

# Can International Law Manage Refugee Crises?

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## Introduction

This article shall aim to answer whether international law, as a legal framework, has the necessary tools to effectively deal with refugee crises in general. I shall use the current Syrian crisis as a springboard to contextualize some pertinent issues and determine whether, as some argue, international law has failed asylum seekers who seek refuge in States other than the home State. I will tackle the question in four parts. Part 1 will introduce the rights of a refugee and discuss the identification of a 'refugee' under international law. Part 2 will discuss the obligations of States under international law. Part 3 will then evaluate whether international law has had any substantial impact in protecting the rights of refugees, and if so, whether and to what extent it can be improved. Lastly, in Part 4, I will discuss a few proposed reforms and show why they are unlikely to take hold. With regards to the 'crises', the only focus of this article will be whether asylum seekers have substantial rights (which can be or are being protected) that can be invoked to offer them some form of protection against States in the international or regional context. This article is not concerned with how to manage crises in domestic contexts, or whether international law imposes a legal responsibility on States to take positive steps, such as by offering aid or offering protection through their armed forces.

The term 'manage' is understandably very broad. For the purpose of this article, I shall consider (a) whether international law guarantees some level of protection for refugees fleeing from their home state, (b) whether international law imposes a legal (as opposed to a political or moral) obligation on States to offer asylum to refugees and (c) whether there is empirical evidence to show that international law can be used to effectively protect the rights of refugees (i.e. whether there are instances where asylum seekers have successfully claimed municipal or international protection through legal process). I argue that the three questions should be answered in the affirmative, and if so, then one must conclude that international law has the potential to solve refugee crises, present and future. However, the fact that it is unable to do so, as evidenced by the chaos being endured by the Syrian asylum seekers (arguably as a result of a lack of systematic protection), suggests a pressing need for reform and points towards the conclusion that the international legal framework is in fact incapable of solving refugee crises as it stands today.

The meaning of key terms will now be clarified. International law refers to customary international law as well as multilateral treaty obligations, primarily those imposed by UN conventions. As a preliminary point, I use the term 'refugee' as a technical legal term to denote those who fulfil the definitional requirements of being a refugee under international law, whereas the term 'asylum seeker' shall refer to those whose status has not yet been determined. It is also to be noted that international refugee law is distinct from international human rights law (albeit with a significant degree of overlap), and this article is not specifically restricted to the former. The protection of asylum seekers under international human rights law will be taken into account when discussing whether the

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\* Magdalene College, Cambridge. This essay is dedicated to all my supervisors. In particular, to Dr Fernando Bordin for introducing me to the nuances of International Law. I wish to express my sincere gratitude to Mr Nigel Lim, Mr Matthew Wong and Ms Rebecca Halbach for their insightful comments. All errors remain my own.

international legal framework is potentially capable of presenting any meaningful solution to refugee crises. This article will also discuss relevant regional law, such as that of EU and AU.

### **Background: The Ongoing Crisis**

An estimated nine million Syrians have fled their homes since the outbreak of civil war in March 2011. As of 21 December 2015, one million asylum seekers have stepped onto EU soil seeking safe haven from the violence in war-torn Syria. Affected countries are divided on how best to resettle these asylum seekers: some cite a legal basis for giving them protection, and others cite a political basis for turning them away.

The 9 million Syrians who have escaped include both those who have fled to their immediate neighbours and EU nations, and those who are internally displaced within Syria.<sup>1</sup> The first question I will try to answer will be in relation to the former: What rights does an individual asylum seeker have under international law? This will be my focus in the first half of Part 1.

There is evidence to show that most Gulf States in the region have passed various measures that aim to facilitate the entry and stay of Syrians since the outbreak of civil war,<sup>2</sup> and only about ten percent of the asylum seekers have fled to Europe.<sup>3</sup> My focus is particularly on the second of these types of asylum seekers, those who seek refuge in the broader international context rather than within Syria or in neighbouring States. The second question I will try to answer, therefore, will be in relation to whether these asylum seekers classify as refugees. This will be dealt with in Part 1B and subsequently in Parts 3 and 4.

Popular media has readily criticized the international community as a whole for their failure to provide refugees with shelter<sup>4</sup> and an adequate standard of living.<sup>5</sup> The third question I will try to answer will be whether States are under any legal obligations with regards asylum seekers or refugees. This will be answered in Part 2 and subsequently in Parts 3 and 4.

The fact that there has been so much trenchant criticism of the system suggests that the international community is simply not equipped to facilitate a surge of people seeking asylum. To answer whether this is a failure of international law or a failure of the international community in adhering to the law I first turn to analyse what the law actually is.

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<sup>1</sup> Migration Policy Centre, 'Syrian Refugees' (Syrian Refugees, January 2013) <<http://syrianrefugees.eu/>> accessed March 23 2016.

<sup>2</sup> Gulf Labour Markets and Migration, 'A Note on Syrian Refugees in the Gulf: Attempting to Assess Data and Policies', GLMM - EN - No. 11/2015.

<sup>3</sup> World Vision, 'What You Need to Know: Crisis in Syria, Refugees, and the Impact on Children' (World Vision, March 9 2016) <<http://www.worldvision.org/news-stories-videos/syria-war-refugee-crisis>> accessed March 23 2016.

<sup>4</sup> BBC News – Middle East, 'BBC News, 'Syria Conflict: "Global Failure" to Protect Refugees' (BBC News, September 3 2015) <<http://www.bbc.com/news/world-middle-east-34140403>> accessed March 23 2016; Rouba Al-Fattal, 'Europe may be failing Syrian refugees, but Canada shouldn't boast yet' (The Globe and Mail, March 17 2016) <<http://www.theglobeandmail.com/opinion/europe-may-be-failing-syrian-refugees-but-canada-shouldnt-boast-yet/article29265806/>> accessed March 21 2016; Esra Kaymak Avci, 'Syrian failure has "incalculable" costs: UN official' (AA, March 16 2016) <<http://aa.com.tr/en/politics/syrian-failure-has-incalculable-costs-un-official/538112>> accessed March 21 2016; Amnesty International, 'The world's pitiful response to Syria's refugee crisis' (Amnesty international, December 5 2015) <<https://www.amnesty.org/en/latest/news/2014/12/world-s-pitiful-response-syria-s-refugee-crisis/>> last accessed March 21 2016.

<sup>5</sup> France-Presse, Agence 'UN Syria Investigators Denounce "failure" to Protect Refugees' (GlobalPost, September 3 2015) <<http://www.globalpost.com/article/6641821/2015/09/03/un-syria-investigators-denounce-failure-protect-refugees>> accessed March 23, 2016.

## 1. On Refugees

### A. What Rights Does a Refugee Have?

The notion of 'legal protection' has a very narrow focus.<sup>6</sup> The 1951 Convention relating to the Status of Refugees<sup>7</sup> (hereafter '**the 1951 Convention**') only applies once a State can identify the status of the party. This means that states are only bound by the Convention once an asylum seeker has been identified as a 'refugee' under the Convention. This may be problematic as it can insert a measure of discretion for the States, which may lead to States using procedure and technical rules to circumvent their international law obligations. In the 1951 Convention, States agreed to provide refugees with a wide range of basic rights, such as administrative assistance (Article 27), the grant of permission to transfer assets (Article 30) and the facilitation of naturalization (Article 34). Moreover, the 1951 Convention proposes as a minimum standard that refugees should receive 'at least the treatment which is accorded to non-citizens generally'.<sup>8</sup> The 2004 Qualification Directive,<sup>9</sup> which defines how the EU States define the notion of 'refugee', further calls for 'subsidiary protection' in the case of those who would face a real risk of serious harm if returned to their country of origin,<sup>10</sup> and this clearly applies to a large majority of those coming from Syria and the surrounding regions.

The cornerstone of the 1951 Convention is arguably the principle of non-refoulement, as provided for in Article 33. It states that all persons should enjoy the right not to be deported to a country where they may be subjected to persecution.<sup>11</sup> As this is almost certainly a principle of customary international law,<sup>12</sup> it should apply to all countries regardless of whether they are a party to the 1951 Convention. As such, it is quite clear that the 1951 Convention has codified some parts of customary international law, especially those relating to the basic rights of such refugees under articles 14 to 30.

Since they are considered a part of custom,<sup>13</sup> a breach of customary international law attributable to the State in question will invoke State responsibility for the internationally wrongful act under Article 1 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts ('**ARS**').<sup>14</sup> The State will be required to make full reparation<sup>15</sup> for the breach under Article 31, and if the obligation is owed to the international community as a whole (i.e. an *erga omnes* obligation) under Article 48(1)(b), any State will be able to invoke the responsibility.<sup>16</sup> Given that

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<sup>6</sup> Goodwin-Gill, Guy S, 'The International Law of Refugee Protection.' *Oxford Handbooks Online*, 36-37.

<sup>7</sup> 1951 Convention relating to the Status of Refugees (adopted 22 April 1954) 189 UNTS 137, in force for 147 states as of January 2016.

<sup>8</sup> Goodwin-Gill (n 6) 41.

<sup>9</sup> EC Directive 2004/83 of 29 April 2004, OJ L 304, 12.

<sup>10</sup> Goodwin-Gill (n 6) 42.

<sup>11</sup> For more information on this principle and what it entails, see Weissbrodt, David S, *The Human Rights of Non-citizens* (OUP 2008) Chapter 6.

<sup>12</sup> UN High Commissioner for Refugees (UNHCR), 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (UNHCR, 31 January 1994) <<http://www.refworld.org/docid/437b6db64.html>> accessed 23 March 2016.

<sup>13</sup> Hofmann, Löhr, Introduction to Chapter V. in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1089.

<sup>14</sup> International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>15</sup> In addition to the ARS, see *Factory at Chorzow (Germany v Poland)* [1927] P.C.I.J. (ser. A) No. 9 for a discussion of the term 'reparation'.

<sup>16</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, using the language of art 41 ARS. See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, ICJ Rep 1970 3, 32 for further comments on the precise scope of *erga omnes* obligations.

refugee law overlaps with human rights law, and that the basic principles of non-refoulement and of temporary refuge are customary in nature, it is highly likely that such obligations will be *erga omnes*. The application of such obligations varies, since it depends on the political will of States to take positive steps to enforce measures. Although it is particularly effective in isolated situations, it has yet to apply in a meaningful manner if a large number of States are potentially in breach, as is the case in the current context. This differs from specific regional enforcement, such as an obligation to respect the rights of refugees articulated in the ECHR or 1969 Convention on the Organization of African Unity (hereafter ‘**the OAU Convention**’).<sup>17</sup>

Therefore, it seems clear that once recognized as a refugee, a person has a significant array of rights that are protected under customary international law. This begs the question of why the rights of Syrian asylum seekers are not protected, as seems to be evident from the numerous media sources mentioned in the introduction. Some suggest that the answer lies in the way refugees are defined under the current legal framework.

## **B. Who is a Refugee?**

Under international refugee law, Article 1(A)(2) of the 1951 Convention states that the term ‘refugee’ applies to any person who is outside the country of his nationality, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and is consequently unable or unwilling to avail himself of the protection of that country. This is the ‘centrepiece of international refugee protection’ today.<sup>18</sup> It is further supplemented by subsidiary protection in regional bodies and through progressive development of international human rights law.<sup>19</sup>

Article (1)2 of the 1967 Protocol Relating to the Status of Refugees<sup>20</sup> (hereafter ‘**the Protocol**’) amends the 1951 Convention and provides that the definition of the term ‘refugee’ is to be applied without the temporal and geographical limitations present in the text of the 1951 Convention. The definition of refugees under the Convention is generally seen as the minimum standard definition for the status of a person as a refugee<sup>21</sup> and forms the basis for the formulation used in the European Union.<sup>22</sup> Moreover, under international human rights law, Article 14 of the Universal Declaration of Human Rights states that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’.<sup>23</sup> This applies to all asylum seekers and only seeks to supplement the definition in the 1951 Convention, thereby giving asylum seekers the protection of both human rights law and refugee law.

As for regional protection, the key (and perhaps the only practical) difference between the 2004 Qualification Directive and the 1951 Convention is the former’s limitation that only nationals of non-EU countries and stateless persons are included in the scope of the Qualification Directive. Anja Klug suggests that the relevance of this limitation should not be overstated,<sup>24</sup> and that the relevant

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<sup>17</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (adopted 10 September 1969) 1001 U.N.T.S. 45.

<sup>18</sup> UNGA Res 429(V) (14 December 1950).

<sup>19</sup> For example the OAU (now AU) Convention 1969, the EC Directive 2004/83/EC, the Cartagena Declaration on Refugees 1984.

<sup>20</sup> 1967 Protocol Relating to the Status of Refugees (adopted 4 October 1967) 606 UNTS 267 art 1 para 1

<sup>21</sup> R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012).

<sup>22</sup> Council of the European Union Directive 2004/83/EC 2004 OJ L304/12, Ch. I General Provisions, art 2(c), on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>23</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) at 71.

<sup>24</sup> Anja Klug, ‘Harmonization of Asylum in the European Union: Emergence of an EU Refugee System?’ 2004 GYIL 47, 594, 600.

procedure is still the one modelled on the 1951 Convention. This is especially true since EU nationals can bring a direct human rights claim to the ECtHR if their freedom of movement is obstructed. Moreover, as Hugo Storey points out, the Qualification Directive does not abrogate any of the provisions in the 1951 Convention, but only serves to add more detail to them.<sup>25</sup> As such, there is no substantial difference in the basic rights accorded to asylum seekers under EU law, though it is at least arguable that EU law may go further than customary international law in general by adding a level of subsidiary protection if the asylum seekers are fleeing from a real risk of serious harm in their home country.

Furthermore, as an extension of the 1951 Convention, the OAU (now AU) seems to encompass a slightly broader scope of protection.<sup>26</sup> The definition in the OAU Convention does not require a 'well-founded' fear of persecution for one to claim refugee status; rather, it opts for an objective examination of whether the facts of a specific situation fit within the definition's specified causes of flight. This is, at least arguably, significantly broader than the 1951 Convention and I shall discuss this further in Part 4 on how this definition might serve as a model to improve on the current general framework.

The main advocate of international protection for refugees is the Office of the UNHCR, which has a broad-ranging mandate with respect to refugees.<sup>27</sup> With regard to effectiveness, the general role of the UNHCR is not to provide direct assistance to refugees, but to coordinate the action of States along with private and public organizations, as well as to provide material assistance for 'persons of concern to the UNHCR'.<sup>28</sup>

## 2. On States

It is questionable whether States have any substantial obligation under customary international law to offer asylum to refugees. The 1951 Convention imposes a duty on States not to obstruct individuals' right to seek asylum,<sup>29</sup> rather than actually giving individuals the right to asylum itself.<sup>30</sup> The 1967 Declaration on Territorial Asylum affirms this in Article 1,<sup>31</sup> emphasizing that each State is the sole judge of the grounds upon which it will extend protection to asylum seekers. Article 2 tells us that other States 'shall consider' measures to lighten the burden when a State finds it difficult to manage asylum seekers. Since the 1967 Declaration, there has been little agreement within the international community with regard to reaching a universal instrument of asylum.<sup>32</sup> Instead, progress is generally seen in the form of regional agreements,<sup>33</sup> and even this has arguably been quite limited. For example, even in regional agreements like those under the European Convention of Human Rights (ECHR), a right to asylum has not been recognized.<sup>34</sup> The furthest that signatory States in the European region have gone is to recognize that the rights under both EU law and the ECHR stem from Article 14 of

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<sup>25</sup> Hugo Storey, 'EU Refugee Qualification Directive: A Brave New World?' *International Journal of Refugee Law* (2008) 20 (1) 8, 9.

<sup>26</sup> Article 1(2) of the OAU Convention states that 'the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

<sup>27</sup> Statute of the Office of the United Nations High Commissioner for Refugees, GA res 428 (V), annex, 5 UN GAOR Supp (No 20) at 46, (1950) UN Doc A/1775 (Commonly referred to as 'the UNHCR Statute').

<sup>28</sup> Weissbrodt (n 11) 164.

<sup>29</sup> Guy Goodwin-Gill, *The Refugee in International Law* (OUP 1998) 358.

<sup>30</sup> Elizabeth J Lentini, 'The Definition of Refugee in International Law: Proposals for the Future' (1985) 5 B.C. Third World L.J. 185.

<sup>31</sup> UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII).

<sup>32</sup> Goodwin-Gill (n 29) 365.

<sup>33</sup> *ibid* 366.

<sup>34</sup> *ibid* 366, 367-8.

the Universal Declaration of Human Rights (UDHR), which only crystallizes the right of non-refoulement and the right of individuals to have their cases considered on their merits.<sup>35</sup>

The AU seems to be encompass a slightly broader scope of protection,<sup>36</sup> as I have already stated. Further, inclusion of the phrase ‘in either part or the whole of’ the definition does away with the requirement that a person must first seek ‘internal flight or relocation alternative’ as required by 1951 Convention.<sup>37</sup> In effect, the differences led to the widening of the scope of those who would qualify for refugee status under the OAU Convention as compared to the 1951 Convention. However, this does not go so far as to recognize an international obligation to grant asylum to asylum seekers.<sup>38</sup> Ultimately, there remains insufficient State practice or *opinio juris* to demonstrate a duty of States to grant asylum to those seeking it under customary international law,<sup>39</sup> and judging by the uncertain and mixed treatment currently, the obligation to grant asylum to asylum seekers is unlikely to be incorporated as custom in the foreseeable future.

This is not to contradict the basis of the rights discussed in Part 1 above. Article 31 of the 1951 Convention provides support for a limited right of temporary admission for asylum seekers, even if they do not possess the requisite documents, to access fair and effective refugee status proceedings.<sup>40</sup> However, this requires evidence of a ‘good cause’ for entering the State in such a manner, and no doubt violence and imminent threats to life (as is the case in Syria) fall under this category.<sup>41</sup> This, combined with a customary duty of States to implement their treaty obligations in good faith under the 1969 Vienna Convention on the Law of Treaties,<sup>42</sup> will lead to an invocation of State responsibility if a State breaches its obligations. A State will be found to be acting in bad faith even if it tries to avoid its obligations.<sup>43</sup> The same analysis as in the previous subsection follows if a State is found in breach of its international obligations.

### **3. On a Potential Solution**

In this section, I consider the arguments for and against the current international refugee law framework, and whether it is capable of offering any meaningful solution to refugee crises in general. The three criteria I will use are (a) the level of protection offered to asylum seekers, (b) the extent of the legal obligations on states for asylum seekers and (c) instances where asylum seekers have successfully asserted their rights as refugees. Almost necessarily, (c) will show how extensive (b) is.

#### **A. The Level of Protection**

The most pressing problem that international refugee law faces is that it suffers from a ‘serious legal lacuna’<sup>44</sup> in that it determines the rights of those who are classified as refugees, but fails to bind States on how to carry out this determination.<sup>45</sup> Instead, it leaves States to rely on domestic laws or regional instruments to conclude whether a person qualifies for refugee status and whether, as a consequence,

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<sup>35</sup> Goodwin-Gill (n 29) 368.

<sup>36</sup> n 26.

<sup>37</sup> 1951 Convention relating to the Status of Refugees (adopted 22 April 1954) 189 UNTS 137 art 1(A)(2).

<sup>38</sup> Goodwin-Gill (n 29) 368.

<sup>39</sup> Gregor Noll, *Negotiating Asylum* (Martinus Nijhoff 2000) 357–62.

<sup>40</sup> Goodwin-Gill (n 29) 384.

<sup>41</sup> *ibid* 387.

<sup>42</sup> 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331, arts 26, 31.

<sup>43</sup> UNHCR, ‘Written Case’, 17 *IJRL* 427 (2005) 32.

<sup>44</sup> Hofmann, Löhr (n 13) 1087.

<sup>45</sup> *ibid* 624 ‘This means that most Third World refugees still remain literally excluded, as their flight is more often prompted by natural disasters, war, or broadly based economic turmoil than by ‘persecution’. Against this background, it remains the task of a new worldwide instrument to adapt the 1951 Convention and the 1967 Protocol to the present needs’.

their substantive rights will be protected.<sup>46</sup> This clearly predicates the effectiveness of international refugee law on the effectiveness of municipal law, and arguably can be seen to undermine the international legal framework.

Two important caveats should be noted with regard to the definition of a refugee under the 1951 Convention that further labour this point. First, there is no universally accepted definition of 'persecution'. As such, Joan Fitzpatrick criticized that the 'elasticity of the definition of persecution depends upon the political will of States Parties implementing the Convention'.<sup>47</sup> I argue that ultimately, even with legal safeguards in place, there is wide room for States to circumvent their obligations, and hence, a State has a broad-ranging discretion whether or not to accord an asylum seeker the title of 'refugee'. Furthermore, it seems to be the case that most asylum seekers are in fact not facing a fear of persecution (such as those in Syria, for example), but instead have had their lives torn apart by war or natural disasters, and therefore are not considered refugees. This does not fall within the scope of the 1951 Convention and hence States can 'legitimately' refuse to offer protection to these asylum seekers.<sup>48</sup> Second, one can lose his or her status as a refugee if the circumstance in connection with which he was recognized as a refugee ceases to exist.<sup>49</sup> This point is less important in the Syrian context (since the conflict is ongoing), but nevertheless has a significant impact on asylum seekers' rights in general, especially when dealing with the long-term protection of refugees' rights. The issue of long-term protection ties in with the next criticism levelled against international law as a framework.

Some argue that international law, as a framework, is one that focuses on the migrant-refugee distinction,<sup>50</sup> and that the separation of the terms (a result of the 1951 Convention) has had a serious impact on 'long-term quality of protection' and the ability of refugees to access 'sustainable and meaningful solutions'.<sup>51</sup> While there is some merit in these arguments, I suggest that there is a meaningful difference between migrants and refugees, and that this goes beyond the mere distinction that a 'refugee *needs* admission whereas a migrant *wants* admission'.<sup>52</sup> The term 'refugee' indeed connotes a humanitarian form of aid, one which is, in many cases, only temporary, whereas the term 'migrant' generally implies a longer duration of residence, though not necessarily permanent. The difference therefore, is not simply with regard to the required aid at the point of entry, but also to the consequential (and hence, long-term) aid which stems from the difference between the two types of asylum seekers. Moreover, it is clear from the wording of the 1951 Convention<sup>53</sup> that the scope envisaged for refugees is primarily humanitarian in nature, in the sense that it offers a minimum standard of protection to those who cannot return home due to fear of persecution. It does not aim to provide a long-term or sustainable solution to the problem, although that would be ideal. The primary focus is to provide aid until the situation in the home territory is resolved. This lies in contradistinction to the status of a migrant, whose aim is usually to settle permanently in a new home. And while it is true that the two may overlap, and often do overlap, the distinction is an important one, especially in a crisis where there is a large influx of asylum seekers.

This is especially true from a pragmatic perspective. It is unlikely that all States will admit a universal duty to allow temporary entry for all 'migrants' (who do not classify as '**refugees**') since this inherently depends on the needs of the States as well as the skills of the migrants. It is easier to establish such a duty for refugees since the cause is at least primarily humanitarian in nature. This

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<sup>46</sup> Hofmann, Löhr (n 13) 1088.

<sup>47</sup> Joan Fitzpatrick, 'Revitalizing the 1951 Convention' (1996) 9 Harvard Human Rights Journal 229, 240.

<sup>48</sup> Elizabeth J Lentini (n 30) 183.

<sup>49</sup> 1951 Convention (n 7) art 1(C)(5).

<sup>50</sup> Katy Long, 'When refugees stopped being migrants: Movement, labour and humanitarian protection', *Migration Studies* (2013) 1 (1) 4.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid* (author's emphasis).

<sup>53</sup> 1951 Convention (n 7) Preamble.

does not mean that there have been no negative ramifications as a result of the distinction;<sup>54</sup> it only means that there may be an argument for retaining the divide, especially in the context of a civil war crisis, such as the one in Syria. Since customary international refugee law does not include victims of natural disaster and violence or war, some may question how far we can classify customary international refugee law as humanitarian in nature. However, the important point is that compared to migrants, the cause is substantially more humanitarian. This is further evidenced by the fact that the term ‘refugee’, as it is used in ordinary language, includes all types of asylum seekers, and not just refugees under the technical legal definition. Thus, as I show below, when States take action to offer protection, it is explicitly couched in humanitarian terms – not legal terms.

Thus, the argument that the law has introduced an unnecessary division between asylum seekers (as between migrants and refugees) fails to convince. The criticism that it creates an unnecessary division between asylum seekers fleeing from persecution and those fleeing from war or disaster seems to hold much more persuasive force.<sup>55</sup> However, as noted above, international refugee law does place minimum obligations on States<sup>56</sup> that almost certainly apply to the context of Syria (and other similar large-scale crises). This is evident in the fact that virtually all States have recognized the refugee status of at least some of the Syrians seeking asylum.<sup>57</sup> Whether or not this recognition is due to legal reasons or political reasons, it follows that the obligations for States to give a basic degree of protection to those refugees can be invoked. To contextualize the point, over a 100,000 refugees have been granted asylum in Germany, with the rest of the EU countries trailing behind with numbers in the tens of thousands or less. The crux of the issue is not whether Syrian refugees are fleeing the country from a fear of persecution (for example the Yazidis or the Assyrian Christians fleeing from ISIS) or whether they are trying to escape the war-torn land (the large majority of the refugees). This is because States are not refusing them protection based on the asylum seekers’ specific motivation,<sup>58</sup> but instead, offer protection based on their own interests. The reason why many countries take a stance one way or the other is because they either have political reasons to welcome refugees (like an ageing population in Germany) or political reasons to turn them away (like national security concerns and public backlash in the USA).<sup>59</sup> As such, the argument that determination of the status of asylum seekers is uncertain is not a strong criticism of the international community in the present context. The real issue is that technical refugee law has been overshadowed by major political concerns, and I shall discuss this further in Part 4.

Therefore, it is clear that there is a degree of protection for asylum seekers through international refugee law. The minimum standard definition in the 1951 Convention applies only to those who flee from persecution, but persecution as a term is not defined and the 1967 Declaration on Territorial Asylum clearly says that States are the sole judge of whether a person can be classified as a refugee or not.<sup>60</sup> Thus, we must conclude that there is a great potential for refugee law to offer a significant degree of protection to refugees, but not to asylum seekers, which is where the problem potentially lies.

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<sup>54</sup> Alan Gamlen, ‘An inborn restlessness: Migration and exile in a turbulent world’ *Migration Studies* (2015) 3 (3) 307.

<sup>55</sup> Elizabeth J Lentini (n 30) 198.

<sup>56</sup> Alan Gamlen (n 54) 1089.

<sup>57</sup> Michael Martinez, ‘Syrian Refugees: Which Countries Welcome Them’ (CNN, September 10 2015) <<http://edition.cnn.com/2015/09/09/world/welcome-syrian-refugees-countries/>> accessed March 23 2016.

<sup>58</sup> Nina Shea, ‘For Christians and Yazidis Fleeing Genocide, the Obama Administration Has No Room at the Inn’ (National Review, September 22 2015) <<http://www.nationalreview.com/article/424401/christians-yazidis-persecuted-iraq-syria-refugees-excluded>> accessed 11 April 2016; HL Deb 9 September 2015, col 1432-34.

<sup>59</sup> Rick Noack, ‘This map helps explain why some European countries reject refugees, and others love them’ (The Washington Post, September 8 2015)

<<https://www.washingtonpost.com/news/worldviews/wp/2015/09/08/this-map-helps-explain-why-some-european-countries-reject-refugees-and-others-love-them/>> accessed 11 April 2016.

<sup>60</sup> Declaration on Territorial Asylum (n 36).



## B. Imposing obligations on States

Another problem that arises with international refugee law is a lack of enforcement. Firstly, commentators argue that the law is not as effective as it could be. Since there is no dedicated UN agency to oversee refugees, the law receives a less than universal application.<sup>61</sup> Secondly, it is argued that there is an absence of an institutional mechanism that can directly enforce refugee rights, as international law, unlike domestic law, cannot force States to act.<sup>62</sup> However, it is clear that States regularly enforce these customary international law obligations on a municipal level.<sup>63</sup> Therefore, it is a full body of law that provides a framework in which States as legal entities interact, and to suggest otherwise would be pure rhetoric.<sup>64</sup> I have already shown how breaches of international obligations can invoke State responsibility and that this can be enforced through a variety of mechanisms.

The more relevant contention for the refugee crisis, therefore, is the first argument; namely, that there is no international agency that directly oversees the situation of refugees, since the UNHCR lacks authority to directly intervene with State discretion on whether or not to grant a person the status of a refugee. While this does mean that there is no international body that can evaluate whether States have fulfilled their obligations, this is not a fatal flaw in the machinery of refugee law. This is because there are a variety of transnational and regional bodies that are capable of overseeing refugee claims, and enforcement need not be directly implemented by UNHCR. The UNHCR usually acts as a mediatory that suggests guidelines and proposes solutions to tackle the difficulties resulting from a growing number of refugees.<sup>65</sup> For example, the European Commission has taken many steps to try to manage the flow of refugees into EU Member States.<sup>66</sup> Moreover, it is by no means a given that States would agree to such a body in practice, nor do I think it would have an impact on the current refugee crisis due to the overwhelming number of people displaced. To prove this point, I shall turn to the last criterion, which focuses on specific instances where asylum seekers' rights have been affirmed.

## C. Specific Instances of Rights' Protection

Without a doubt, the key milestone in international refugee law is the 1951 Convention. Although it does not prescribe a duty to accept refugees, it goes a long way in establishing the certainty of the rights which are protected, and the duties of States in respect of refugees, as I have already shown in the preceding two subsections. This is especially important in the international arena because, as Louise Holborn demonstrates, from the period of the First World War onwards, many States introduced municipal legislation giving the State the right to expel and return immigrants to their

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<sup>61</sup> While there is the UNHCR, refugee law has no institution to evaluate state compliance, or to provide authoritative guidance on matters relating to refugee law. For more information see Hathaway and James 'Summary Conclusions of the Roundtable on the Future of Refugee Convention Supervision' (Opinio Juris, 27 March 2013) <<http://opiniojuris.org/2013/03/27/summary-conclusions-of-the-roundtable-on-the-future-of-refugee-convention-supervision/>> accessed March 23, 2016.

<sup>62</sup> Hersch Lauterpacht, 'Westlake and Present Day International Law' (1925) in Elihu Lauterpacht (ed.) *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol 2 (CUP 1975) 401.

<sup>63</sup> While it would be impossible to cite an exhaustive list of cases, a great many can be found online. For example, the Center for Gender & Refugee Studies lists American cases, the European Database of Asylum Law lists EU cases and South African cases can be found at the Refugee Rights website (<http://www.refugeerights.uct.ac.za/>). See also UN High Commissioner for Refugees (UNHCR), *UNHCR Compilation of Case Law on Refugee Protection in International Law* (March 2008).

<sup>64</sup> James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Leiden Nijhoff 2013) Chapter 1.

<sup>65</sup> UN High Commissioner for Refugees (UNHCR), *The State of the World's Refugees: In Search of Solidarity* (2012) <<http://www.refworld.org/docid/5100fec32.html>> accessed 23 March 2016.

<sup>66</sup> European Commission 'Refugee Crisis: European Commission Reports on Progress in Implementation of Priority Actions' (Press Release, October 14 2015) <[http://europa.eu/rapid/press-release\\_IP-15-5839\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5839_en.htm)> accessed March 23, 2016.

countries of origin on the basis of discontentment.<sup>67</sup> This uncertain and unstable protection was insufficient to uphold the rights of refugees, and Hofmann and Löhr rightly argue that resettlement of these refugees thus became difficult since no country was seen to be legally responsible for individuals who could not receive protection from another State.<sup>68</sup> International refugee law, in tandem with regional legislative bodies and human rights law, now offers a much more certain bedrock of legal rules and offers States the opportunity to contribute to and develop the law over time, rather than be completely dependent on the political atmosphere of the day.

For example, through human rights claims, refugees have been able to assert their rights against States to force State action. Philip Leach gives an account of the decisions of ECtHR in *Sargsyan v Azerbaijan*<sup>69</sup> and the *Chiragov and Others v Armenia*<sup>70</sup> both of which upheld the rights of refugees against the States concerned.<sup>71</sup> He further suggests that this might put the Council of Europe in a position to pursue the interests of individual victims of the conflict. And though individuals have to assert their rights, it is still a level of legal protection that was not present before the implementation of the 1951 Convention. This is in contrast to purely political decisions, which, on the shaky foundations of policy, are almost always unpredictable.<sup>72</sup> More specifically in the context of the Syrian crisis, human rights law has been invoked to ensure the basic rights of refugees are upheld. This was the approach taken by the Lille Administrative Tribunal<sup>73</sup> in their decision to order France to improve the conditions of the Calais refugee camp.

Furthermore, the 2004 Qualification Directive, as I have already discussed, gives subsidiary protection that is wider than the 1951 Convention, and imposes a positive duty on EU states to offer protection to those who seek refuge from violence or war (and hence would apply to any 'crises'). Similarly, the OAU Convention gives a legal basis for protecting asylum seekers based on the context of the situation, and thus gives greater recognition to the need for humanitarian protection than the 1951 Convention.

Even in domestic law contexts, municipal courts have used international law as a basis to safeguard the rights of asylum seekers. For example, in the related Canadian cases of *R v Appulonappa*<sup>74</sup> and *B010 v Canada (Citizenship and Immigration)*,<sup>75</sup> the Canadian Supreme Court noted that Article 31 of the 1951 Convention meant that domestic law had to recognize that people would seek refuge in groups and work together to enter a State illegally. Therefore, Canada could not impose a criminal sanction on refugees solely because they aided others to enter illegally in their collective flight to safety. As such, it is clear that refugee law has shaped, and is in turn bolstered by, human rights law, regional law, and even domestic law.

The conclusion one must draw is that there is great potential from the mechanisms of international refugee law, as developed by the 1951 Convention, to offer a high degree of protection to refugees. This is primarily because customary international law has helped give form to national and municipal law.

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<sup>67</sup> Holborn, *AJIL* 32 (1938), pp. 680, 683, 685; Weis, *BYIL* 30 (1953), pp. 478, 482.

<sup>68</sup> Hofmann, Löhr (n 13) 1091.

<sup>69</sup> App no 40167/06.

<sup>70</sup> App no 13216/05.

<sup>71</sup> Philip Leach, 'Thawing the Frozen Conflict? The European Court's Nagorno-Karabakh Judgments' (EJIL Talk, July 6 2015) <<http://www.ejiltalk.org/thawing-the-frozen-conflict-the-european-courts-nagorno-karabakh-judgments>> accessed March 23, 2016.

<sup>72</sup> David Martin 'YLS Sale Symposium: Interdiction of Asylum Seekers - The Realms of Policy and Law in Refugee Protection' (Opinio Juris, March 15 2014) <<http://opiniojuris.org/2014/03/15/yls-sale-symposium-interdiction-asylum-seekers-realms-policy-law-refugee-protection/>> accessed March 23, 2016.

<sup>73</sup> Lille Administrative Tribunal, 2 November 2015, No. 1508747.

<sup>74</sup> 2015 SCC 59.

<sup>75</sup> 2015 SCC 58.

#### 4. On Reform

I have already shown that there is potential, through customary international law being developed by regional and municipal law, to effectively solve the three issues I posited in the introduction. However, in this section, I suggest that refugee crises will not be solved by international law and that the potential will remain just that: a potential, never an actuality. While this is clearly empirically true, given that the international community does not have a good track record in dealing with humanitarian crises in general (for example the Bosnian genocide, the Afghan civil war and the Rwandan genocide), what I suggest goes further: that international law is inherently incapable of utilizing the necessary tools (as they exist) to combat mass influx of asylum seekers to other regions.

##### **A. The Main Problems**

As Wessbrost notes,<sup>76</sup> there are three major issues that present a significant risk to what he terms the 'refugee regime': (a) the replacement of durable solutions with temporary protection; (b) the failure of States to share the burden of protecting refugees; and (c) the scaling back of refugee rights in response to the September 2001 attacks. These issues are underscored by the fact that the meaning of 'persecution' is still unclear, as States have not agreed on what persecution means, and the 1951 Convention definition does not offer protection for asylum seekers fleeing from natural disaster or violence.

The first issue has to do with what I have already discussed as a part of the general nature of the status of refugees, that the law as it stands today is ever only focussed on developing temporary rights for asylum seekers until the disaster they are escaping from ceases to exist. Anything further depends on political will, and that is and always will be uncertain.

The second issue relates to a lack of any duty under international law to displace asylum seekers from one country to another if the former lacks the capacity or infrastructure to deal with the influx. The impact of this issue has been reduced by regional organizations, because they offer an alternative venue to discuss how best to redistribute the asylum seekers. The clearest example where such discussions regularly occur is the EU and the Arab League. Although these discussions are political in nature, one has to recognize that there has been some progress in States trying to share the burden of protecting refugees.

The third issue is another way of defining political interests which curtail the effectiveness of the legal regime. National security, especially after the recent Brussels bombings, will inevitably play a key role in whether States choose to recognize asylum seekers as refugees and find themselves bound to offer protection or not.

These issues conclusively show that the issue of refugees is dominated by political concerns. The fact that there are a large variety of asylum seekers in crises, who may each have a different claim for protection, shows that it is increasingly difficult to sort out who should be a refugee and who should not. The problem becomes humanitarian in nature, and almost exclusively political. The fact is that States will be staunchly against any form of legal obligation imposed on them that derogates from their freedom to choose which asylum seekers to accept. Elizabeth Lentini gave a comprehensive account of the proposals made by some states to alter the definition of the 1951 Convention to include those who flee from violence and war, but the international community decisively rejected it.<sup>77</sup> I argue that states do not and will not accept to be bound to protect refugees in any further manner than the one already established in customary international law. For this reason alone, we must conclude that although there is potential to tackle the crises, the result will never be achieved. Some

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<sup>76</sup> Weissbrodt (n 11) 178.

<sup>77</sup> Elizabeth J Lentini (n 30) 190-3.

authors suggest reforms that will encourage States to be more willing to protect the rights of asylum seekers, and I will show that each of the reforms is unlikely to bear fruit.

### **B. Three Possible, Alternative, Reforms**

Most authors on international refugee law seem to agree that to approach these issues on a general level would be to attack the problem from the wrong direction, and that what we need is further decentralization to treat individual situations specifically in a regional setting.<sup>78</sup> In addition, I suggest that it may be valuable to treat smaller numbers of asylum seekers under a different legal framework, as compared to massive numbers of asylum seekers from crises like Syria.

The first reform is one that is region-centric. I am by no means the first to suggest greater regional protection. For example, an MPC report by Philippe Fargues and Christine Fandrich suggests the establishment of a Regional Protection Programme (RPP) to deal with the large influx of Syrian refugees.<sup>79</sup> The benefit of an RPP would be to provide sufficient assistance to the refugees on a regional scale, and it would be authoritative over member States, especially in times of crises. Further, it aims to ‘continue positive asylum procedures throughout the EU, and grant prima facie recognition including provision of sufficient assistance to Syrian asylum seekers; encourage visa facilitation and family reunification for Syrians; and continue to work with its international partners to find a political and humanitarian solution to the Syrian crisis.’<sup>80</sup> Similar programmes could be introduced in other regional organizations as well, such as the AU. This would ensure (a) durable protection, (b) the sharing of the burden to protect refugees, and (c) a degree of certainty with regards to refugee rights.

However, through sustained, prolonged and divisive debates, States have shown that they are unlikely to agree to any global duty to protect refugees and give them shelter. Indeed, enforcing such a duty would be a logistical and practical nightmare. For example, on what (agreeable) grounds could we regulate the number of refugees a State could shelter? What would be the consequence of failing to protect them? A lack of consensus is evident from the inability of EU states to conclude any agreements on the issue of refugees, despite being a relatively unified economic region with a strong degree of authoritative central control from the Council as well as the different Courts. Further, I suggest that such a proposal would be best suited to a less volatile socio-political climate, especially not one mired in the midst of a global refugee crisis. Thus, although the scope for reform through this suggestion may be the only one that might have substantial effect in the long term, it is not practical as of now and hence we must consider other alternatives.

The second reform would be to subsume refugee law under human rights law. Some authors point out that the reach of human rights law is already impressive, and that human rights law already informs refugee law to a large extent.<sup>81</sup> While this is undoubtedly true, Colin Harvey rightly doubts whether conflating the two separate regimes would have any further benefit on the current state of the law. David James Cantor shows that the relationship between refugee law and human rights law is not necessarily consistent, as is generally assumed.<sup>82</sup> Moreover, separating the regimes of ordinary refugee applications from those driven by crises can be justified by legitimate resource constraints, which motivate the use of different criteria for refugee acceptance in different situations. This is not to say that States should be given liberty to turn a blind eye towards human rights or refugee rights, but

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<sup>78</sup> For example, see Elizabeth J Lentini (n 30).

<sup>79</sup> Philippe Fargues, and Christine Fandrich, ‘The European Response to the Syrian Refugee Crisis: What next?’ Migration Policy Centre Research Report 2012/14.

<sup>80</sup> *ibid* 2.

<sup>81</sup> Colin Harvey, ‘Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights’ *Law Refugee Survey Quarterly* (2015) 34 (1) 43.

<sup>82</sup> David James Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’, *Refugee Survey Quarterly* (2015).

rather that we should be cognizant of the practical limitations that each State faces, particularly where there is a mass influx of refugees. Lastly, there is no central body that adjudicates and enforces international human rights, as such, it seems slightly unhelpful to add international refugee law under the same category (other than the overlap which already exists).

The third reform would be to treat cases of mass influx of refugees under a different legal framework altogether. Ultimately, it is established that in cases of mass influxes of refugees, States already adopt different requirements to determine the status of an individual.<sup>83</sup> Some States may make it easier by granting prima facie refugee status to all, and others may make it more stringent by treating every case individually. In the name of preventing the ill-effects and human rights violations of the Syrian crisis from occurring again, it would be preferable to have a separate legal framework to deal with situations in which there is a mass influx of refugees. Situations with a large influx of asylum seekers should be managed on a regional level, instead of leaving it to State discretion. While the scope of this reform is unclear, I suggest that this reform, while attractive in theory, will be highly impractical. For one, the major issue is that States refuse to accept a universal obligation to accept and shelter asylum seekers. By introducing a different framework for a smaller number of asylum seekers, States would have the discretion to apply one of the other as they deem fit, unless specific rules are devised to make it an objective assessment. The question as to how this assessment will be formulated and enforced then needs to be answered. Moreover, this still avoids the problem that seems to be central: States have divergent interests in offering protection, and the only sustainable solution to refugee crises would be one that takes into account these differences.

### **5. Conclusion: An Impossible Task**

As I have shown, the international framework which protects asylum seekers' rights in seeking refuge in other States is clearly not a failure. It provides minimum standards of protection, it is not always dependent on political will since domestic law, modelled on international law, can offer to protect the rights of some asylum seekers, and it has substantial effectiveness through regional and local authorities. The potential that exists in the legal framework however, is not being utilized. In September 2015, 674 international lawyers and practitioners signed an open letter criticizing the human rights violations being perpetrated against those seeking refuge.<sup>84</sup> There is a lot more that can be done.

I further suggest that it may not be viable to expect international law, as a legal framework, to be able to contribute further in a substantial way. This is because the international legal system, much like domestic legal systems, does not seek to police the individuals who draft it, but instead provides a set of agreements that are meant to be binding. Enforcement lies under the purview of the executive body, not the legislative body, and international law lacks a comparable enforcement system.

The current issue is one that is embedded far too deeply in the realm of politics. It is unlikely that international law, at least on a general level, will be able to compel States to act in a certain manner. However, international law can serve to publicize the plight of refugees and to provide a platform on which their rights can be discussed. It also offers an avenue of indirect, if not direct, legal protection. International refugee law is significantly bolstered by human rights law as well as regional and municipal law, but even then it lacks sufficient certainty and general application. This is why the international community as a whole, while it has been able to offer substantial help to asylum seekers, has also had some glaring failures. Thus, I conclude that international law will never be able to effectively 'manage' refugee crises.

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<sup>83</sup> J-F Durieux and A Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees' German Yearbook of International Law vol 47 (2004) 105.

<sup>84</sup> 'Open Letter to the Peoples of Europe, the European Union, EU Member States and Their Representatives on the Justice and Home Affairs Council' (Opinio Juris, September 22 2015) <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/09/open-letter1.pdf>> accessed March 23, 2016.