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Recognising Transnational Refugee Law

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Abstract:

This analysis sets out to examine the fragmentary nature of international refugee law today and argues for a formal recognition of a body of 'Transnational Refugee Law' ('TRL') in the absence of a world legislative authority for norm-setting, as well as a world court for the interpretation of refugee law. Who makes the 'norms' and who are the 'actors' making them, is a question rarely addressed in mainstream works of refugee law. Neither is it asked how 'norms' in refugee law evolve under the influence of transnational actors and who the new 'norm entrepreneurs' are. The discussion here offers some thoughts on what the regulatory purpose of the body of refugee law norms is and how it originated, and considers how the shift in "actors, norms and processes" has begun to transform our understanding of the refugee.

Keywords: UNHCR, Refugees, War, OAU Convention, Vietnamese Boat People, UNRWA, Bolbol, UNHCR Handbook.

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In *Transnational Law*, now written over half a century ago, Philip C. Jessup explained[2] the nature of the rules that men live by, observing that, "[a]s man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated" but that "[h]istory, geography, preferences, conveniences, and necessity have dictated dispersion of the authority to make the rules men live by." This Chapter aims to locate the dispersion of authority in a rapidly changing area of law, namely, international refugee law, where everything is said to be agreed, and yet nothing is. The centrality of the *Convention Relating to the Status of Refugees 1951*[3] to the definition of the refugee is proclaimed by James Hathaway and Michelle Hathaway, in their magisterial The Law of Refugee Status, [4] as "both universal and applicable to contemporary refugees." [5] Yet, it is neither 'universal' as a definition nor entirely 'applicable to contemporary refugees' today. There has always been a marked dispersion of authority in who gets to say what about refugee law. Goodwin-Gill and McAdam in their classic, The Refugee in International Law,[6] whilst writing that "[t]he States which acceded to or ratified the 1951 Convention agree that the term 'refugee' should apply . . . to any person who, broadly speaking, qualifies as refugee under the UNHCR Statute",[7] also then make it clear that "[f]rom the outset, it was recognized that, given its various limitations, the Convention definition would not cover every refugee."[8] In fact, they note early on that

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[1] Professor of Law, Dickson Poon School of law.

[2] Philip C. Jessup, Transnational Law (Yale Univ. Press, New Haven 1956) at p. 8.

[3] Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* reads: "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." See, http://www.unhcr.org/3b66c2aa10.html.

[4] James Hathaway and Michelle Hathaway, The Law of Refugee Status (CUP, 2014). In an earlier work James Hathaway described the Refugee Convention as one "which remain the cornerstone of modern international refugee law…" see, James C. Hathaway, The Rights of Refugees, (CUP, 2005) p. 91 at para 2.3.

[5] Ibid., at p. 1.

[6] Guy S. Goodwin Gill & Jane McAdam, The Refugee in International Law (OUP, 3rd edn, 2007).

[7] Ibid., at p. 35.

[8] Ibid., at p. 36.

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"[r]efugee law…remains an incomplete legal regime of protection."[9] It is high time therefore for refugee law to be seen as an eclectic, diverse, multifarious and amorphous corpus of law and practices. Any other conception is misleading.

This chapter sets out to examine the fragmentary nature of international refugee law today and argues for a formal recognition of a body of 'Transnational Refugee Law' ('TRL') in the absence of a world legislative authority for norm-setting, as well as a world court for the interpretation of refugee law. Who makes the 'norms' and who are the 'actors' making them, is a question rarely addressed in mainstream works of refugee law. Neither is it asked how 'norms' in refugee law evolve under the influence of transnational actors and who the new 'norm entrepreneurs' are.

To deal with these questions, this chapter will first examine what the regulatory purpose of the body of refugee law norms is and how it originated. It will be seen here that following the Second World War, when an East-West exodus of refugees began to take place, the focus of refugee law was on 'persecution' of the asylum-seeker, given the historic concern of religious and racial minorities across Europe at the time and the ill-treatment of the Jewish peoples in Europe, and it was this which led to the form of the *Geneva Convention on the Status of Refugees 1951.*

Second, it will consider how the shift in "actors, norms and processes"[10] began to transform our understanding of the refugee. In examining the emerging sociology of the field, three distinct and clearly identifiable landmarks in the modern landscape of refugee law will be scrutinized. First, it will be noted that even a year before the establishment of the *UN Statute of the Office of the United Nations High Commissioner for Refugees 1950*, which oversaw the promulgation of the *Geneva Convention on the Status of Refugees 1951*, the international community had eschewed any suggestion of a requirement of 'persecution' for Palestinian refugees, in favour of a clear recognition that they had been displaced as a result of armed conflict through a loss of home and had become 'war refugees' resulting in the United Nations having to establish the *United Nations Relief and Works Agency for Palestine Refugees* ('UNRWA') in the Near East for their protection. This was an early recognition of 'war refugees' which resonates right down to the present day. Second, alongside these international developments undertaken by the United Nations, individual states continued to find means and methods of accommodating refugees even in circumstances where the UNHCR Statute did not apply to the fleeing populations: first, there was the exodus of the Chinese refugees from Communist China to Hong Kong which the British Government accommodated; second, there was in 1954 the rebellion of the Algerian nationalists against French rule, leading to an exodus of French speaking Algerians of European descent which the French accommodated; third, there was the Hungarian refugee crisis of 1956, where western powers, on seeing the revolt of the

[9] Ibid., at p. 1.
[10] Peer Zumbansen, "Lochner Disembedded: The Anxieties of Law in a Global Context" Indiana Journal of Global Legal Studies [2013, vol. 20, pp. 29-69].

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Hungarians against Russian rule, applied the UNHCR Statute to them, but upon discovering that they were not being 'persecuted' still allowed them to find sanctuary amongst them; and fourth, the communist victories of 1975 in the former French colonies of Indochina, namely of Viet Nam, Cambodia and Laos led to some three million 'Vietnamese Boat People' fleeing, who could have been given sanctuary in various South East Asian countries, had a system of effective 'burden-sharing' been put in place, but who in the end were mostly accommodated by the leading western powers of the world. All four of these examples show us both, who makes the 'norms' and what 'types' of norms there are, (in terms of domestic law, international treaty law and Conventions, and in the case-law); and show us who the 'actors' that are driving the field of refugee law at critical junctures in time are.

Third, we will consider how, in the light of the above, we can reflect on the 'place' and 'space' of refugee law, such that we can understand the domain of domestic 'place' lawmaking, but also a 'space' of transnational contestation. We find that (a) the kinds of questions that were earlier asked (eg; in the immediate post-World War II at an early point about the field's aspirations) are not the same questions that are being asked today. The focus has shifted markedly from assessing the eligibility of refugees on the basis of whether then can show 'persecution', to their flight as 'war refugees' fleeing the 'indiscriminate violence' of armed conflict. The focus is also on the way in which regional solutions, in the form of the EU, can provide a form of 'subsidiary protection' to those migrants who cannot come under the *Geneva Convention on the Status of Refugees 1951*. This is a telling reminder of Mathias Reimann's thesis in "Beyond National Systems", which emphasized the changes that have taken place in the modern world today, such as "the rapid rise of transnational law, the growing interdependence of national regimes, and the emergence of large-scale transnational legal practice."[11]

Fourth, and finally, we will in a concluding section consider (a) how these interests and aspirations have shifted since then; (b) what the role and significance of refugee law is today; and (c) what questions refugee law answers today, and which ones it does not answer? We will see here first, that States increasingly have to concern themselves with refugees who come in the guise of 'war refugees' fleeing the 'indiscriminate violence' of armed conflicts in countries like Syria, Iraq and Afghanistan. However, emerging norms are incomplete and impoverished of real content because States differ in their responses, with some requiring an individualized threat, whilst others looking to establish the level of violence, and yet others not interested in individualizing the threat at all. We will see, secondly, that the efficacy of refugee law is constrained by the fact that most entitlements are only available to refugees if they have arrived 'lawfully', and that proving that one can meet the conditions set out in the *Geneva Convention on the Status of Refugees 1951* does not necessarily guarantee success. We will see that the very purpose of refugee law

[11] Mathias Reimann, "Beyond National Systems: A Comparative Law for the International Age", Tulane Law Review [2001, vol. 75, pp. 1103-1119] at p. 1106-1107.

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remains contested given that the dichotomy between political refugees and economic migrants or displaced persons, is still rigorously maintained in refugee law.

In this way, it is hoped that this Chapter will trace, through the earliest transnational legal processes, the precise location of TRL. There are four distinctive features, as Harold Koh has argued,[12] to the transnational legal process, all of which bring out the special nuances of TRL: it is *non-traditional* in that it breaks down the traditional dichotomies of international law between domestic and international; it is *non-statist* in that it includes non-state actors as well as state actors; it is *dynamic* in that it is not static so that it "transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again;" and it is *normative* in that new rules emerge, are interpreted, internalized, and enforced, thus emphasizing the 'normativity of that process." This is a helpful categorization because as Koh reminds us, when it comes to "the transnational legal process scholars" their distinctive outlook lies in the fact that they, "are focused on the normativity of process, sensitivity to practice, and alive to interdisciplinary theory."[13]

I. The regulatory purpose of the body of norms and its origins in Refugee Law

Modern refugee law is traceable to World War II when a movement of East-West refugees took place. This displacement of European refugees lasted up to the end of the 1950s. In the 1970s a second flow of refugees occurred which was mainly intra-South. As Gervase Coles points out, these refugee movements have forced the West into an, "inheritance of a way of thinking and acting which grew out of the circumstances of the two previous periods"[14] which we will consider in this chapter, giving way to a fragmentary nature of refugee law.[15]

The Requirement of 'Persecution' in the Refugee Convention

In the first, East-West movement of refugees which began in the late 1940s, the western countries which formed the majority in the United Nations, set out to reduce the European refugee problem. They did this by stipulating that the refugees comply with a requirement of 'persecution' because it was seen as a satisfactory way "of dealing with the historic concern of religious and racial minorities in Europe, especially the Jews"[16] whose experience in Europe had traditionally been precisely one of 'persecution'. It is no

[12] Harold Koh, "Transnational Legal Process", Nebraska Law Review (vol. 75:181, pp. 181-207) at p. 184.
[13] Ibid., at p. 207.
[14] Gervase Coles, *"Approaching the Refugee Problem Today"* in Gil Loescher and Laila Monaghan (eds) Refugees and International Relations (New York, OUP, 1989) at p. 373.
[15] Ibid., at pp. 390-393.
[16] Ibid., at p. 375.

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exaggeration to say, therefore, as James Hathaway does, that the requirement to show 'persecution' is directly a "product of recent western history"[17] even though for a historian like Claudena Skran, the persecution requirement is a "deviation from the humanitarian principles of the early phase of refugee law."[18] In fact, as Gil Loescher notes the persecution requirement was designed to fit into the Western notion of the refugee.[19] To approach refugee law in this way had its pitfalls because as Mathew Price explained, "the persecution requirement distorted asylum into a political instrument to be wielded against the Soviets at the cost of addressing the urgent needs of refugees."[20] Others too, like Gervase Coles, have confirmed how the dictates of post-war Europe meant that the persecution requirement was "specifically devised for a particular geographic problem at a particular time", so that it was "adopted as being the essential characteristic of the new refugee in the belief that this would satisfactorily define European asylum seekers, the majority of whom were from Eastern Europe . . ."[21] On any view, therefore, the requirement of 'persecution' has corrupted the legal institution by politicizing humanitarian action.

Perhaps this was inevitable, given that the *Geneva Convention on the Status of Refugees 1951* arose as the product of post-World War II Europe, being "born on the ashes of the Holocaust", to use the evocative words of Mathew E. Price, so that in this way it was accepted that, "asylum's function was to protect unfortunates from specifically political harms; granting asylum reflected the judgment that the state of origin had abused its authority; and asylum was connected to other tactics for reforming or challenging abusive regimes . . . ."[22] Yet, this was precisely the problem, and one which soon led refugee law to be questioned. It was said that, "the Convention with its definition is sometimes described as a Cold War product, 'Eurocentric' and, if only for these reasons, obsolete" as Jerzy Sztucki notes.[23] The realization that this is so has been deeply felt right down to present times, so that James Hathaway labels it "incomplete and politically partisan."[24] Or, as Coles puts it, "the entire refugee problem was now seen as one of persecution . . . ."[25] This is despite his observation that "the experience of the European countries during this century has provided abundant evidence of the futility of trying to define a refugee by a particular motivation for departure" something which "had no precedent in this century and proved inappropriate or unworkable in many subsequent

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[17] James Hathaway, Law of Refugee Status (Toronto, Butterworths, 1991) at pp. 1.
[18] Claudena M. Skran, Refugees in Inter-War Europe: The Emergence of a Regime (New York, OUP, 1995) p.112, note 33.
[19] Gil Loescher, Beyond Charity (New York, OUP, 1993) at p.57.
[20] Mathew Price, in his *"Recovering Asylum's Political Roots"* in Rethinking Asylum: History, Purpose and Limits, Chapter 1.
[21] Coles (n 14 above) at pp. 374-5.
[22] Price (n 20 above) at p. 57.
[23] Jerzy Sztucki, *"Who is a Refugee?" The Convention Definition: Universal or Obsolete?"* in Frances Nicholson and Patrick Twomey (eds.) Refugee Rights and Realities: Evolving International Concepts and Regimes (CUP, 1999), p55.
[24] Hathaway, Law of Refugee Status, at p. 8.
[25] Coles (n 14 above) at p. 375.

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situations."[26] If this is so, then plainly alternative conceptions of the refugee had to be sought, where other 'norm entrepreneurs' such as the States themselves, could be identified as playing a role in 'norm setting', and where this was done a dispersal of authority away from the United Nations, could also be tracked.

Coles recognized early that fleeing populations may be more motivated by the desire to escape oppression and seriously disturbing events that by the desire to escape persecution, and that did not make them any less refugees. As he explained, "it may be possible to maintain that many asylum-seekers or clandestine aliens do not suffer persecution; but what is more difficult to maintain in many cases is that they do not come from a society which is oppressive and/or seriously disturbed, even violent."[27] In this respect, refugee law is not about satisfying the eligibility criteria for entry. This has itself been criticized for its opaqueness. B.S. Chimni reminds us how the UNHCR carries out refugee status determinations (RSD) in some 80 countries but this is a "decision-making that has received relatively little attention" even though it has "grave implications for the life and liberty of individuals"[28] and yet, "[i]n the last decade, studies have pointed to lapses in the conduct of RSD by UNHCR."[29] Relying on the pioneering work of Michael Alexander,[30] Chimni was able to show how this process does not meet "clear standards of transparency" and it "needs to be accountable to its beneficiaries."[31] Valuable as such research is, as Coles argues, if it is oppression and serious disturbances that refugees flee from then "the modern refugee problem is not one of eligibility criteria or of immigration controls; the problem is, basically that of adverse conditions within the country of origin which are forcing people to flee."[32] Satisfying eligibility criteria will not secure entry. Who is a refugee and who qualifies as such is a question which will remain shrouded in obscurity. This is why Chimni observes that Western responses to the refugee crisis, "may, in the final analysis, be seen as an instrument of an exploitative international system which is periodically mobilized to address its worst consequences."[33]

In the same way, "the attempt to affect events by asserting the claims of individual human rights, is largely doomed to failure, "as Jack Garvey has pointedly remarked, "when dealing with refugee problems" because given that refugees move from state to state, "[t]he perspective of state-to-state relations, not the relation between the individual and

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[26] Ibid., at p. 385.
[27] Ibid., at p. 386.
[28] B.S. Chimni, "*Co-option and Resistance: Two Faces of Global Administrative Law",* International Law & Politics [vol. 37; Oct. 2006; pp. 799-827] at p. 819. Available at http://iilj.org/gal/documents/co-optionandresistancetwofacesof.pdf.
[29] Ibid., at p. 820.
[30] Michael Alexander, *"Refugee Status Determination conducted by the UNHCR",* 11 Int'L J. of Refugee L. 251, 286-87 (1999).
[31] Ibid., at p. 821.
[32] Coles (n 14 above) at para 387.
[33] B.S. Chimni, "*From Settlement to Involuntary Repatriation: Towards A Critical History of Durable Solutions to Refugee Problems",* Refugee Survey Quarterly, (Vol. 23, No. 3, 2004) pp. 55-73 at p. 56.

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the state, becomes critical for the mitigation or solution of refugee crisis"[34] and that, of course, is glaringly absent. The nation-state system acts to prevent an international authority from solving the problem of refugees. Insofar as international agencies have existed, from the League of Nations to the United Nations, they are created by states, and are constitutive of the states themselves, with the result that these states will not relinquish their sovereign right to determine who lives in them and who does not.[35] Unsurprisingly then, eminent refugee lawyers like Hathaway and Neve in the end openly acknowledged, "the increasingly marginal relevance of international refugee law [which] has in practice signalled a shift to inferior or illusory protection."[36]

These shortcomings were well known to advocates of the Refugee Convention. Western countries at the end of World War II were using the United Nations to deal with their own problems and so they deliberately made "some apparent concessions to universality" but these remained "inevitably arbitrary and fraught with problems since the new approach was specifically devised for a particular geographical problem at a particular time." So it was well known to all concerned that "the approach was not universal, but regional and provisional: it was not a model for general application."[37] In this way, there first followed the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (UNHCR) and then the *1951 Convention Relating to the Status of Refugees*. These required refugees to show (i) that there was persecution; (ii) that it was individually directed and not group targeted; (iii) that external settlement would be the solution; and (iv) that the refugees had to be outside their country of origin.[38] Thus was the modern law on refugees crafted by the international community.

The refugee problem could not, however, be resolved through the agency of the law alone. It was the ultimate conceit of the international community to think that it could. A salutary reminder was provided of this by none other than Michel Foucault, who whilst recognizing how "[i]n Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law,"[39] also added the sobering *caveat* that, "[w]e have been engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, as serving as its system of representation."[40] One may wonder for this reason at the wisdom of framing the refugee problem as fundamentally a legal one insofar as its essential attributes and architecture is concerned. Simon Arthur Roberts puts it well that, "it has proved very difficult, despite sustained attempts to do so,

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[34] Jack I. Garvey, *"Toward a Reformulation of International Refugee Law,"* Harvard Human Rights Law Journal (Vol. 26, No. 2, Spring 1985) pp. 483-574 at p. 484.
[35] Michael Marrus, The Unwanted (New York, OUP, 2002) p.7, 9.
[36] James Hathaway & Alexander Neve, *"Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection"* Harvard International Law Journal (1997, Vol. 10) pp.115-211 at p. 116.
[37] Ibid., at p. 374.
[38] Thus exhibiting an 'exile bias' to refugee law (see Coles' unflinching criticism of this at p. 391-392, 402).
[39] Michel Foucault, *La Volonte de Savoir* (Paris: Gallimard, 1976); trans., R. Hurley, *The History of 'Sexuality,* vol. 1 (London: Allen Lane, 1978) at p. 87.
[40] Ibid., at p. 89.

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to talk confidently about law in the case of the acephalous orders of the pre-state/non-state world or about local level-orderings within centralized polities. The unresolved identity of 'the anthropology of law' and the problematic character of subsequent attempts to delineate 'plural' legal orders testifies clearly to that difficulty."[41]

II. The shift in "actors, norms and processes" and the changing sociology of the field

i. The Palestinian Crisis

It is a paradox all too often overlooked, that in 1949, only a year before the *UN Statute of the Office of the United Nations High Commissioner for Refugees 1950*, in grappling with the fate of Palestinians, western powers avoided stipulating any requirement of 'persecution'. All that was needed was for them to show that they had lost their home as a result of the 1948 conflict in Palestine. This was another distinctive way in which TRL early developed because in this altogether more realistic and simpler way of understanding why refugees move, "[n]o particular motivation for leaving or remaining abroad formed part of the criterion for a Palestinian to qualify as a refugee; merely, the loss of home" and, "[t]he question of solution was left open."[42] In this way, there was a clear dispersal of authority elsewhere with different actors and processes being put into train, only a year before the resolution of East-West refugees in Europe was addressed by the Refugee Convention 1951. Palestinian refugees became 'Mandate refugees' as a result of "the mandate of the UN agency established to deal with the problem, [namely] UNRWA,"[43] and those falling under the Refugee Convention 1951 became "Convention refugees." The requirement of 'persecution' only applied to the latter.

For Palestinians it was armed conflict which was the immediate cause of their refugee situation, and to this day the position of Palestinian refugees, in recognition of the conflict of 1948 which displaced them, is still covered by General Assembly Resolution 302 (IV) of 8 December 1949, through which the United Nations established the *United Nations Relief and Works Agency for Palestine Refugees* ('UNRWA') in the Near East.[44] Even after so many years of intractability, UNRWA's mandate is renewed every three years and its area of operations comprises five 'fields': Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip. The approach to the Palestinian Refugee crisis in 1949 aptly illustrates how, "the vast majority of all persons externally

[41]Simon Arthur Roberts, "*After Government? On Representing Law Without the State* Modern Law Review, (vol. 68, Jan. 2005., No1, at pp. 1-24) at p. 17. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=640095.
[42] Coles (n 14 above) at p. 375.
[43] Ibid., at p. 375.
[44] This dealt with Resolution 212 (III) of 19 November 1948 which set up the *United Nations Relief for Palestinian Refugees* to provide immediate temporary assistance for such persons.

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displaced by events occurring in Europe between the beginning of World War I and the end of World War II were 'war' refugees,"[45] and this is why, as Coles explains, non-Western and socialist countries at the time, "either rejected the Western approach or regarded it as relevant only to the European refugee situation."[46] Nevertheless, with respect to Palestinian refugees, working out who falls to benefit from UNRWA's mandate remains after all these years a matter of not inconsiderable complexity and difficulty.[47] The case of ***Al-Khatib***[48] has recently confirmed once again that Palestinian refugees continue to face an uphill struggle in securing entitlement to subsidiary protection, as a formerly habitually resident in Syria, who had been living in the United Kingdom since 2007, discovered.

ii. State Actors and the search for a new 'norm' setting

Four events occurred outside Europe soon after the Refugee Convention 1951 which showed western countries take measures that amounted to an outright rejection of that regime. These four events are often overlooked in discussions of modern refugee law practice these days. Yet, they show the role of the State as an actor in shaping refugee law. They also show how across national jurisdictions a different methodology was applied. What this tells us is that transnational processes were not just confined to the international plane. The State did not disappear. It simply disaggregated, breaking up into various different components. In this way it helped the development of TRL. This is a process well described by Anne-Marie Slaughter in *A New World Order,* in which she describes how "the state is not disappearing, it is disaggregating" in that "its component institutions . . . are all reaching out beyond national borders in various ways, finding out that their once 'domestic' jobs have growing international dimension."[49] She envisions "a world order in which hope and despair, crime and charity, ideas and ideals are transmitted around the globe through networks of people and organizations."[50]

First, there was the exodus of the Chinese refugees from Communist China to Hong Kong. This occurred when the Communist party took full control of mainland China in 1949 and refugees fled across the open border, in what Edvard Hambro in 1957 described by observing that, "nowhere is the refugee problem less dramatised, or even unknown to

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[45] Coles (n 14 above) at p. 375.
[46] Ibid., at p. 375.
[47] The Handbook notes that, although UNRWA is currently the only organ or agency other than the UNHCR that is providing protection or assistance under Article 1D, there was previously one other such body (the United Nations Korean Reconstruction Agency) and there could, potentially, be other such bodies in the future.
[48] ***Al-Khatib v The Secretary of State for the Home Department*** [2016] ScotCS CSIH_85.
[49] Anne-Marie Slaughter, A New World Order (Year 2009, Princeton University Press) at p. 31. She suggests (at p.1) that, "government networks are a key feature of world order in the twenty-first century, but they are underappreciated, under-supported, and underused to address the central problems of global governance."
[50] Ibid., at p. 271.

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many Westerners."[51] The United Kingdom determined that they did not come within the ambit of the Statute of the UNHCR, because the resettlement opportunities for Chinese refugees outside Hong Kong were unrealistic. There were also political and security factors at stake, so the 1951 Refugee Convention was made to fall into abeyance, and a different approach was devised.

Second, in 1954 Algerian nationalists rebelled against French rule. This led to the Algerian War of Independence in 1962. Some ten per cent of the overall Algerian population (amounting to 1 million French Algerians) left for sanctuary in France. Such was the role of the French state here that Peter Gatrell has suggested that France actually helped "the construction of the Sahrawi refugee identity. [52] They did so by accommodating Sahrawi refugees, as they were Christians, and descendants of the French, Spanish and Mediterranean peoples of Northwest Africa. Accordingly, France did not wish the Statute of the UNHCR to apply to them.

Third, and even more interestingly, the Hungarian refugee crisis of 1956 differed both from the Chinese and Algerian exodus. Here western powers, on seeing the revolt of the Hungarians against Russian rule, immediately applied the UNHCR Statute to them, with a programme of resettlement to follow. However, after most had fled to Austria, the Hungarians then expressed the desire to return back to their homeland once the security situation had improved. This meant they could no longer show 'persecution' in Hungary. Austria did not force them to return but called on states to help resettle them with both financial and physical help. This was done so well and so very quickly and by such a large number of states that it has been described by Marjoleine Zieck as, "the first large-scale resettlement under the present legal regime." In this way, the Hungarian refugee crisis not only stands to be contrasted with contemporary resettlement practice, "that is characterised by a scarcity of resettlement places and few resettlement states",[53] it also shows the irrelevance of the Refugee Convention in the first large-scale resettlement program after World War II. It is a telling example of a 'legal transfer', such that in the words of David Nelken,[54] "[i]n all but the most technical of legal transfers there are likely to be conflicting interests at stake, involving different governments or different economic interests . . ." for example, but that "the most fundamental question from which there is no escape is who gets to determine what is meant by success" and that "[s]ucess will . . . turn on the ability of one group to impose its interpretation of the outcome of the particular transfer or ademption and tell a convincing story of what has occurred." In all these three cases discussed so far, national governments have successfully imposed their own interpretation of the outcome sought to be achieved.

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[51] Edvard Hambro, *"Chinese Refugees in Hong Kong"* The Phylon Quarterly (Vol. 18, No. 1, 1st Quarter) pp. 69-81 at p. 69.
[52] Peter Gatrell, The Making of the Modern Refugee (2013, OUP) at p. 228.
[53] Marjoleine Zieck, *"The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement"* Amsterdam Law Forum, (2013, Spring Issue, Vol. 5:2) pp. 45-63 at p. 45.
[54] David Nelken, "*The Meaning of Success in Transnational Legal Transfers"* Windsor Yearbook of Access to Justice (vol. 19, 2001, pp. 349) at p. 363.

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There was, however, a fourth event also, "which proved to be a watershed",[55] and it occurred at the end of the period described above. It occurred from the upheavals which followed the communist victories in 1975 in the former French colonies of Indochina, namely of Viet Nam, Cambodia and Laos. These caused such turmoil that over the next two decades more than three million people fled from these countries, in what became popularly known as the 'Vietnamese Boat People.' Their plight has been well documented by Leo Goodstadt, who recounts the exodus of ethnic Chinese from Vietnam as a struggle for power in South East Asia between the USA, the Soviet Union and China.[56] The political interests of the major powers were directly involved and the USA wished to find a speedy solution, even though the western powers' first reaction was to call them, not refugees at all, but 'boat people'. What happened here, however, was that the South-eastern states most immediately affected, such as Thailand, Indonesia and Malaysia, did not help in the burden-sharing and accommodation of these refugees. Their rejection by these countries consequently generated a huge amount of western media attention, as they were driven away from foreign shores, with the result that "they finally succeeded in almost entirely transferring the onus of settling these people onto Western countries."[57] The settlement programme was undertaken by the UNHCR which for the first time negotiated an Orderly Departure Programme,[58] making for family reunion and safe exodus. This did little to curb the refugee flows themselves. It was the West which had to shoulder the burden of refugee flows. In the process, the UNHCR had by the end of the 1970s overnight transformed itself to an organisation with "an assistance budget" of "nearly one hundred times what it had been less than ten years before."[59] This transformation contrasted sharply with its presence as a small European migration agency during both the first period of the East-West flow of European refugees and the second period of intra-South refugee movements, during which periods it had been little more than a modest assistance body.

The transformation of the UNHCR in this way was not without costs, because it was during this time that the UNHCR Statute looked antiquated and obsolete especially in Third World situations. Despite this, as Coles explains, "[n]o one, however, was willing to try to amend the Statute, and the Convention was widely seen as having at least some political and symbolic value."[60] This is particularly so given that the Western countries no longer enjoyed a majority in the UN General Assembly, preferring neither to re-

[55] Coles (n 14 above) at p. 379.
[56] Leo Goodstadt, *"Race, Refugees and Rice - China and the Indo-China triangle"*, The Commonweatlh Journal of International Affairs, (vol. 68, 1978, Issue 271) at pp. 253-260.
[57] Coles (n 14 above) at p. 157.
[58] "In the case of Vietnam, an *Orderly Departure Programme* was devised, whereby the Vietnamese authorities agreed to permit the orderly departure of individuals to resettlement countries, to avoid the clandestine and dangerous departures by sea. The programme marked the first occasion in which UNHCR became involved in efforts to pre-empt a refugee problem rather than simply dealing with its aftermath." See, The State of the World's Refugees 2000: Fifty Years of Humanitarian Action (Chapter 4, *"Flight from Indochina"*) at p. 79 (Available at http://www.unhcr.org/3ebf9bad0.pdf).
[59] Coles (n 14 above) at p. 381.
[60] Coles (n 14 above) at p. 383.

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negotiate the UNHCR Statute nor to develop a coherent body of international refugee law. Today if refugee law looks out-dated and anachronistic, it is in no small part due to this reason. The fact is that western powers long ago chose inaction over action because "they saw their interests as served by a continuation of the status quo" and "[n]o one else was interested in a global initiative**,** preferring regional means instead."[61] This provides us with a salutary reminder of the limitation of traditional international law with its focus only on solutions involving state actors and institutions. The case for TRL was for this reason early made out. There was a need for different actors and norm entrepreneurs to find a place and space for refugee law elsewhere once the UNHCR Statute began to appear as being not fit for purpose. In this way this early resulted in a "move of international society, from an essentially negative code of rules of abstention," to use the words of Friedman, "to positive rules of co-operation, however, fragmentary in the present state of world politics . . .",[62] In this way, refugee law has become an example of what has been alluded to in "*Defining the Space of Transnational Law",* as "the concerns among international lawyers about 'legal fragmentation,'"[63] which happens when "the absence of a world government radicalizes the governance dilemma facing modern societies." What trans-nationalists hope for is that, "the improvement of participatory elements can strengthen the democratic foundations of global governance institutions."[64]

iii. Africa responds with the OAU Convention:

Change was driven by the 1970s refugee movements from South to North, but the Western countries, which were UN-donor and refugee-receiving countries, alone dominated international refugee policy. These utilized both their financial and political power to this end. The South-North refugee movements themselves were the result of armed conflicts arising between Western colonial powers and indigenous revolutionary movements. To break this dominance African countries created their own regional refugee system. They did so early as wars of independence in the 1960s began to displace African populations and so thus arose what has been described as, "one of the world's most flexible and innovative refugee instruments"[65] today which is the *Organisation of African Unity (OAU) Refugee Convention 1969*. It extended the narrow scope of the 1951 Refugee Convention to include people fleeing "events seriously disturbing public order". This is a reminder of what one commentator in *Transnational Legal Pluralism* has described as the "fragmentation of law outside of the nation state" so that today we have

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[61] Coles (n 14 above) at p. 383.
[62] Wolfgang Friedman, The Changing Structure of International Law, (London, 1964) p. 62.
[63] Peer Zumbansen, *"Defining he Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism",* 21 Transnat'l L. & Contemp. Probs. (summer 2012) 305 at p. 1. Available at https://www.wzb.eu/sites/default/files/u273/zumbansen_2012_defining_the_space_of_transnational_law_wzb_hu.pdf.
[64] Ibid., at p.2.
[65] Micah Bond Rankin, *"Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On"* (2005, Vol. 21) South African Journal of Human Rights (SAJHR) pp. 406-435, at p. 406.

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"pluralistic legal orders" which have "inspired a larger contestation of concepts of legal formalism" and challenge "the alleged unity of the legal order and of the hierarchy of norms against the background of a constantly advancing process of constitutionalisation."[66]

Given the conflict and civil strike that followed from Africa's decolonization process in the 1960s, and its subsequent escalation, thereafter, the OAU has been well placed to articulate refugee protection in much wider terms that are more suited to the colonial African context, so 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."[67]

This unique definition explicitly introduces objective criteria, based on the conditions prevailing in the country of origin, for determining refugee status, and 'requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention definition'.[68] As Coles puts it, "this definition is so wide as, in many cases, to make individual determinations of status a mere formality."[69] In fact, it is predicated on protection from oppression and serious disturbances, which James Hathaway acknowledged as being a fundamental reason for why people flee their homes. Ironically, both definitions are today employed by UNHCR in its operations in Africa,[70] which is a telling affirmation of the significance of TRL itself. It may well be asked why, however, given severe limitations imposed by the requirement of 'persecution' in the Refugee Convention 1951, this altogether more realistic conceptualization of the modern refugee is not adopted in the West in their legal systems. Perhaps it is time.

What these developments point to is a need for a more explicit acceptance of 'alternative knowledges' and the recognition that line-drawing excludes relevant knowledge from being taken into account, and this is a role that TRL can help fulfill today. Its importance can hardly be over-stated. After all, one writer has lamented that, "[i]t is not that the utopian lawyer pushes against a citadel of self-assured, parochial doctrinal framework in the name of an as-yet impossible, unthinkable, out-of-the world legal imagination," but that rather, that this line-drawing, "which is done through the identification of what

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[66] Peer Zumbansen in "*Transnational Legal Pluralism",* Transnational Legal Theory 10: 141-189. Research Papers, Working Papers, Conference Papers, Comparative Research in Law & Political Economy (Research Report No. 1/2010 Available at http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1070&context=clpe.

[67] 1969 Convention (n 1) art I(2).

[68] Ruma Mandal, 'Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")' (2005) UNHCR Legal and Protection Policy Research Series accessed 8 December 2010, 13.

[69] Coles (n 14 above) at p. 378.

[70] UNHCR, 'Note on International Protection' A/AC96/830 (7 September 1994) [32].

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belongs to a legal 'field' and what falls through the cracks" is something which "denies any such utopia from the start by establishing an entire universe of self-sufficient legal reproduction."[71] I have myself elsewhere referred to this phenomenon as the '[P]olitics of Knowledge Recognition",[72] whereby some forms of knowledge are excluded but others willingly embraced by those in power. And yet, given the limits of traditional law, as highlighted by Steiner & Vagts,[73] such that it is now clear that, "classical international law is often inadequate to the contemporary world's problems" it was surely only a matter of time before non-Western countries developed their own approaches. After all, "[b]y the mid-20th century, European countries . . . formed a minority of members of the world community" and the fact remains that, "[t]he over 120 states in the United Nations represent many cultures or social and economic ideologies, and have sharply divergent interests." It is time therefore that the international community learnt to draw from a wider range of knowledge constructs. Ultimately, this is what makes the lure of TRL irresistible.

iv. The Courts and the UNHCR Handbook

Notwithstanding the major developments that had already taken place in the 1950s and 1960s, at both state and regional levels, most legal positivists in the world continued to maintain that the *Geneva Convention of the Status of Refugees 1951*,[74] supplemented by its 1967 Protocol,[75] is the primary source of modern refugee law. This overlooked the fact that such was the uncertainty about what was agreed and what was not, that when the text was finalised, "the successive drafts were subject to continual changes in the light of comments by governments and specialist agencies".[76] As the Courts too began to discover, it was unclear whether the changes in language "were intended to reflect a change in substance" or whether they were "intended to reflect the same meaning in different words." From "a lawyers point of view" the changes were "inconclusive" and when looking at the meaning of the text of the Convention, the Courts were driven to say that, "we do not know."[77] This uncertainty was eventually settled, *inter alia*, by the United

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[71] Peer Zumbansen, "*The Politics of Relevance: Law, Translation and Alternative Knowledges*" (2013) Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No. 45/2013. Available at http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1287&context=clpe.

[72] Satvinder Juss, in Satvinder Singh Juss & Colin Harvey, Contemporary Issues in Refugee Law [Elgar, 2013, pp. 31-67] at p. 38-41.

[73] H. Steiner & D. Vagts, Transnational Legal Problems, (2nd edn., New York, 1976) at p. 330.

[74] http://www.unhcr.org/uk/1951-refugee-convention.html.

[75] The re-edited version of the 1979 Handbook, which was issued in 1992, runs into 223 paragraphs, with six annexures: see, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Available at http://www1.umn.edu/humanrts/instree/v2prsr.htm. It was re-issued again in 2011. The current version is available as of 2012 at http://refugeearchives.wordpress.com/2012/02/22/updated-unhcr-handbook-and-guidelines-on-procedures-and-criteriafor-determining-refugee-status-under-the-1951-convention-andthe-1967-protocol-relating-to-the-status-of-refugees/.

[76] per Lord Lloyd in *Secretary of State for The Home Department, Ex Parte Adan* and *R v Secretary of State For The Home Department Ex Parte Aitseguer,* [2000] UKHL 67 (19 December 2000); [2001] Imm AR 253, [2001] 2 WLR 143, [2001] 2 AC 477, [2001] 1 All ER 593, [2000] UKHL 67.

[77] Ibid.

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Nations High Commissioner for Refugees ('UNHCR'). As we have seen, the Office of the UNHCR was created on 14 December 1950 by Resolution 428 (V) of the United Nations General Assembly, and it is a subsidiary organ of the United Nations under Article 22 of the UN Charter, such that the functions of the Office of the UNHCR are defined in its Statute.[78] This means that UNHCR is the body charged with the task of supervising international conventions that provide for the protection of Refugees. In 1979, the UNHCR published its Handbook Relating to the Criteria for Determining Refugee Status'[79] (hereafter "the Handbook"). The publication itself was the result of a request to the UNHCR by state parties to have the UNHCR provide them with guidance on the meaning and interpretation of the text of the Convention, and this confirms the role of domestic transnational actors, participating as norm entrepreneurs to help develop the meaning of key concepts of modern refugee law. The importance of the process of norm-setting can be seen in the range of issues tackled. In fact, even with respect to pre-Convention matters, such as the plight of Palestinian refugees, who are excluded by Article 1D of the Refugee Convention as 'Mandate refugees', the UNHCR Handbook ended up having to give clear guidance, because this is what States required. In ***Bolbol***[80] the Court of Justice of the European communities (CJEU) adhered to this guidance. It observed the statement in the Handbook that, "UNRWA operates only in certain areas of the Middle East, and that it is only there that its protection or assistance are given". This means that "a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention." In fact, it is the Handbook which then goes further than Article 1D and expresses the sanguine hope that, "it should normally be sufficient to establish that the circumstances which originally qualified him for protection or assistance from UNRWA still persist and that the cessation and exclusion clauses do not apply to him."[81] The Office of the UNHCR has in this way too helped the development of TRL.

So much so, that over the years, the Courts have noted the Handbook's guidance across a range of issues with respect to refugees - from international humanitarian law,[82] to the exclusion of refugee status,[83] and from the credibility assessments of unaccompanied minors,[84] to the internal relocation of refugees.[85] It has become part of the transnational legal order. Its guidance stands to be conceived as norm-setting, but one which occurs outside the province of traditional international law. A number of textbooks give the Handbook a special status, such as Fordham's, Judicial Review Handbook,[86] Symes and Jorro's, Asylum Law and Practice,[87] de Smith, Woolf and Jowell's, Judicial Review of

[78] See, *Bolbol (Area of Freedom, Security and Justice)* [2010] EUECJ C-31/09_O (04 March 2010) at para 14.
[79] James Hathaway and Michelle Hathaway (n 4 above).
[80] *Bolbol* (Area of Freedom, Security and Justice) [2010] EUECJ C-31/09_O (04 March 2010).
[81] Ibid., at para 17.
[82] see, *QD (Iraq) [*2009] EWCA Civ 620.
[83] *Bolbol (Area of Freedom, Security and Justice* [2010] EUECJ C-31/09_O.
[84] *U. & Anor -v- MJELR* [2010] IEHC 317.
[85] see, *AH (Sudan*) [2007].
[86] 6th edn., 2008, Hart Publishing, London.
[87] 2nd edn., 2009, Bloomsbury Publishing, London.

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Administrative Action,[88] and Macdonald and Toal's, Immigration Law and Practice.[89] Lord Bingham's essay on judicial determination of factual issues has also drawn attention to the Handbook.[90]

Examples of how the office of the UNHCR has continued to develop TRL through the agency of the Handbook abound.[91] Even with respect to well-settled legal questions, the Courts in their legal decisions today frequently draw upon the UNHCR Handbook for guidance in relation to key concepts of refugee law. In one case[92] the Supreme Court of Ireland had to inquire into the meaning of the '*well-founded fear of persecution'* and it observed that "the Handbook gives a general analysis of this crucial phrase".[93] It then concluded of the trial judge, "that it was appropriate for him to have regard to the Handbook."[94] More recently, an appeals tribunal criticized the fact-finding tribunal below for dis-believing an asylum-seekers account for reasons that he had been unable to provide any corroboration of his account, referring to the distinctively original contribution of the Handbook to our understanding of refugee law. The appeal tribunal declared that: "It is well-established principle of asylum law that refugees should not be expected to produce documentary corroboration of their claims. The origins of this principle are to be found in paragraph 196 of the UNHCR Handbook."[95] In another case from Northern Ireland, the High Court accepted, when inquiring into the question of how standards of probability and assessment of future risk operate in refugee law that, "[t]he UNHCR recognises the balance of probabilities coupled with, where appropriate, the benefit of the doubt, as an acceptable approach."[96] These judicial *dicta* all confirm the value of emerging normative standards, and the role that they then have to play in unfolding legal process when illuminating key legal concepts. It is reminiscent of what Halliday and Shaffer describe in *Transnational Legal Orders*[97] as the need to explore "new concepts of 'global' and 'transnational' law to make sense of legal processes that are not adequately captured by the concept of international law,"[98] They explained how this was

[88] 6th edn, 2009, Sweet & Maxwell, London.
[89] 8th edn., 2010, Butterworths, London.
[90] [1985] Current Legal Problems 1.
[91] *T* v *Immigration Officer* [1996] AC 742; *Birungi* v *Secretary of State for the Home Department* [1995] Imm AR 331; *R* v *Secretary of State for the Home Department ex parte Akdogan* [1995] Imm AR 176; *The Queen (on the application of Dirisu)* v *Immigration Appeal Tribunal* [2001] EWHC.
[92] *Z v. Minister for Justice, Equality & Law Reform* [2002] IESC 14 (1 March 2002) [2002] 2 IR 135, [2002] 2 ILRM 215, [2002] IESC 14.
[93] The guidance in the handbook being given at paras 37-42.
[94] *T* v *Immigration Officer* (n 91 above) at para 30.
[95] Judge Bruce in *PA059052016 [2017] UKAITUR PA059052016*, at para 16. The Judge sets out paragraph 196 of the Handbook that: "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents . . . ."
[96] *ON -v- Refugee Appeals Tribunal & ors [2017] IEHC* 13 at para 62.
[97] Terrence Halliday and Gregory Shaffer in Transnational Legal Orders Draft paper at p. 2
[98] Ibid., where they refer to Twining (2000); Tamanaha (2007); Berman (2012); Zumbansen (2010); Shaffer (2013).

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necessary given the existence of "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.[99]

v. War Refugees

Modern refugee law is fast realizing that armed conflict is the root cause of human displacement. It creates 'war refugees' who are forced to seek safety elsewhere. Where an asylum-seeker cannot demonstrate the risk of individual 'persecution' and therefore does not fall into the category of refugees as defined by the 1951 Refugee Convention,[100] but otherwise nevertheless is at serious risk of a threat to their life, liberty and security, the international community has found protection in other ways. Historically, the requirement of 'persecution' nevertheless stood in the way. This is why when the UNHCR Handbook,[101] first issued in 1979 dealt with 'War Refugees' it did so only under the heading of 'Special Cases.'[102] It noted that "[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol."[103] Yet, it still went onto recognize an exception, and to say that, "[h]owever, *foreign invasion or occupation* of all or part of a country can result – and occasionally *has resulted – in persecution* for one or more of the reasons enumerated in the 1951 Convention.[104] The result was still to emphasize the central importance of the requirement of 'persecution' in international refugee law.

There was a problem, however, in alluding to the concepts of 'foreign invasion' and 'occupation' alongside that of 'persecution, because the former concepts were drawn directly from the realms of International Humanitarian Law, but 'persecution' was specifically a concept of International Refugee Law only taken from the 1951 Refugee Convention. The UNHCR Handbook nevertheless struggled to bring 'War Refugees' fleeing foreign invasion or occupation within the ambit of the 1951 refugee law system observing that, "refugee status will depend upon whether the applicant is able to show that he has a 'well-founded fear of being persecuted' in the occupied territory. It will also depend upon whether or not he is able to avail himself of the protection of his government, or of a protecting power whose duty it is to safeguard the interests of his

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[99] Ibid., at p. 7

[100] See, Article 1A (2) *supra*.

[101] The reference here is to the re-edited version of the 1979 Handbook, which was issued in 1992, and which runs into 223 paragraphs, with six annexures: see, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Available at http://www1.umn.edu/humanrts/instree/v2prsr.htm.

[102] See the UNHCR Handbook, op. cit. at Chapter V, at para 164.

[103] This provision goes onto add that, "They do, however, have the protection provided for in other international instruments, eg. The Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims on International Armed Conflicts." Nevertheless, the general position is clear that the 1951 Refugee Convention does afford immediate protection.

[104] See the UNHCR Handbook, op. cit. at Chapter V, at para 165.

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country during armed conflict, and whether such protection can be considered to be *effective* (emphases added)."[105] The UNHCR Handbook concluded this section with the words that, ". . . every case has to be judged on its merits."[106] The plight of 'War Refugees' has remained an intractable one for the world ever since.[107] Clearly, therefore, not everything that the Office of the UNHCR has grappled with has it been able to resolve.

This is where the regional systems falling outside the 1951 Refugee Convention come into play because over half a century after the passage of the Refugee Convention in 1951, it fell to European Union law to develop a basis of protection for refugees that was not grounded on the requirement of 'persecution'. This was achieved by means of an EU Directive, which now stands to make a direct impact on the practice of international law in this area. The countries of the European Union already allowed failed asylum-seekers to remain on their soil by granting them forms of 'subsidiary protection' (also sometimes referred to as 'humanitarian protection'), as persons seeking asylum who do not qualify as refugees: an example of how domestic law drives international law. It is what Anne-Marie Slaughter & William Burke-White meant when, in extolling the virtues of the EU, they explained, "that the future of international law is domestic" in that "the future of international law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors in domestic politics.[108] Indirectly, "[i]nternational law and the international community" are able "to intervene in and influence what were previously the exclusive jurisdiction and political process of national governments."[109]

With armed conflict in mind, and therefore eschewing any reference to 'persecution', Article 15(c) of the ***EU Qualification Directive (Council Directive 2004/83/EC)***, which augmented the establishment of the Common European Asylum System,[110] required only that there is a risk of "serious harm" to the individual asylum-seeker. This was defined *inter alia*, as a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[111] In this

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[105] Ibid., at para 165.
[106] Ibid., at para 166.
[107] Hugo Storey, *"Armed Conflict in Asylum Law: The 'War-Flaw'",* Refugee Survey Quarterly, (June 2012, Vol. 31, No.2, pp. 1-32) at p.18. He argues that, refugee law's "inability to deal effectively with armed conflict related claims is related in its conspicuous failure, or unwillingness to recognise that international law regards international humanitarian law as the *lex speclialis* in situations of armed conflict" and that "the human rights paradigm remains stuck trying to analyse such situations in exclusively international human rights law terms." (at p.1). However, for a contrary view see, Jean-Francois Durieux, *"Of War, Flows, Laws and Flaws: A Reply to Hugo Storey*", Refugee Survey Quarterly, [2012] (vol. 31, No. 3, pp. 161-176) at p. 174 where he critiques Hugo Storey,
[108] Anne-Marie Slaughter & William Burke-White, *"The Future of International Law is Domestic"* (or, The European Way of Law), Harvard International Law Journal (Vol. 47, No. 2, Summer 2006, pp. 328-352) at p. 350.
[109] Ibid., at p. 352. They end with the words that, "The EU is a great experiment with precisely this type of system, although one underpinned by a unique history and culture generating the necessary domestic political will…." And that "[t]he world is not likely to replicate this experience…." (at p. 352).
[110] *QD (Iraq) v. SSHD* [2009] EWCA Civ. 620 at para 8.
[111] In full, Article 15 defines the serious harm as follows:
"Serious harm consists of:

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way, 'war refugees' were now able to invoke ***Article 2 of the Qualification Directive***, which provides for '*subsidiary protection'*. This new form of protection was designed as a substitute to refugee protection. Protection from removal was granted to, "a third country national…who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin . . . would face a real risk of suffering serious harm as defined in Article 15…and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

In the landmark case of ***Elgafaji***[112] in 2009, the CJEU explained how Article 15 (c) was to be implemented. It suggested a 'sliding scale' of internal or international armed conflict vis-à-vis the protection afforded so that, "the more an applicant is able to show that he is specifically affected by reason of fact which is particular to his own circumstances, the lower the level of indiscriminate violence is needed for him to be eligible for subsidiary protection."[113] ***Elgafaji*** shaped the scope and criteria of application of Article 15 (c). Lord Burns in a subsequent judgment has explained that the effect of ***Elgafaji*** is that "[i]f the claimant can demonstrate that he is at particular risk of harm by reasons of factors particular to his personal circumstances, a lower level of indiscriminate violence may be required to be shown for him to be eligible for the subsidiary protection under article 15(c)."[114]

In ***Diakite***[115], a second decision of the CJEU dealing with Article 15(c), the meaning of 'internal armed conflict,' was explained for the purposes of applying the directive. It was said that "[t]he usual meaning in everyday language of 'internal armed conflict' is a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other." [116] Nevertheless, as subsequent decisions have affirmed, to qualify for protection under Article 15(c) a person fearing a risk of 'serious harm' would still need to demonstrate that indiscriminate violence was at a high level."[117]

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a. Death penalty or execution; or
b. Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
c. Serious and individual threat to a civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

[112] ***Elgafaji v Staatssecretaris van Justitie*** (C-465/07; 17 February 2009) [2009] 1 WLR 2100

[113] Ibid., 2100 at para 39

[114] Opinion of Lord Burns in the petition h.a.h. (ap) for judicial review of a decision of the Secretary of State for the Home Department [2014] ScotCS CSOH_110 at para 28 (where Lord Burns drew upon paragraph 39 of ***Elgafaji***).

[115] *Diakite v Commissaire general aux refugies* (Judgment of the Court) [2014] EUECJ C-285/12

[116] Ibid., at para 28.

[117] See, ***AA (Article 15(c)) (Rev 2) [2015] UKUT 544*** (IAC) at para 86, which draws upon para 30 of ***Diakite***, which is as follows: "30. Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State's armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations reaches such a high level that substantial

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III. Conclusion

In this concluding section, we summarize how the interests and aspirations of refugee law have shifted from the earliest time immediately following World War II; what the role and significance of refugee law has become today; what questions refugee law answers today, and which ones it does not answer. These questions are important and arise at a critical point in our history, because some 70 years after World War II the paradigm of the international system has shifted. The world has changed and is changing in ways that we cannot yet predict. In 2016 the US under President Trump decided to exit global agreements, such as the Paris Pact[118] and the Trans Pacific Partnership.[119] The UK embarked on negotiating Brexit. Yet, both the USA and the UK had been instrumental in creating the very edifice of the international system after World War II. All around us, nation states are increasingly turning inwards. A renewed nationalist vigour abounds. The efficacy and effectiveness of a transnational legal order is in question. Wolfgang Streeck argues that we are entering "a period of uncertain duration in which the old order is dying but a new one cannot yet be born" where the old order was "the state system of global capitalism" and that "what the still to be created new order will look like is uncertain" so that we are now in what Antonio Gramsci termed, an 'interregnum'.[120] This makes the inquiry into refugee law all the more compelling.

First, we have been able to demonstrate that there is a shift away from identifying the 'persecution' of victims to their flight from events seriously disturbing of public order, insecurity, and foreign invasion. There is a realization that States increasingly have to concern themselves with 'war refugees' displaced by the prospect of 'serious harm'

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grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would - solely on account of his presence in the territory of that country or region - face a real risk of being subject to that threat (see, to that effect, Elgafaji, paragraph 43)." The applicable CJEU jurisprudence is also referred to in MOJ & Ors (return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) at [30] - [33].

[118] This agreement, which is designed to deal with greenhouse gas emissions mitigation, adaptation, also known as the 'Paris Climate Accord' or the 'Paris Climate Agreement' is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC), was to start in 2020. The aim of the Agreement was to tackle global climate change by keeping global temperature below 2 degrees Celsius above pre-industrial levels in this century. Temperature rises were thereafter to be limited to 1.5 degrees Celsius. The Agreement was negotiated at the 21st Conference of the Parties of the UNFCC in Paris on 12th December 2015 by representatives of 196 parties, and 195 UNFCCC members had become party to the Agreement by November 2017 (see, https://sustainabledevelopment.un.org/partnership/?p=9546).

[119] The Trans-Pacific Partnership ('TPP'), signed in February 2016, by 12-countries that border the Pacific Ocean, and representing some roughly 40% of the world's economic output, aimed to deepen economic ties between these nations, aims also to slash tariffs and to thereby foster trade to enhance economic growth. The 12-member countries also intended to foster a closer relationship on economic policies and regulation. The eventual purpose was to create a new single market akin to the European Union, but it was necessary for all 12-member nations to first ratify it, in order for it to take effect, before it could come into effect. US President Donald Trump had made abandoning the TPP a key plank of his election campaign and acted on this on the first day of his taking office (see, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text).

[120] Wolfgang Streeck, *"The Return of the Repressed",* New Left Review (Vol. 104, March-April 2017) pp. 1-8 at p.4 (Available at https://newleftreview.org/II/104/wolfgang-streeck-the-return-of-the-repressed).

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resulting from 'indiscriminate violence' as a result of armed conflict. The present exodus from countries like Syria, Iraq and Afghanistan attests to the importance of that shift. Emerging norms remain incomplete and under-developed. However, because States differ in their responses, with some requiring an individualized threat, whilst others looking to establish the level of violence, and yet others are not interested in individualizing the threat at all. Moreover, the Courts require there to be a high level[121] of indiscriminate violence without a clear threshold for what constitutes 'indiscriminate violence' in a country. Does it refer to the whole territory or part of the territory? Is 'indiscriminate violence' an agreed definition? If so, how is it agreed? Does it refer to the intensity[122] of violence, the geographical spread of violence, the number of casualties, or the nature and frequency of violent acts. Can sporadic violence fit the formula? Or, is 'indiscriminate violence' to be considered cumulatively?

Second, take the 'individual' who is fleeing a war zone. What should be the basis for an 'individual threat' to civilian life? What if the 'indiscriminate violence' is not linked to the 'armed conflict' in the country? In such as case, is protection denied? If it is not denied, and protection is granted in such cases, upon what legal basis is it granted? Is the threat meant to be to any hypothetical individual in a situation of indiscriminate violence? Or, is it individualised to the specific person who presents himself before the authorities concerned? It will fall to the domain of TRL to answer all these question. Who the actors and norm entrepreneurs will be remains yet to be seen. Even if there is a clear answer to these questions, it is not clear who is a 'civilian.' Article 15 (c) requires there to be a 'threat to a civilian's life or person'. But what if the 'civilian' is also a combatant? From Syria to Pakistan, there are now 'part-time fighters' engaged in armed struggles. What if someone

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[121] See, ***AA (Article 15(c)) (Rev 2) [2015] UKUT 544*** (IAC) at para 86, which draws upon para 30 of ***Diakite*** , which is as follows: "30. Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State's armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would - solely on account of his presence in the territory of that country or region - face a real risk of being subject to that threat (see, to that effect, Elgafaji, paragraph 43)." The applicable CJEU jurisprudence is also referred to in MOJ & Ors (return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC) at [30] - [33].

[122] As the EctHR explained at para 241 in ***SUFI and ELMI v. THE UNITED KINGDOM - 8319/07*** [2011] ECHR 1045, "Although the Court has previously indicated that it would only be "in the most extreme cases" that a situation of general violence would be of sufficient intensity to pose such a risk, it has not provided any further guidance on how the intensity of a conflict is to be assessed. However, the Court recalls that the Asylum and Immigration Tribunal had to conduct a similar assessment in *AM and AM (Somalia)* (cited above), and in doing so it identified the following criteria: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. While these criteria are not to be seen as an exhaustive list to be applied in all future cases, in the context of the present case the Court considers that they form an appropriate yardstick by which to assess the level of violence in Mogadishu."

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'off-duty' is killed?[123] The formula in Article 15 is such that States differ in their practical responses to these questions. Some states choose to focus on 'armed conflict' *per se*. Others choose to focus on 'indiscriminate violence.' Some states are apt to individualise threat. Others set out to establish the level of violence. Yet, some again, are not interested in individualising the threat at all. The 'sliding scale' of protection throws up many more problems than it resolves. Everything suggests from this that TRL will grow and not diminish. The attempt to visualize refugee law as emanating from a singly authority with a single agreed meaning will fail – and been seen to be failing.

Third, regardless of whether the test is 'persecution' or a risk of 'serious harm' from indiscriminate violence, refugees invariably only succeed in gaining sanctuary if they can show they were lawful in the host countries, so that "[m]ost of the detailed entitlements, it turns out, are available only to refugees 'lawfully in' or 'lawfully staying in' the host country." The result is that "[m]erely proving that you are a refugee under the treaty definition, as arduous as that process can be, does not mean that you achieve the requisite lawful status" if a claimant does not have a legal right to remain pursuant to relevant domestic law and "[t]his is why the 1951 Convention is not a treaty about asylum and why, as refugee-law writings frequently repeat, there is no individual right of asylum in international law". In short, "t]he Convention is, as the title advertises, a treaty about the status of refugees – and primarily about the status of those refugees that the state has chosen, in its discretion, to treat as lawfully present." David A. Martin rightly reminds us that in the aftermath of World War II and during the Cold War, such a premise was likely to be uncontroversial because of the "Convention's genesis as a document largely addressing technical difficulties for European refugees whose residence was, in essence, already in their host countries" but "that emphasis may distort understanding of our situation" today "when asylum-seekers almost always show up in the asylum country in an irregular status."[124] Again, how TRL develops the field of refugee law, in circumstances where it is widely accepted that the 1951 Convention is not about anything, but about the status of refugees, will be a question that transnationalists will be seeking to uncover.

Finally, modern refugee law remains incongruously focused on political violence, as a cause of flight, rather than also economic violence, when it is clear that many people leave their countries as much for the latter as for the former reason. Modern refugee law has always been contested for this reason. As Matthew Price has explained, "[e]specially objectionable, say many of the writers, is the dichotomy between political refugees on the one hand, and who can claim a host of legal protections, and economic migrants or displaced persons on the other, who cannot."[125] The result has been to give less then

[123] The ***EASO COI Report on Afghanistan (July 2012)*** recognises the concept of part-time civilian fighters: see, Section 3.2.1 (p.26ff). Available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/european-asylum-support-office/bz3012564enc_complet_en.pdf.
[124] David A. Martin, *"The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource"* Chapter 5, at p. 30.
[125] Ibid., at p. 31.

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unqualified support to Mathew Price's thesis that asylum's function historically was always "to protect unfortunates from specifically political harms." Yet today, as Gil Loescher has pointed out refugees have become a "distinctly modern problem", because before the twentieth century, "asylum was a gift of the crown, the church, and municipalities; and fugitive individuals and groups could expect no response to claims of asylum or protection premised on human rights or political right."[126] It is as well to remember, therefore, as Mathew Price has observed in "Recovering Asylum's Political Roots" how "[h]historiography plays an important role in debates over proper conception of asylum."[127] The distinction between the political and the economic migrant "is particularly inept" given "the travails of the developing world" which is "the source of most of today's … refugees"[128] The view has been widely echoed by other renown writers in refugee law.[129] Already, within forty years of the Refugee Convention it was being asked that "surely we ought to think again about the morality of trying to base an immigration policy on the difference between economic and political motivations"[130] It is the "dispersal of the authority" to use the words of Philip Jessup in his seminal *Transnational Law*,[131] to which as transnationalists we will need to look to, if we are to determine how, "the rules men live by" are to be developed in the emerging new world order of the 21st Century. And it is this which will help locate the proper place of TRL in international law in future.

[126] Gil Loescher, Beyond Charity (New York, OUP, 1993) at p.33.
[127] Mathew Price, in his *"Recovering Asylum's Political Roots"* in Rethinking Asylum: History, Purpose and Limits, Chapter 1, at p.51.
[128] Martin (n 124 above) at p.30.
[129] James Hathaway, *"A Reconsideration of the Underlying Premise of Refugee Law"* Harvard International Law Journal, (1990, Vol. 31) at pp 129, 150, 163-65; Heyman, *"Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife"* San Diego Law Review (1987, Vol. 24) p. 449; Andrew Shacknove, *"Who is a Refugee"* Ethics (January 1985, 95(2)) at p. 274; Peter Singer and Renata Singer, *"The Ethics of Refugee Policy"* in Mark Gibney, ed Open Borders? Closed societies? New York: Greenwood Press (1988) at p. 111; Perlus and Hartman, *"Temporary Refuge: Emergence of a Customary Norm"* Virginia Journal of International Law, (1986, Vol. 26) at p. 551; Guy Goodwin-Gill, *"Non-refoulement and the New Asylum Seekers,"* Virginia Journal of International Law, (Vol. 26, 1986) at p. 897; Karl Hailbronner, *"Concerning 'Nonrefoulement' and the 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?"* Virginia Journal of International Law, (Vol. 26, 1986) at p. 857.
[130] "*No Way to Judge Refugees",* New York Times (8th May 1986) at p. A27.
[131] Jessup (n 2 above) at p. 8.

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