary international law foundations for the protection of those in flight. Other, often quite related issues, will not be dealt with here, including the practical application of Convention obligations over time, or the challenges raised by internal displacement. The factual scenario providing the background to this contribution is the flight of people seeking refuge from armed conflict, massive violations of human rights, or indiscriminate violence. But although they commonly move in large numbers and may therefore give rise to actual or apprehended emergencies, the principles, rules and obligations discussed are no less applicable to the individual in need of protection.<sup>6</sup> Whether he or she is able to invoke an individual,

4 Report of the UNHCR Executive Committee, 32nd Session: UN doc A/AC.96/601 (22 October 1981) para 57(2).

5 Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 290–296.

6 Ibid, 290.

justiciable claim to protection in the current state of international (and national) law also is not crucial; for the principal focus is on the obligations of the State, within and apart from the international refugee regime.

## 1 The 'New' Asylum Seekers

### 1.1 'Temporary Refuge'

Academic debate on the international law dimensions to temporary refuge was inspired by Deborah Perluss and Joan Fitzpatrick Hartman, the authors of 'Temporary Refuge: Emergence of a Customary Norm',<sup>7</sup> which still stands as a model in marshalling State practice, drawing the appropriate inferences, and identifying *opinio juris*. Significantly, those who disagree with its conclusions have singularly failed, for the most part, to engage with its methodology and, in particular, to deal with the Perluss/Hartman analysis on its facts, from the perspective of State practice and of what States do and why, and in the light of the legal standards applicable to the emergence of customary international law in regard to human rights and humanitarian issues, and to its continuation in force.

Perluss and Hartman in fact draw the norm of temporary refuge narrower than the evidence would allow; for them, it,

...prohibits a State from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence and other threats to their lives and security caused by internal armed conflict within their own state.<sup>8</sup>

They locate the normative force of the principle at the intersection of refugee law, humanitarian law and human rights law, but consider that it is 'best appreciated as a customary *humanitarian* norm, rather than as an extension of refugee law or as a gloss upon codified humanitarian law'.<sup>9</sup> Moreover, as the above quotation shows, the obligation in question is not about the *admission* of those

7 D. Perluss and J.F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1985-1986) 26 *Virginia J Int'l L* 551.

8 *Ibid*, 554: 'The prohibition on forced repatriation continues until the violence ceases and the alien's own state can assure the security and protection of its nationals. The refuge state may seek in the interim to resettle the aliens in a third country willing to accept them and to protect their lives and safety'.

9 *Ibid* (emphasis added).

in need of protection to State territory, but about their non-return to danger. Perluss and Hartman see it, nonetheless, as rooted in customary international law, that is, in consistent, not necessarily uniform, State practice, followed because of the sense that it is obligatory (*opinio juris*). In support of their argument, they provide detailed empirical evidence of State practice, in ways pre-saging those employed nearly twenty years later by Lauterpacht and Bethlehem in their study of *non-refoulement*.<sup>10</sup> They also draw on practice from practically every corner of the globe: Africa, East and West; South and South East Asia; Western Europe; the Middle East; and Latin and Central America.

Already existing practice can be seen as the 'driver' behind the 1979 Executive Committee call for 'at least temporary' refuge, and in the yet firmer statements, resolutions and declarations which followed. While none of this may be 'law-making' as such, clear statements of obligation, of *opinio juris*, are notoriously rare in any context of State activity. For this reason, among others, expressions of 'value' in forums like the General Assembly, or by organisations like UNHCR,<sup>11</sup> are not only juridically significant in themselves, but also permit the necessary inferences to be drawn regarding the character of State practice.<sup>12</sup>

Perluss and Hartman argue, first, that the norm of temporary refuge should be seen as distinct from refugee law and from the customary international law norm of *non-refoulement*.<sup>13</sup> This has certain advantages over subsuming non-return, whatever its specifics, within an overarching principle of *non-refoulement*, writ large as it were.<sup>14</sup> In particular, when conceived as a principle located within the body of customary humanitarian law, temporary refuge is freed from that traditional discourse which sees asylum as the ideal 'permanent solution', and from traditional refugee law discourse, which is bound up

10 E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003).

11 UNHCR's statutory international protection responsibility entitles it to take positions on States' compliance with their international obligations, and to promote the better protection of refugees through the development of international agreements and international law generally. Its Executive Committee, currently comprising 87 States and shortly to be increased to 94 (UNGA Resolution 68/142 (18 December 2013)) provides its Members with a forum in which to question or contribute to emerging standards. See generally, C. Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012); C. Lewis, 'UNHCR's Contribution to the Development of International Law: Its Foundations and Evolution' (2005) 17 IJRL 67.

12 See further below, Section 2.2.

13 Perluss and Hartman, 'Temporary Refuge' (n 7) 599–600.

14 Compare Goodwin-Gill, 'Non-Refoulement' (n 1) 899–903.

with a Refugee Convention focus on rights and status geared to integration. Secondly, Perluss and Hartman identify how States in 'contested' matters will often seek to define themselves out of their obligations, for example, by avoiding the classification of conflict as 'war' or 'civil war', or by describing those seeking protection, not as refugees or displaced, but as irregular, illegal or economic migrants.<sup>15</sup> Thirdly, and presciently, Perluss and Hartman anticipate that objectors to their thesis will focus on the potentially problematic issue of *opinio juris*.<sup>16</sup> That was certainly the initial response, typified by Kay Hailbronner's article in the same volume of the *Virginia Journal of International Law*—'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?'<sup>17</sup> Notwithstanding its catchy title, the critique aimed at Perluss and Hartman was rather off target.

It may seem a little pointless to take issue with a paper published nearly thirty years ago, but the negative or restricted approach adopted then to certain fundamental issues of international law is still present today, and often in closely related fields concerned with the protection of individuals from the risk of relevant harm.<sup>18</sup> Even if Hailbronner can be excused for not having anticipated the judgment of the International Court of Justice (ICJ) in the *Nicaragua* case,<sup>19</sup> or that of the European Court of Human Rights in *Soering v the United Kingdom*,<sup>20</sup> there are nonetheless major substantive weaknesses in his attempts to counter the customary international law argument for protection, which are mainly due to questionable assumptions, apprehensions, and assessments. First, Hailbronner assumes what has long been understood as incorrect, namely, that there is a bright line between those fleeing generalised violence in, rather than persecution by, their home countries. Even in the 1980s, it was known that internal conflict is often configured precisely by those

15 Perluss and Hartman, 'Temporary Refuge' (n 7) 572–575; see also Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 230.

16 Ibid, 575–578, 625–626.

17 K. Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985–1986) 26 *Virginia J Int'l L* 857.

18 See K. Jastram, 'Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution' in J.C. Simeon (ed), *Critical Issues in International Refugee Law Strategies toward Interpretative Harmony* (CUP 2010) 143, 159–162, for a trenchant critique of David Martin's 'asylum as a limited resource' thesis. See also below on recent challenges to the customary international law foundations of refugee protection.

19 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) [1986] ICJ Rep 14.

20 *Soering v United Kingdom* (1989) 11 EHRR 439.

elements which the Refugee Convention itself locates within the framework of persecution, that conflict itself is often the vehicle for persecution, and that persecution might have different sources, not just the State and its organs.

Hailbronner further assumes that the protective norm of temporary refuge presented by Perluss and Hartman draws on refugee law in general, and *non-refoulement* in particular – a point which they specifically counter while avoiding any suggestion that there is any such category or status as that of 'humanitarian refugee'; the latter is Hailbronner's own construct, and not surprisingly, he finds no consensus on its definition.<sup>21</sup> His opposition to temporary refuge also reflects apprehensions, for example, that such a norm would open the floodgates, challenge absorptive capacity, require the admission of large numbers of aliens in all circumstances, and undermine sovereign competence over immigration.<sup>22</sup> Finally, his assessment of the relevant material raises particular problems of methodology. As a matter of fact, he cannot deny the body of State practice, and actually adds to the evidence with his own citations to municipal law. He relies on the judgment of the International Court of Justice in the *North Sea Continental Shelf* case as supporting a requirement of 'proof of consistent practice' in the creation of customary international law, but this is not the language used,<sup>23</sup> and then claims to find too much variation and inconsistency, except on the central, core element of non-return. He also considers it significant that he cannot find 'an individual right of temporary refuge', a 'civil right',<sup>24</sup> as if the obligations of States needed their exact parallel in domestic legal systems.

The protection of the displaced is not about, or not only about, 'admission'. Besides the individual, there is also a collective dimension, which engages the institutional and the international community at large, particularly by way of obligations *erga omnes*. In short, Hailbronner engages with issues that Perluss and Hartman either do not raise, or from which they expressly disassociate their thesis. He asserts that customary international law requirements are not met, but does not support his argument with any relevant material evidence of State practice, let alone *opinio juris*. While ready to invoke the occasional doubt and qualifications raised by a few States, not unusual in a period of norm-consolidation, he does not attend to the inferences to be drawn from practice,

21 Hailbronner, 'Humanitarian Refugees' (n 17) 859–861, 876.

22 Ibid, 858; and compare Jastram (n 18).

23 Instead, the Court spoke of 'extensive and virtually uniform' practice in a very limited context and with regard to a precisely identified rule: *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 43, para 74.

24 Hailbronner, 'Humanitarian Refugees' (n 17) 870, 876, 887.

from the declarations and resolutions of States and international organisations, or from the dynamic phenomenon which is the inter-action in an operational context between UNHCR and States.

More or less contemporaneously with Hailbronner's critique, Catherine Brown, a US Department of State Legal Adviser, gave a more focused and nuanced policy position on these issues, when describing the US government's response to the 'Sanctuary' movement which emerged in the context of the Central American refugee crisis.<sup>25</sup> Like Hailbronner, she took her lead from *non-refoulement* and the Refugee Convention, rather than from custom and State practice, and from US legislation intended to comply with, but go no further than, the treaty obligations. She took it as a given that the Refugee Convention does not protect those fleeing civil war, and that no other treaty ratified by the US dealt with the status of such people, once outside their own country.

In dismissing customary international law, she adopted a strongly municipal law perspective, in which immigration was, of itself and by definition, an 'unlikely area' to find rules or customary international law restricting the 'sovereign competence' of States. Like Hailbronner, she accepted that there was State practice with regard to those in flight from conflict, but considered that it was driven by policy, not by any sense of legal obligation. In support, she mentioned the objections of a few States, and identified some not unreasonable questions as to when the norm of temporary refuge would apply, to whom it would apply, and what role might remain for exclusion. Unlike Hailbronner, however, Brown recognised the value of the tension between moral values and legal precepts which, in her view, can lead to a better understanding of the law and therefore also to the ways in which it might be changed.

## 1.2 Further Comment

Although the focus of my short commentary in 1986 was very much on *non-refoulement*, I suggested that the underlying obligations were both wider and deeper.<sup>26</sup> Nevertheless, '*non-refoulement*' does have a certain appeal which

25 C. Brown, 'Refugees and "Refugees" in International and Domestic Law: The Status of Central Americans in the United States', paper presented at the Harvard Divinity School, 4 May 1987, copy on file with the author. On the sanctuary movement, see among others, I. Bau, *This Ground is Holy: Church Sanctuary and the Central American Refugees* (Paulist Press 1985).

26 Goodwin-Gill, '*Non-Refoulement*' (n 1) 909–910. In 'Three Asylum Paradigms' (2013) 20 *Int'l J Minority and Group Rts* 165, 20, J.F. Durieux notes some of the implicit inconsistencies resulting from that focus, but also picks up the key normative elements, namely,

exceeds its once strict meaning as a term of art in the Refugee Convention. It is well-known and well-understood today, precisely because it has migrated from the refugee context to encapsulate the protection obligations that arise in similar, if related contexts, for example, with regard to those at risk of torture or enforced disappearance. But the use of the term in a still wider sense, for example, to cover the variety of circumstances which may require non-removal under Article 3 of the European Convention on Human Rights, risks straining the primary duty and failing to appreciate that deeper level of obligation which underpins, among others, rescue at sea, the landing of the shipwrecked, and the admission of victims of conflict or other humanitarian disaster. Overall, perhaps, it might be seen as placing too much emphasis on 'non-return',<sup>27</sup> although 'temporary refuge' in the sense described above was always about much more, including the essential dynamic in the international refugee regime which engages in the pursuit of solutions while ensuring that those in flight are able to enjoy broad protection of human rights.<sup>28</sup>

It was argued in 1986 that the principle of temporary refuge, captured by the word '*non-refoulement*', applied to refugees beyond the Refugee Convention, to a class of the displaced who do not enjoy the protection of their country of origin, but that temporary refuge did not necessarily entail 'asylum', as that term is traditionally understood.<sup>29</sup> Contemporary mass movements certainly inspired thinking on this issue, but the characteristics of those movements – escape from violence, armed conflict, and human rights violations – were no less critical and, indeed, the argument for '*non-refoulement*' was located against a broad, normative background, which included the duties owed to the victims of armed conflict,<sup>30</sup> and that much older body of principles encompassing the specific needs of those in distress by reason of *force majeure*, or reflected in moral philosophy.<sup>31</sup>

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distress, refuge in the sense of admission to a place of safety and non-return to danger, together with international solidarity as the practical counterweight to claims for contingency.

27 Durieux, 'Three Asylum Paradigms' (n 26).

28 See above, text to n 4 and following.

29 Goodwin-Gill, '*Non-Refoulement*' (n 1) 902–906.

30 With reference to the 1949 Geneva Conventions and the 1977 Additional Protocols, see Goodwin-Gill, '*Non-Refoulement*' (n 1) 907.

31 Ibid, 909–910. See also Durieux, 'Three Asylum Paradigms' (n 26) 8–9, 14; and on the idea of a 'duty to rescue', 15–21. One challenge here may lie in translating the academic, abstract morality of 'rescue' in limited social context (daily life) into a complex international environment, one in which, arguably, States have no moral principles, but only political, pragmatic interests. In fact, the scene is not quite so bleak, as shown below; 'elementary

During the 1980s, States were clearly concerned at the impact of contemporary displacements on an international refugee regime oriented around the Refugee Convention. On the one hand, it was widely accepted that those fleeing armed conflict or acute distress should be humanely treated and not returned to situations of danger; on the other hand, there was uncertainty and some apprehension regarding the dimension of international obligation, in particular, because of what was perceived to be an inevitable link to more or less permanent asylum. But, as I argued then,

Asylum...is not the only way in which the protection of refugees can be accomplished. It is a mistake to make the leap from *non-refoulement* to asylum...Unilateral and uncoordinated responses need to be abandoned in favor of a unified response which focuses on root causes, regional solutions, burden-sharing, resettlement, and safe return. In the final analysis, *non-refoulement* through time implies temporary refuge.<sup>32</sup>

'Temporary refuge' is, by definition, refuge which lasts for a limited time, or which is provided to supply a passing need. It either comes to an end, when the need has passed, or it transitions to something more lasting, if not quite yet to a durable solution.<sup>33</sup> Temporary refuge, nonetheless, is a matter of obligation. Some suggestions for a framework of standards were included in an Annex to the article, which emphasised, not *non-refoulement* as such, but rather the protection due to the general category of 'people in distress' or 'persons in need of international protection', to use today's terminology. Drawing on the practice of States and the various sources of applicable law, it was argued that people in

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considerations of humanity', among others, are in the background, and a protection regime exists, combining obligations with institutions, so that those in need of protection can receive it.

32 Goodwin-Gill, '*Non-Refoulement*' (n 1) 913–914.

33 See J.F. Durieux and J. McAdam, '*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4. There are many grey areas in international law, and compliance with treatment standards over time may well be an issue, whether they are based in treaty or customary international law; the core obligations of temporary refuge still stand, however. The 1951 Convention and the 1967 Protocol also contain no clear time-scale for their application, as many refugees and asylum seekers have discovered to their cost. For an egregious, if not particularly rare, example, see *R (on the application of SS) v Secretary of State for the Home Department* [2013] EWCA Civ 1715; the applicant having waited over six years for a decision, the Court ordered that his case be determined by a stated date, after the Secretary of State had declined to give an undertaking to do so.

distress ought to be admitted and not returned to situations of risk, provided with such assistance as is necessary, and treated with humanity and in accordance with internationally recognised human rights and fundamental freedoms; what exactly might be required in this latter regard was left open, for much will depend on the circumstances.<sup>34</sup> It was also emphasised, however, that *all* States should 'cooperate to relieve the burden borne by States receiving people in distress'.<sup>35</sup>

## 2 Temporary Refuge Today<sup>36</sup>

### 2.1 Introduction

Nearly thirty years later, the debate has certainly moved on. Europe, which once seemed to lag behind and to have the most objections, has learned to accommodate the necessity for temporary protection, in legislative theory at least and within the EU.<sup>37</sup> It has learned to integrate its human rights jurisprudence into a regime of subsidiary protection,<sup>38</sup> and, in principle, to provide

34 As noted above, the UNHCR Executive Committee proposed a set of minimum standards of treatment for mass influx situations, which were geared very much to lessons learned from the circumstances of flight, reception and resettlement during the Indo-China refugee crisis. Other situations may require more, given what is due to 'everyone' as a matter of international human rights law. At the same time, and borrowing from the 'programmatic' aspects recognized in economic, social and cultural rights doctrine, effective compliance with core obligations will often be contingent on international solidarity in an environment in which cooperation will increasingly be seen as a matter of obligation. Generally, on treatment post-refuge, see J. McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 197–251 (particularly the summary of minimum standards at 242–248).

35 Goodwin-Gill, 'Non-Refoulement' (n 1) 917.

36 Since the 1980s, the term 'temporary refuge' has been overtaken by 'temporary protection'; see G.S. Goodwin-Gill, *The Refugee in International Law* (2nd edn Clarendon Press 1996) 199–202; Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 286–296, 335–345. For the purposes of this chapter, the original term will be maintained.

37 See European Union (Council) Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJEU, L 212/12.

38 See the provisions on 'subsidiary protection' in the (recast) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary

protection to those at risk of serious harm due to armed conflict,<sup>39</sup> again within the EU framework.<sup>40</sup>

Practice outside Europe has also developed and consolidated.<sup>41</sup> The UN Secretary-General's 2012 and 2013 reports on assistance to refugees, returnees and displaced persons in Africa provide a telling account of the role of violence and conflict as a powerful driver of both internal and external displacements in the continent.<sup>42</sup> But as the 2012 report concludes, notwithstanding some incidents of forced return and border closure, 'the principle of non-refoulement...remained widely respected'; '[r]efugee protection....remains a reality in Africa, based on tradition and law...'.<sup>43</sup> UNHCR's report for the same period confirms the overall picture – that conflict drives displacement, that displacement produces Convention refugees and refugees more broadly considered, but that States at large continue to admit those in need of international protection.<sup>44</sup> As the Secretary-General put it in his 2013 report, 'The response of the Governments and peoples of Africa to many of the refugee emergencies has been exemplary...[D]uring the reporting period, neighbouring countries maintained open borders and respected the principle of non-refoulement, despite the significant social and economic implications...'.<sup>45</sup> The UN General Assembly likewise acknowledged 'the generosity, hospitality and spirit of solidarity of African countries that continue to host the influx of refugees due to humanitarian crises...', noted that 'armed conflict is one of the

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protection, and for the content of the protection granted (recast) [2011] OJEU 20.12.2011 L337/9-23.

39 See Article 15(c) of the (recast) Qualification Directive (n 38); also Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921; Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (30 January 2014).

40 See H. Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 25 IJRL 207.

41 See J. Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279.

42 'Assistance to refugees, returnees and displaced persons in Africa. Report of the Secretary-General': UN doc A/67/323 (21 August 2012) paras 1-3; UN doc A/68/341 (22 August 2013) paras 1, 8-45.

43 'Assistance to refugees, returnees and displaced persons in Africa' (n 42) paras 42, 92. See also UNGA Resolution 67/150, 'Assistance to refugees, returnees and displaced persons in Africa' (20 December 2012).

44 'Report of the United Nations High Commissioner for Refugees covering the period 1 January 2011 – 30 June 2012': UN GAOR, 67th Sess., Suppl. No. 12 (A/67/12) paras 1-3, 16, 30-36.

45 'Assistance to refugees, returnees and displaced persons in Africa. Report of the Secretary-General': UN doc A/68/341 (22 August 2013) paras 46, 94.

principal causes of forced displacement in Africa...', and condemned 'all acts that pose a threat to the personal security and well-being of refugees and asylum seekers, such as refoulement, unlawful expulsion and physical attacks...'<sup>46</sup>

## 2.2 *Temporary Refuge in State Practice and Customary International Law*

The principle of temporary refuge comprises more than its core obligations of admission and non-return to situations of danger, being an extrapolation from the practice of States across a broad spectrum of activity concerned with forced displacement. The question is, whether it does indeed have a sure footing in customary international law, independently of specific, regional developments, for example, in relation to complementary and subsidiary protection.

It is in the nature of customary international law to be contested, of course, particularly in the absence of a final authoritative ruling by a competent international tribunal.<sup>47</sup> Nevertheless, it continues to be a powerful guide to the practice of States, and for that reason it is crucial to be clear, not only about how it comes into being, but also about how it continues in force.

Good guidance can be found in the jurisprudence of the International Court of Justice, not only in the *North Sea Continental Shelf* and *Nicaragua* cases, but also in the academic literature and commentary. The latter, in particular, has helped to identify what can be called the 'traditional' and 'modern' approaches to customary international law, not as competing or contradictory methods, but as complementary aspects of a common stream. Commenting shortly after judgment in the *Nicaragua* case, Frederic Kirgis noted with regard to the question of how much State practice is required, that a lot depends on the activity in question and the reasonableness of the rule: 'The more destabilizing or morally distasteful the activity – for example...the deprivation of human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable'.<sup>48</sup> At around the same time, however, Bruno Simma and Philip Alston expressed

<sup>46</sup> UNGA Resolution 68/143, 'Assistance to refugees, returnees and displaced persons in Africa' (18 December 2013) (adopted without a vote) tenth preambular paragraph and paras 4, 17.

<sup>47</sup> Or perhaps, as Anthea Roberts recently put it, 'The rules for determining custom are not a good description of what any of us actually do. Instead, they are largely used to critique the work of others...': A. Roberts, 'Custom, Public Law and the Human Rights Analogy' <<http://www.ejiltalk.org/custom-public-law-and-the-human-rights-analogy/>> accessed 1 March 2014.

<sup>48</sup> F.L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146, 149.

misgivings about the uses to which customary international law was being put in the name of human rights.<sup>49</sup> They wondered then whether the 'radical approach' which they identified with Kirgis's brief reflection on the *Nicaragua* case was justified, and questioned whether the concept of custom,

...should be so fundamentally reshaped in a matter which disregards its intrinsic limitations (and some would say, virtues) in order to accommodate a desired (and highly desirable) policy outcome.<sup>50</sup>

Simma and Alston in fact opted for an alternative approach to the legal foundations and legal force of human rights at large,<sup>51</sup> which they located more in the notion of general principles (as reflected in the jurisprudence of the ICJ), and as the product of constant interaction between States and international institutions under the jurisdictional umbrella of a 'droit de regard'.<sup>52</sup>

In his 1998 lectures at the Hague Academy, Maurice Mendelson closely examined the relationship between State practice and *opinio juris*, considered against the 'claims' of different schools of thought.<sup>53</sup> He argued that *opinio juris*,

...is of only limited utility. When properly explicated, it provides a reason – if one is needed – why certain types of potential precedent do

49 B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–89) 12 *Aust YBIL* 82.

50 *Ibid*, 96.

51 The differentiation issue is not explored. It may well be that the legal foundation of human rights at large is located in the manner described, while specific rights and obligations may trace their individual provenance to treaties and to the formative practice of States.

52 Simma and Alston, 'The Sources of Human Rights Law' (n 49) 98. The role of UNHCR and its supporting regime in the field of forced population displacement is similar, but focused even more precisely on a limited number of obligations, while the ICRC likewise acts as an 'agent' in the development of customary international humanitarian law; see ICTY, *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber) IT-94-I-AR72 (2 October 1995) para 109, cited in J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) vol I, xxxi–xlv, xxxv.

53 M. Mendelson, 'The Formation of Customary International Law' (1998) 273 *Hague Recueil* 155; on the 'voluntarist approach', see in particular 253–267. Mendelson was Rapporteur and then Chair of the International Law Association's Committee on Formation of Customary (General) International Law, which presented its Final Report to the ILA 2000 London Conference.

not count...it [also] provides a somewhat tautologous explanation of obedience to established customary rules. But it does not provide a very helpful account of the *creation* of those rules...<sup>54</sup>

He noted, as others also had done, that 'in most cases', it is unnecessary 'either in theory or (particularly) in practice, to establish the presence either of *opinio juris* or of consent'; and that the International Court of Justice, for example, will often rely simply on 'well-established practice', or on assertions that such and such is a rule.<sup>55</sup>

In her prize-winning 2001 article, Anthea Roberts goes one step farther and identifies 'modern' customary international law as a deductive process that begins with statements of rules, rather than particular instances of practice.<sup>56</sup> In the case of temporary refuge, however, a not inconsiderable body of long-standing State practice can be combined with a substantial number of statements on the rules to be followed, which in turn can be found in declarations and resolutions adopted in the UNHCR Executive Committee and the UN General Assembly. The normative theory – the ideal of admission and non-return – reflects the moral issues and the human values which have contributed to the development of international law in the UN era.<sup>57</sup> Temporary refuge, in fact, not only 'prescribes ideal standards of conduct', but is also largely descriptive of existing practice.<sup>58</sup> Moreover, the very extensive practice of admission and non-return should not be under-estimated in the broader international environment which values the protection of refugees.<sup>59</sup> That

54 Ibid, 282. See also, J. Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2013) 26–27. In its Advisory Opinion in the *Wall*, the International Court of Justice, when finding certain actions contrary to international law, called in aid the customary international law aspects of international humanitarian law, and relied on general principles of international law when determining the jurisdictional applicability of the 1966 Human Rights Covenants: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, 172–181, 200.

55 Mendelson (n 53) 285, 288–289 n. 364 for examples. For a more recent assessment of the complementary approaches to customary international law at work, see A. Alvarez-Jiménez, 'Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009' (2011) 60 ICLQ 681.

56 A. Roberts, 'Traditional and Modern Approaches to Customary International Law' (2001) 95 AJIL 757; also, A. Roberts, 'Who killed Article 38(1)(b)? A Reply to Bradley and Gulati' (2010) 21 Duke J Comp and Int'l Law 173.

57 Roberts, 'Traditional and Modern Approaches' (n 36) 764.

58 Compare Roberts, *ibid*, 764–765, 769.

59 Compare O. Schachter, 'Recent trends in international law-making', (1988–89) 12 Aust YBIL 1, 11: '[I]nternational rules are not all equal. Some are more equal than others because

context includes the regular endorsement of these practices by States, the active engagement of a responsible UN agency – UNHCR – in the oversight of State practices vis-à-vis refugees and others of concern under its mandate, and the related dimensions of international solidarity, co-operation, burden-sharing, and the pursuit of durable, sustainable solutions.

### 2.3 *Sceptical Views*

James Hathaway follows Hailbronner as a more recent sceptic when it comes to the place of protection in customary international law, although he seeks to confine the notion closely and sees it as largely derivative from the prohibition of *refoulement* in its Refugee Convention-centric form. He appears also to infer that the end result of arguments for a broader approach is, 'a legally binding and universally applicable right to asylum for all seriously at-risk persons'.<sup>60</sup> With these constraints in mind, and without defining asylum, he questions the customary international law argument from the voluntarist perspective that, 'the consent of States evinced by either formal commitments or legally relevant action' is missing.<sup>61</sup> Hathaway's avowed intent is to cling to the Refugee Convention (including its latent possibilities),<sup>62</sup> which he fears may be endangered by those who seek to 'leverage' undefined asylum by extending *non-refoulement* and refugee rights to 'non-refugees'.<sup>63</sup>

Like Hailbronner's 'humanitarian refugees' in 1986, Hathaway's 'leveraged right to asylum' is self-constructed, and so readily de-constructible. Although he seeks to engage with customary international law doctrine, his analysis reveals serious gaps when dealing with practice, doctrine, and jurisprudence. Above all, it lacks a sense of the big picture, of a world in which customary international law is a dynamic or, in Mendelson's words, a continuing process,<sup>64</sup> responding, growing, contracting, and refining under the lens of daily practice by States and international institutions. An analytical framework locked into the treaty rule of *non-refoulement* means that principles and practices with an older, or even contemporary, provenance are simply missing. This fixation was wisely anticipated by Perluss and Hartman, who carefully located

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they express deeply-held and widely-shared convictions as to the unacceptability of the prohibited conduct. Contrary and inconsistent practice would not and should not defeat their claims as customary law'. Quoted in Roberts, 'Traditional and Modern Approaches' (n 56) 783.

60 J.C. Hathaway, 'Leveraging Asylum' (2010) 45 Texas Int'l LJ 503, 506.

61 Ibid.

62 Ibid, 507, note 22.

63 Ibid, 506–507.

64 Mendelson (n 53) 283.

the norm of temporary refuge as they understood it, at the *intersection* of international humanitarian law, refugee law, and human rights law<sup>65</sup>; their work is among the many not cited by Hathaway.

Although he appears to accept that a more flexible approach to *opinio juris* may now be applicable,<sup>66</sup> Hathaway's own version is hardly indicative of this, being both strict and ambiguous to a fault: 'It is sufficient to show that States presently regard the putative norm as legally compelled, even if their concordant actions in keeping with the norm were not induced by a sense of legal duty'.<sup>67</sup> When looking for evidence of *opinio juris*, he rightly acknowledges the relevance of successive UN General Assembly resolutions on *non-refoulement*, but rather than placing them within the context of consistent practice, looks first for them to be weighed against 'contrary indicators'.<sup>68</sup> Given the Refugee Convention as his point of departure, he not surprisingly identifies non-ratification in Asia and the Middle East as the principal contrary indicator, and thereupon asserts that there is no evidence that openness to those in need, 'has been influenced by a sense of obligation'.<sup>69</sup>

As noted above, the curious omission at this juncture is any recognition of the operational context in which refuge is accorded, on the one hand, and resolutions adopted, on the other. The many General Assembly resolutions which Hathaway cites do not stand in isolation; among other matters, they follow on from and generally acknowledge the High Commissioner's report on the Office's activities, as well as the annual report of the UNHCR Executive Committee.<sup>70</sup> Over the years, the General Assembly has approved for UNHCR, its subsidiary organ, a protection mandate of some considerable breadth for the externally displaced, while simultaneously calling on States to fulfil their international obligations, provide the basics of protection, and co-operate in the pursuit of solutions.<sup>71</sup> Such resolutions cannot be isolated from a refugee regime in which obligations figure front and centre.

This dynamic of interaction between States and international institutions is especially well-illustrated by the records of 1994. In that year's 'Note' for the Executive Committee, UNHCR focused on the concept of international

65 Perluss and Hartman, 'Temporary Refuge' (n 7) 554, 602, 624–626.

66 Hathaway, 'Leveraging Asylum' (n 60) 508.

67 Ibid, 508–509.

68 Ibid, 512.

69 Ibid, 513–514.

70 See, for example, UNGA Resolution 68/141 (18 December 2013) 'Office of the United Nations High Commissioner for Refugees', Preamble, first para.

71 Ibid, operational para 1. UNHCR's additional mandates for stateless persons and the internally displaced are outside the scope of this chapter.

protection.<sup>72</sup> It referred to the progress made, after the rather *ad hoc* responses of earlier times, in moving towards a more universally applicable refugee definition in UNHCR's Statute and the Refugee Convention, where lack of national protection was at the core of the refugee concept.<sup>73</sup> Looking beyond the Convention and the Protocol to the larger class of persons in need of international protection was not just a matter of a broad or narrow interpretation of the elements of the refugee definition:

However liberally its terms are applied, some refugees fleeing the civil wars and other forms of armed conflict that are the most frequent immediate causes of refugee flight fall outside the letter of the Convention. Although many refugees from armed conflict do have reason to fear some form of persecution on ethnic, religious, social or political grounds at the hands of one or more of the parties to a conflict, others typically are fleeing the indiscriminate effects of armed conflict and the accompanying disorder, including the destruction of homes, harvests, food stocks and the means of subsistence, with no specific element of "persecution".<sup>74</sup>

The need for appropriate international action had led to successive General Assembly resolutions extending the High Commissioner's competence to those fleeing armed conflict, so that they too should receive protection, assistance, and solutions.<sup>75</sup> Reviewing the frequent inconsistency in the terminology employed for refugees who may not come within the Convention/Protocol definition, UNHCR noted that in order, 'to convey clearly...the reality of coerced flight from one's country', it used the term 'refugee' in the broader sense,

...to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder.<sup>76</sup>

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<sup>72</sup> UNHCR, 'Note on International Protection': UN doc A/AC.96/830 (7 September 1994) paras 8-18.

<sup>73</sup> Ibid, para 10.

<sup>74</sup> Ibid, para 30.

<sup>75</sup> Ibid, para 31.

<sup>76</sup> Ibid, para 32. On protection in 'non-ratifying States', see paras 38, 40; on possible further development, see paras 44-67.

The Executive Committee responded by duly noting the large number of persons in need of international protection and forced to flee by reason of armed conflict. Whether or not refugees in the Convention/Protocol sense, their situation and needs were often comparable and temporary protection, 'including admission to safety, respect for basic human rights, protection against *refoulement*, and safe return when conditions permit, can be of value as a pragmatic and flexible method of affording international protection of a temporary nature...'<sup>77</sup>

The General Assembly then followed up by expressly calling on States to assist UNHCR in continuing to provide international protection to refugees from conflict, and recognised the desirability of exploring further measures, 'to ensure international protection to all who need it', including through temporary protection and other forms of asylum oriented towards repatriation.<sup>78</sup> Since then, the language of General Assembly resolutions dealing with protection has reflected the broader understanding of 'refugee' adopted by UNHCR,<sup>79</sup> while later developments have confirmed also the broader range of protection obligations. To take just two examples: In 2005, the UNHCR Executive Committee expressly recognised the value of 'complementary forms of protection' in ensuring that 'persons in need of international protection receive it'. With its repeated references to *non-refoulement*, the Executive Committee's conclusion provides further strong support for the *obligation* to ensure protection.<sup>80</sup> More recently, in its December 2013 resolution on UNHCR, the UN

77 UNHCR Executive Committee, *Report of the 45th Session*: UN doc A/AC.96/839 (11 October 1994) para 19. For later developments, see UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (UNHCR February 2014); para 4 notes that temporary protection provides, 'immediate protection from *refoulement* and basic minimum treatment'.

78 UNGA Resolution 49/169, 'Office of the United Nations High Commissioner for Refugees' (23 December 1994) paras 6, 7. See also para 3, calling upon States, 'to take all measures necessary to ensure respect for the principles of refugee protection and the humane treatment of asylum-seekers in accordance with internationally recognized human rights norms'; and para 4, calling upon all States, 'to uphold asylum as an indispensable instrument for the international protection of refugees, and to respect scrupulously the fundamental principle of *non-refoulement*'.

79 See, for example, UNGA Resolution 68/141, 'Office of the United Nations High Commissioner for Refugees' (18 December 2013) paras 20, 24.

80 UNHCR Executive Committee Conclusion No. 103 (LVI) (2005), 'Conclusion on the Provision of International Protection including through Complementary Forms of Protection': Report of the UNHCR Executive Committee, 56th Sess., UN doc A/AC.96/1021 (7 October 2005) para 21. The Executive Committee acknowledges such protection as a positive and pragmatic response, 'to ensure that persons in need of international

General Assembly covered almost all the disparate parts of the refugee regime. It reaffirmed the Refugee Convention and 1967 Protocol as the foundation of international refugee law; underlined, in particular, the importance of full respect for the principle of *non-refoulement*; strongly emphasised the importance of active international solidarity and burden-sharing; deplored the *refoulement* and unlawful expulsion of refugees and asylum seekers, and called upon all States concerned to ensure respect for the relevant principles of refugee protection and human rights. It further emphasised the dynamic, action-oriented aspect of international protection, which includes promotion and facilitation of admission, reception and treatment of refugees in accordance with internationally agreed standards, and ensuring durable, protection-oriented solutions. It recognised, in particular, the need to address the root causes of refugee movements, noted the importance, in mixed migratory flows, of better addressing protection needs, including by safeguarding access to asylum for those in need of international protection, and urged co-operation and mobilisation of resources in a spirit of international solidarity and burden-sharing, in order to reduce the heavy burden borne by countries and communities hosting refugees.<sup>81</sup>

When it comes to State practice, Hathaway places great emphasis on violations of 'the principle of *non-refoulement*', although many of his examples involve general interference with the movements of people, rather than the actual return of those in need of protection to situations of persecution or conflict.<sup>82</sup> Of course, there have been refusals of admission and returns, and these have been deplored and protested; but this is exactly the point at which Hathaway's critique could have benefited from consideration of the approach

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protection receive it...'; notes that 'temporary protection, without formally according refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from other forms of international protection...': para 21(l); affirms that 'relevant international treaty obligations...prohibiting *refoulement*' are important tools to provide protection to those outside their country of origin, 'who may be of concern to UNHCR but who may not fulfil the [Convention/Protocol refugee definition]...and calls upon States to respect the fundamental principle of *non-refoulement*': para 21(m). See also para 21(s) on the importance of 'applying and developing the international refugee protection system in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it'.

81 UNGA Resolution 68/141, 'Office of the United Nations High Commissioner for Refugees' (18 December 2013) (adopted without a vote) paras 6, 7, 20, 24, 29, 34, 37. Compare Goodwin-Gill, '*Non-Refoulement*' (n 1) Annex, 916–918 (suggested principles 7–12).

82 Hathaway, 'Leveraging Asylum' (n 60) 515, 518–519.

to customary international law adopted in the work and analyses of Simma and Alston, Mendelson, and Roberts,<sup>83</sup> or from some closer attention to the jurisprudence to which they and other authors have referred. Here, too, the development of customary international law in the context of armed conflict is analogous and instructive. In the Introduction to the *ICRC Study on Customary International Humanitarian Law*, the authors note that State practice includes both physical and verbal acts, and abstention from certain conduct.<sup>84</sup> With regard to the ICJ's now classic characterisation of contrary practice in the *Nicaragua* case,<sup>85</sup> the *Study* observes that,

[t]his finding is particularly relevant for a number of rules of international humanitarian law where there is overwhelming evidence of verbal State practice supporting a certain rule found alongside repeated evidence of violations of that rule. Where this has been accompanied by excuses or justifications by the actors and/or condemnations by other States, such violations are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their *official* practice and claim to be acting *as of right*.<sup>86</sup>

Turning to the challenges of identifying *opinio juris*, the authors distinguish between a rule which contains a prohibition, an obligation, or a right to act in a certain manner: 'If the practice largely consists of abstention combined with silence, there will need to be some indication that the abstention is based on a legitimate expectation to that effect from the international community'. Moreover, quite often, 'the same act reflects practice and legal conviction'.<sup>87</sup>

Since 2012, the 'Identification of customary international law' has been included in the International Law Commission's programme of work.<sup>88</sup>

83 Neither Simma and Alston, 'The Sources of Human Rights Law' (n 49) nor Roberts, 'Traditional and Modern Approaches' (n 56) receives a mention; Mendelson (n 53) is mentioned only indirectly, and not by name, in two citations to the (shorter) report adopted by the ILA in 2000.

84 Henckaerts and Doswald-Beck (n 84) xxxii–xxxiv; on UNHCR's role in protesting breaches of the principle of *non-refoulement*, see Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 228.

85 *Nicaragua* (n 8) 98, para186.

86 Henckaerts and Doswald-Beck (n 84) xxxviii (emphasis in original).

87 *Ibid*, xxxix–xl.

88 The topic was initially styled, 'Formation and evidence of customary international law'. See 'Note by Michael Wood, Special Rapporteur': UN doc. A/CN.4/653, 30 May 2012; 'First

The ILC's 2013 Report to the General Assembly records the following remarks of the Special Rapporteur, Michael Wood, who noted,

'...the general support among members for the "two-elements" approach, that is to say, that the identification of customary international law requires an assessment of both State practice and *opinio juris*, while recognizing that the two elements might sometimes be "closely entangled", and that the relative weight to be given to each might vary depending on the context'.<sup>89</sup>

When Hathaway asserts that, 'there is little doubt that clearly predominant global practice remains a requirement for the establishment of a legal duty',<sup>90</sup> it is as if nothing has changed since 1951, or perhaps even earlier. In international law, as in life, there is rarely, if ever, a perfect record of compliance with law, or with moral or social standards. What is missing in Hathaway's analysis is the capacity to integrate the practice of States, including its failings, into a working regime of refugee protection. On an almost daily basis, this reflects the special value which members of the international community attach to the protection of those displaced by persecution or conflict, and to the obligations of admission and non-return. Regularly reaffirmed by States through the UN General Assembly and other international forums, this value and these obligations are 'operationalised' by the UNHCR in the exercise of a universal protection mandate unconstrained either by Statute or Convention, and unquestioned by States.

In concluding his critique of the customary international law foundations of protection, or aspects of it, Hathaway prays in aid the judgment of the Court of Appeal in the *Roma Rights* case.<sup>91</sup> This case involved a challenge to the

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Report of on the formation and evidence of customary international law': UN doc. A/CN.4/463, 17 May 2013; *Report of the International Law Commission (2012)*: UN doc. A/67/10, Ch. VIII, 108–115; *Report of the International Law Commission (2013)*: UN doc. A/68/10, Ch. VII, 93–100.

89 *Report of the International Law Commission (2013)*: UN doc. A/68/10, Ch. VII, 99, para 101.

90 Hathaway, 'Leveraging Asylum' (n 60) 517.

91 *European Roma Rights Centre and others v The Immigration Officer at Prague Airport and the Secretary of State for the Home Department and the United Nations High Commissioner for Refugees* [2003] EWCA Civ 666. Declaration of interest: The author was one of the Claimants' legal team in the initial High Court proceedings: *European Roma Rights Centre and 6 others v The Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2002] EWHC 1989 (Admin) and thereafter acted as Counsel *pro bono* for UNHCR as Intervener in the Court of Appeal and the House of Lords.

United Kingdom's application of a 'pre-clearance scheme' in Prague Airport, which was intended to screen out potential asylum seekers before they could embark for the UK. It is not clear why the Court of Appeal should be invoked, rather than the precedent decision of the House of Lords,<sup>92</sup> but presumably it is not for any legal support. Hathaway nonetheless suggests that the Court had been invited by UNHCR to find that the duty of *non-refoulement* had evolved beyond Article 33 of the Refugee Convention, because it 'wanted to prohibit efforts by member (sic) states to stymie the departure of would-be refugees from their own country'.<sup>93</sup> In fact, UNHCR's argument took quite another tack, with emphasis placed on the obligation of good faith in the application of treaty obligations,<sup>94</sup> rather than on particular articles of the Convention.

In the judgment at first instance, reference had indeed been made to the notion that pre-clearance scheme involved the State 'extending its frontier' into the territory of the country of origin,<sup>95</sup> and this was briefly taken up in UNHCR's submissions to the House of Lords, as perhaps indicating a 'virtual frontier' to which the well-established rules of *non-refoulement* and non-rejection should apply. Lord Bingham rightly concluded that, 'save in a highly metaphorical sense', those facing UK immigration control at Prague Airport had not presented themselves at the frontier of the United Kingdom.<sup>96</sup> As in the Court of Appeal, however, UNHCR's arguments were founded more particularly in general international law. The principle of good faith, it was submitted, requires that a State contemplating action within the area of its sovereign authority, for example, in controlling the movement of persons, must ensure that its actions are nonetheless lawful. Good faith regulates the area between the permissible and the clearly impermissible. Certain things may not be done in pursuit of the 'legitimate aim' of migration management, such as shooting people or sinking boats suspected of carrying illegal migrants, but the actions generally of the State must also be consistent with its other obligations under international law.<sup>97</sup>

92 *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55. For related comment, see Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 353-354.

93 Hathaway, 'Leveraging Asylum' (n 60) 535.

94 [2003] EWCA Civ 666, paras 29, 47. Counsel for the *Appellants* submitted that the Prague operation constituted 'a form of constructive refoulement': para 32.

95 [2003] EWHC 1989 (Admin) para 41.

96 [2004] UKHL 55, para 26.

97 UNHCR's submissions are a matter of public record and can be consulted on Refworld: <<http://www.refworld.org/docid/41c1aa654.html>>; they were also published in (2005) 17 IJRL 427.

The House of Lords accepted that the principle of good faith had a place in the interpretation and performance of treaties, but considered that it was not itself a source of obligation where none would otherwise exist; the claimants not being outside their country of origin, nor within the United Kingdom, they could not be 'returned' contrary to the principle of *non-refoulement*, and the pre-clearance scheme did not therefore violate the UK's Convention obligations. However, as those who have read the judgment will recall, UNHCR's argument for 'migration management' to be consistent with a State's obligations generally under international law did resonate in the judgment. When allowing the appeal on the ground that the pre-clearance scheme operated in a manner that was directly discriminatory, contrary to UK legislation, Lord Bingham, Lord Steyn, Lord Hope and Baroness Hale were of the view that, having regard to the universal proscription of racial discrimination, the operation was also contrary to the United Kingdom's obligations under customary international law and international treaties to which it was a party.<sup>98</sup> Clearly, even at the level of municipal law, there is more to the protection of refugees than the Convention and Protocol might lead one to believe...

It might still be argued that the broader picture reveals elements of contingency sufficient to qualify the legal weight to be attributed to practices of admission and non-return,<sup>99</sup> but as repeatedly stressed above, that would be to disregard the content and the dynamic of the international refugee regime as a whole. International law and obligation are woven into this complex of institutional and State mechanisms which have evolved to meet the protection needs of those in flight. Here, normative value may be 'relative', but only in the sense that legal duties are just one part of the whole; thus, the immediate protection of refugees demands compliance with the core obligations of temporary refuge, while stepping back to gain a view of the regime in operation reveals a picture characterised by interlocking obligations, some complete, others inchoate. Admission, non-return, and treatment in accordance with international human rights law are clearly among the former,<sup>100</sup> while active or

98 [2005] 2 AC 1, [2004] UKHL 55, paras 10, 31, 36–38, 46–48, 97–104, 106.

99 Cf. Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 336–339.

100 In *Complementary Protection* (n 34) Jane McAdam argues that those who, not having been recognized as Convention refugees but nonetheless accepted as being in need of international protection, should be granted an equivalent status and benefit from the same rights. This argument is further developed and strengthened in J. McAdam, 'Status Anxiety: The New Zealand Immigration Bill and the Rights of Non-Convention Refugees' (2009) NZL Rev 239. Hathaway, beginning and ending within the confines of the 1951 Convention, disagrees, primarily, it seems, because those who are to benefit are not, in his view, 'Convention refugees': Hathaway, 'Leveraging Asylum' (n 60) 528. In the world at

practical solidarity, co-operation, and the pursuit and promotion of durable and sustainable solutions are among the latter, being possessed of compelling weight in the *political* sphere and perhaps even beginning to acquire normative content.

Temporary refuge does not fit the Roberts model precisely, for there is indeed a considerable amount of relevant State practice, but it gains considerably from her analysis of the importance, from an *opinio juris* perspective, of declarations, resolutions, statements by competent international organisations, and acquiescence in the protection activities of UNHCR. As the later jurisprudence of the ICJ shows, when it comes to determining customary international law, there is no need to swing between traditional, radical, or even modern options. The Court will use both a 'strict inductive' and a 'flexible deductive' method, as demanded by the occasion and the subject-matter.<sup>101</sup> Temporary refuge draws conveniently on the material relevant to both methods – long-standing, well-established practice, significantly and substantially reinforced by declarations, conclusions and resolutions adopted in the UN General Assembly, the UNHCR Executive Committee, and regional bodies. In addition, the practice of States at large has developed under the influence of UNHCR, as the representative of the international community of States, in the exercise of its responsibility to provide international protection to refugees and others persons within its mandate, and as the forum and the channel through which the problem of refugees can be addressed.

There is no ambiguity in the practice of temporary refuge, such as might require the separate identification of *opinio juris* – the practice is dense, the expectation is high, the exceptions are few, and regularly protested by UNHCR,

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large, however, States have accepted other realities, and the developing body of customary international law is moving beyond the preliminaries of admission and non-return, to make firmer the other essential components in an effective functioning regime, in particular, international co-operation and responsibility sharing.

101 See Alvarez-Jiménez, 'Methods for the identification of customary international law' (n 55). Alvarez-Jiménez looks at instances in which the Court, 'applied the flexible approach in the sense that it recognized the customary status of provisions included in treaties or United Nations General Assembly resolutions, without such recognition generating controversy or altering the legal status quo': *ibid*, 689–693, 692–693. He also identifies other 'non-traditional' methods to declare customary international law, for example, in declarations founded on past decisions or other judicial rulings, or by way of implicit recognition: *ibid*, 698ff. For an earlier account of the use and sufficiency of 'assertions', see Mendelson (n 55) 289, footnote 364. For a more recent example, see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 99,

and by individual States.<sup>102</sup> The obligation, however, is particular: to admit those in need of international protection and not to return them to a situation of danger; protection cannot cease with the fact of admission, of course, but temporary refuge is not an obligation to grant permanent asylum.<sup>103</sup>

### 3 Conclusion

Like the prohibition of torture, temporary refuge has a special value, a moral quality which distinguishes it from other rules of international law, such as those governing the delimitation of maritime boundaries. Less importance can therefore be ascribed to instances of contrary practice, because to recognise exceptions, to allow or approve return to the real risk of danger to life and liberty, would shock the conscience of mankind or, to use the words of the International Court of Justice, be contrary to 'elementary considerations of humanity'.<sup>104</sup>

To start, as it were, with the value, with the statement of principle before the practice, might be thought utopian, divorced from reality, even 'wishful legal thinking'.<sup>105</sup> Nevertheless, having once accurately identified the obligations in

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where the International Court of Justice stated that the prohibition of torture is part of customary international law and that it has become a peremptory norm: 'That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application...and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora'.

<sup>102</sup> Durieux refers to the closing of the Yugoslavia Republic of Madeconia/Kosovo border in 1999, as leading to 'rather crude blackmailing of the international community': Durieux (n 26) 20. In my view, this goes too far, for the crisis was in no small way due to UNHCR's own earlier failure to act in the face of the hardly unpredictable likelihood that the internal displacement with which it was involved in Kosovo would turn into an 'external' search for refuge: G.S. Goodwin-Gill, 'The Kosovo Refugee Crisis: An Independent Evaluation of UNHCR's Emergency Preparedness and Response' (2000) Humanitarian Exchange Magazine <http://www.odihpn.org/humanitarian-exchange-magazine/issue-16/the-kosovo-refugee-crisis-an-independent-evaluation-of-unhcrs-emergency-preparedness-and-response> accessed 29 April 2014. On the outcome and for other instances of 'inconsistent' practice, see Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 336–339.

<sup>103</sup> Goodwin-Gill and McAdam, *The Refugee in International Law* (n 2) 343–345. See also the 1982 Report of the UNHCR Executive Committee Sub-Committee of the Whole on International Protection, cited in Goodwin-Gill, *The Refugee in International Law* (n 36) 197, 198n.

<sup>104</sup> *Corfu Channel Case*, [1949] ICJ Rep, 4.

<sup>105</sup> '...the charge of utopianism is made by the "deliberately short-sighted who congratulate themselves upon the limits of their vision"'. A. MacIntyre, *Three Rival Versions of Moral*

issue – admission and non-return – we can see how strong is the evidence of both practice and *opinio juris*. The practice has been occasionally undervalued and misrepresented, with the principle of admission and non-return of those displaced by conflict being theorised from within the box, which is the more or less closed system called ‘Convention refugee law’. It has been too readily associated with, and then limited by, the established principle of *non-refoulement*, and it has suffered from the link; it has been wrongly presented as a norm about immigration, and dismissed for the lack of any corresponding individual or civil right. Individual rights are certainly of critical importance as a basis for challenging governmental action, but they do not always or automatically follow on from the existence of the rules or principles of international law; they commonly need to be mediated into domestic legal systems, either directly through express incorporation, or indirectly, through judicial processes of interpretation and application.

For Perluss and Hartman in 1986, the obligation not to return those displaced by armed conflict was conceptually distinct from refugee law and from international humanitarian law. The object and purpose of temporary refuge, in their scheme of analysis, was general protection against the risk of relevant harm, irrespective of the style or type of armed conflict; and, in their view, it ought not to be subsumed within the principle of *non-refoulement*, even if, from time to time it might cover the same ground and benefit some of the same individuals. Today, the core obligations of the principle of temporary refuge are firmly rooted in customary international law, they operate across a broader spectrum than *non-refoulement*, and are closely integrated into the international refugee regime. For understandable reasons, its impact on issues of admission and non-return means that it continues to be associated with the principle of *non-refoulement*. This can be advantageous, so far as *non-refoulement* acts as a powerful brake on the State, but it can also be a drawback. A good case can be made for de-linking the concepts of refuge and *non-refoulement*, and in developing refuge itself as the overarching principle of protection, sufficient to accommodate all those instances where States are obliged to act or refrain from action in order that individuals or groups are not exposed to the risk of certain harms. This is not a recipe for proactive intervention, or a variation on the responsibility to protect, and neither are the duties subsumed within the principle of refuge necessarily always absolute or unqualified; in each case, it has to be determined exactly what the particular obligation requires.<sup>106</sup>

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*Enquiry: Encyclopaedia, Genealogy, and Tradition* (University of Notre Dame Press 1990) 234, quoted in Roberts, ‘Traditional and Modern Approaches’ (n 56) 790.

<sup>106</sup> For example, ‘refuge’ may simultaneously require the non-surrender of the fugitive and his or her prosecution for a crime in international law.

Of course, temporary refuge, as described above, is not a complete answer to the problems of forced displacement, any more than the Refugee Convention is a complete answer to the protection needs of those in fear of persecution. But it is a critical normative first step in the effective international protection of those displaced by armed conflict, massive violations of human rights, or indiscriminate violence; and it is firmly and soundly based in customary international law, in the practice of States, and in their understanding of obligation.