RECOGNIZING TRANSNATIONAL REFUGEE LAW

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In *Transnational Law*, now written over half a century ago, Philip C. Jessup explained 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." [1] This chapter aims to locate the dispersion of authority in a rapidly changing area of law, namely, international refugee law. The centrality of the Geneva *Convention Relating to the Status of Refugees 1951*[2] (hereafter 'the Refugee Convention') to the definition of the refugee is proclaimed by James Hathaway and Michelle Hathaway, in their magisterial *The Law of Refugee Status*,[3] as "both universal and applicable to contemporary refugees." [4] 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*,[5] 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,"[6] 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." [7] In fact, they note early on that

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[1] Philip C. Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956), 8.

[2] 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, *Convention Relating to the Status of Refugees 1951*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), http://www.unhcr.org/3b66c2aa10.html.

[3] James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 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 Under International Law* (Cambridge: Cambridge University Press, 2005), 91.

[4] Ibid., 1.

[5] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007).

[6] Ibid., 35.

[7] Ibid., 36.

"[r]efugee law… remains an incomplete legal regime of protection."[8] 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. 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"[9] 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,*[10] [hereafter "the UN Statute"] . 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

[8] Ibid.,1.

[9] Peer Zumbansen, "Lochner Disembedded: The Anxieties of Law in a Global Context," *Indiana Journal of Global Legal Studies* 20, no. 1 (2013): 29–69.

[10] *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428(V), UNGAOR, Supp No 20, UN Doc A/1775 (1950).

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 into 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[11]; 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[12]; third, there was the Hungarian refugee crisis of 1956, where Western powers, on seeing the revolt of the 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[13]; and fourth, the communist victories of 1975 in the former French colonies of Indochina, namely of Vietnam, 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.[14] These four examples contain important evidence in relation to *who* makes the "norms" and *what* "types" of norms exist (in terms of domestic law, international treaty law and Conventions, and in case-law). In addition, they tell a story

[11] See Glen Peterson, "The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong and Indonesia" Journal of Refugee Studies, (Volume 25, Issue 3, September 2012) at pp. 326-343. Also see, John P. Burns, "Immigration from China and the Future of Hong Kong" Asian Survey (Univ. of California Press, Vol. 27, No. 6 (Jun., 1987), pp. 661-682

[12] See, Rand Corporation (2013), *"Algerian Independence: 1954-1962"* in: Christopher Paul, Colin P. Clarke, Beth Grill, and Molly Dunegan (eds.), Paths to Victory: Detailed Insurgency Case Studies (edited, 2013) at pp. 75-93. See also Arnold Fraleigh, "*The Algerian War of Independence",* Proceedings of the American Society of International Law at Its Annual Meeting *(1921-1969)*

Vol. 61 (April 27-29, 1967), pp. 6-12

[13] See, James P. Niessen, *"God Brought the Hungarians: Emigration and Refugee Relief in the Light of Cold War Religion",* The Hungarian Historical Review *(*Vol. 6, No. 3, Migration and Refugees, 2017), at pp. 566-596. See also, Marjoleine Zieck, *"The 1956 Hungarian Refugee Emergency, and Early and Instructive Case of Resettlement"* Amsterdam Law Forum (Vol. 5, Issue 3, Spring 2013) at pp. 45-63

[14] See, Nhia M. Vo, The Vietnamese Boat People, 1954 and 1975-1992 (2005, McFarland Press) esp. at pp. 115-130. Also see Chan Kwok Bun, *"The Vietnamese Boat People in Hong Kong",* in Robin Cohen, The Cambridge Survey of World Migration (CUP, 1995) at pp. 380-385. Particularly valuable also is the the UNHCR publication, "Flight for Indo-China" in The State of the World's Refugees – Chapter 4 (Available at https://www.unhcr.org/3ebf9bad0.pdf)

about *who* the "actors" are who are driving the field of refugee law at critical junctures in time.

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, and also the "space" of transnational contestation. We find that the kinds of questions that were asked earlier for example, in the context of the immediate post-World War II climate of religious persecution, are not the same questions that are being asked today.[15] 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.[16] The focus is also on the way in which regional solutions, in the form of the EU, can provide a form of "subsidiary protection"[17] to those migrants who cannot come under the *Geneva Convention on the Status of Refugees 1951*. These changes, including "the rapid rise of transnational law, the growing interdependence of national regimes, and the emergence of large-scale transnational legal practice,"[18] further illustrate the different background against which we are called upon to reassess and, arguably, re-imagine refugee law *as* transnational.[19]

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[15] See Gillian McFadyen, "The Contemporary Refugee: Persecution, Semantics, and Universality" in Special Issue The 1951 UN Refugee Convention - 60 Years On (2012), pp. 9-35, where (at p.10) she focuses, ' particularly upon the notion of the persecution criteria within the Refugee Convention,' and 'challenges this notion and engages with alternative understandings of refuge ' (Available at https://www.gla.ac.uk/media/media_234569_en.pdf)

[16] See, Hugo Storey, *"Armed Conflict in Asylum Law: The 'War-Flaw'",* Refugee Survey Quarterly, (June 2012, Vol. 31, No.2,) pp. 1-32; 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.p. 161-176; and Satvinder s. Juss, "*Problematising the Protection of War Refugees"* Refugee Survey Quarterly (OUP, Vo.32, No.1, 2013) at pp. 122-147. Also see, Violeta Moreno-Lax, *"Systematising Systemic Integration: 'War Refugees', Regime Relations, and a Proposal for a Cumulative Approach to International Commitments"* Journal of International CriminalJustice (Vol. 12, 2014, pp. 907-929)

[17] See, Jens Vedsted-Hansen, "Complementary or subsidiary protection? Offering an appropriate status without undermining refugee protection" (in New Issues in Refugee Research, Working Paper No. 52, Evaluation and Policy Analysis Unit, ISSN 1020-7473) (Available at https://www.refworld.org/pdfid/4ff550682.pdf)

[18] Mathias Reimann, "Beyond National Systems: A Comparative Law for the International Age," *Tulane Law Review* 75, no. 4 (2001): 1103-1119, 1106-1107.

[19] For the argument to rethink law in today's global context *as* transnational, see Peer Zumbansen, *Transnational Law as Socio-Legal Theory and Critique: Prospects for "Law and Society" in a Divided World*, 67 BUFFALO LAW REVIEW (2019), 101-152, 109, 149.

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, but also completely new types of threats and peril. [references needed to the cases of "climate changes", and the surge of economic refugees from Latin America in the first half of 2019] However, emerging norms are incomplete and lacking actual and effective content because states differ in their responses, with some requiring an individualized threat, others look to establish the level of violence, and yet others are not interested in individualizing the threat at all.[20] 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 remains contested given that the dichotomy between political refugees and economic migrants or displaced persons is still rigorously maintained in refugee law.[21]

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[20] Satvinder S. Juss, "*Problematising the Protection of War Refugees"* Refugee Survey Quarterly (OUP, Vo.32, No.1, 2013, pp. 122-147) at p. 125. Much of the difficulty is inherent in the fact that governments themselves violate the rules of war. Thus, Daniel Krcmaric notes, "[t]he recent Syrian civil war, for example, has been devastating for the local population. Pro-regime forces have violated nearly every law of war in a campaign that has featured the shelling of residential neighborhoods, the use of chemical weapons against civilians, and other atrocities. Some observers estimate that the civilian death toll in Syria is around 500,000." (Daniel Krcmaric, "*Varieties of civil war and mass killing: Reassessing the relationship between guerilla warfare and civilian victimization"*Journal of Peace Research(2018, vol. 55, Issue 1, pp. 18-31) at p. 18. The figures are from Ben Taub, "*The Assad Files"*New Yorker,18thSeptember 2016, at pp.36-49.) Moreover, governments and insurgents dominate certain areas, but in others they compete for control. In some cases the army rules by day, but once it army retreats back to its barracks, the insurgents come out at night" (see N. Kalyvas, *"Wanton and Senseless? The Logic of Massacres in Algeria*" Rationality and Society(vo. 11, Issue 3, 1999) at pp. 243-285).

[21] Animesh Ghosha and Thomas M. Crowley, *"Refugees and Immigrants: A human Rights Dilemma"* Human Rights Quarterly, (vol. 5, August 1983) pp. 327-47. Also, Roger Zetter, *"More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization",* Journal of Refugee Studies, Volume 20, Issue 2, June 2007, Pages 172–192. Also see, R Lohrmann,*"Migrants, Refugees and Insecurity. Current Threats to Peace?"* International Migration (Volume 38, Issue 4, September 2000,) at pp.3 -22. Further see, S. Glover C. Gott, Ceri, A. Loizillon, J. Portes, R. Price, Richard . S. Spencer, V.Srinivasan, C. Willis, Carole, " *Migration: an economic and social analysis.* Published in: Home Office Occasional Papers No. No 67 (January 2001) (Available at https://mpra.ub.uni-muenchen.de/75900/1/MPRA_paper_75900.pdf)

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,[22] 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."[23]

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,"[24] which we will now consider and which as Coles notes, gave way to a fragmentary nature of refugee law.[25]

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[22] Harold Koh, "Transnational Legal Process," *Nebraska Law Review* 75, no.4 (2001):181-207, 184.

[23] Ibid., 207

[24] Gervase Coles, "Approaching the Refugee Problem Today," in *Refugees and International Relations*, eds. Gil Loescher and Laila Monahan (Oxford: Oxford University Press, 1989), 373-410, 373.

[25] Ibid., 390-393. See in particular, Colin Harvey, "Is humanity enough? Refugee, asylum seekers and the rights regime" in Satvinder S. Juss and Colin Harvey, Contemporary Issues in Refugee Law, (Elgar, 2013) at pp. 68-90. For a staunch defence of the Refugee Convention itself, see Kristin Walker, "Defending the 1951 convention definition of refugee" Georgetown Immigration Law Journal, (2003, vol. 17) at pp. 583 – 609. For background reading as to how the post-war refugee system took shape, see the illuminating work of Hannah Arendt, *"The Decline of the Nation-State and the End of the Rights of Man",* in The Origins of Totalitarianism (New York, 1966) at Chapter 9 at pp. 267-290. Also see, Deborah Perluss and Joan F. Hartman, "*Temporary Refuge: Emergence of a Customary Norm".,* Virginia Journal of International Law (1985-86, Vol. 26, Issue 3,) at pp. 551-626. Further see, Kay Hailbronner, *"Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?* Virginia Journal of International Law (1985-86, Vol. 26, Issue 4) pp. 857-96)

A. 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 that 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"[26] whose experience in Europe had traditionally been one of "persecution." It is no exaggeration to say, therefore, as James Hathaway does, that the requirement to show "persecution" is directly a "product of recent Western history"[27] 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."[28] In fact, as Gil Loescher notes the persecution requirement was designed to fit into the Western notion of the refugee.[29] To approach refugee law in this way has its pitfalls because as Mathew Price explains, "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."[30] 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…."[31] 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. It was against this background

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[26] Ibid., 375.

[27] James C. Hathaway, *Law of Refugee Status* (Toronto: Butterworths, 1991), 1.

[28] Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (New York: Oxford University Press, 1995), 112, note 33.

[29] Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crises* (New York: Oxford University Press, 1993), 57.

[30] Mathew E. Price, "Recovering Asylum's Political Roots," in *Rethinking Asylum: History, Purpose and Limits* (Cambridge: Cambridge University Press, 2009), 24-68

[31] Coles, *supra* note 13, 374-5.

that 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…"[32] 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.[33] The realization that this is so has been deeply felt right down to present times, so that it could rightly be labelled as "incomplete and politically partisan."[34] Or, as another scholar puts it, "the entire refugee problem was now seen as one of persecution…"[35] 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 situations."[36] 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, than 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."[37] In this respect, refugee law is not about satisfying the eligibility criteria for entry. This has itself been criticized for its opaqueness. Bhupinder Chimni reminds us how the United Nations High Commissioner for Refugees (UNHCR) carries out Refugee Status Determinations (RSD) in some 80 countries but this is "decision-making that has received relatively little attention" even though it has

[32] Price, *supra* note 19, 57.

[33] Jerzy Sztucki, "Who is a Refugee? The Convention Definition: Universal or Obsolete?" in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999), 55.

[34] Hathaway, *supra* note 16, 8.

[35] Coles, *supra* note 13, 375.

[36] Ibid.,385.

[37] Ibid.,386.

"grave implications for the life and liberty of individuals".[38] Meanwhile, "[i]n the last decade, studies have pointed to lapses in the conduct of RSD by UNHCR."[39] Relying on the pioneering work of Michael Alexander,[40] Chimni was able to show how this process does not meet "clear standards of transparency" and "needs to be accountable to its beneficiaries."[41] 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."[42] 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."[43]

In the same way, "the attempt to affect events by asserting the claims of individual human rights, is largely doomed to failure," , "when dealing with refugee problems" because refugees move from state to state, "[t]he perspective of state-to-state relations, not the relation between the individual and the state, becomes critical for the mitigation or solution of refugee crisis."[44] This suggests that 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.[45] Unsurprisingly then, eminent refugee

[38] B.S. Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law," *New York University Journal of International Law and Politics* 37, no.4 (2005): 799-828, 819.

[39] Ibid.,820.

[40] Michael Alexander, "Refugee Status Determination Conducted By the UNHCR," *International Journal of Refugee Law* 11, no. 2 (1999): 251-289, 286-87.

[41] Chimni, *supra* note 27, 821.

[42] Coles, *supra* note 13, 387.

[43] B.S. Chimni, "From Settlement to Involuntary Repatriation: Towards A Critical History of Durable Solutions to Refugee Problems,*"Refugee Survey Quarterly* 23, no. 3 (2004): 55-73, 56.

[44] Jack I. Garvey, "Toward a Reformulation of International Refugee Law," *Harvard International Law Journal* 26, no. 2 (1985): 483-574, 484.

[45] Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* (New York: Oxford University Press, 2002), 7,9.

lawyers have openly acknowledged, that "the increasingly marginal relevance of international refugee law [which] has in practice signaled a shift to inferior or illusory protection."[46]

These shortcomings were well known to advocates of the Refugee Convention of 1951. 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."[47] 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."[48] In this way, there first followed the *1950* UNHCR Statute. and then the *1951 Refugee Convention.* 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.[49] Thus was the modern law on refugees crafted by the international community.

The refugee problem could not, however, be resolved through the use of the law alone. And yet, it was the ultimate conceit of the international community to think that it could. A salutary reminder was provided 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,"[50] 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."[51] One may wonder, then, at the wisdom of framing the refugee problem as a fundamentally legal one insofar as its essential attributes and architecture are concerned. Simon Roberts aptly observed that "it has proved very difficult, despite sustained attempts to do so, 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

[46] James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," *Harvard Human Rights Journal* 10 (1997), 115-211, 116.

[47] Coles, *supra* note 13, 374.

[48] Ibid.

[49] Thus exhibiting an "exile bias" to refugee law (see Coles' unflinching criticism of this at *supra* note 13, 391-392, 402).

[50] Michel Foucault, *The History of Sexuality*, vol. 1, trans. Robert Hurley (London: Allen Lane, 1978), 87.

[51] Ibid., 89.

centralized polities."[52] 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."[53] The result, as this author has elsewhere argued, is a "lack of clarity in the way in which 'knowledge' systems in the world are conceived, constructed and perceived." Contrary to the expectations of most lawyers, this state of affairs results in "refugee law having an equivocal authority before courts and tribunals" and "this impacts adversely on the global resolution of major problems of international law and governance." [54] Accordingly, if we are to comprehend the methodical underpinnings of Transnational Refugee Law today, then we must desist the urge to locate them in the established formal mechanisms, through which we normally determine the pedigree of international legal norms. Instead we must identify these rules in the wider international regulatory activity. This is characterised by variation, pliability, dexterity, and customization. Yet, it is still efficacious all the same. It still retains the efficacy to have normative effect. In short, we must get used to the existence of equivocal authority.

B. The Shift in "Actors, Norms and Processes" and the Changing Sociology of the Field

1. The Palestinian Crisis

It is a paradox all too often overlooked that in 1949, a year before the *UN Statute of the Office of the United Nations High Commissioner for Refugees 1950* was enacted, the Palestinian Arabs were recognised as 'refugees,' without the need of having to prove that they had been specifically 'persecuted,' provided only that they could show that they had lost their home in Palestine, as a result of the 1948 conflict. This underscores an understanding, within the international community, of the need to develop TRL in a way that was not just simple, but also customised, to the real life situation of the Palestinian refugee who had become displaced. The result was that "[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."[55] Yet, already at

[52] Simon Arthur Roberts, "After Government? On Representing Law Without the State," *Modern Law Review* 68, no. 1 (2005): 1-24, 17.

[53] Ibid.

[54] Satvinder s. Juss, "*The UNHCR Handbook and the interface between 'soft' law and 'hard' law in international refugee law"* in Satvinder S. Juss and Colin Harvey, Contemporary Issues in Refugee Law (Elgar, 2013) pp. 31-67, at p. 33

[55] Coles, *supra* note 13, 375.

that time, the international community had decided upon the need to have to disperse its authority so as to be able to work through different actors and processes, if it was to succeed in alleviating the developing problem of displaced refugees elsewhere on globe. It displayed pliability and dexterity by adopting a variegated approach. On the one hand it was willing to countenance a scenario whereby, only a year before the resolution of East-West refugees in Europe was addressed by the 1951 Refugee Convention, those who had been displaced from Palestine as refugees would be designated as "Mandate refugees" and fall under "the mandate of the UN agency established to deal with the problem, [namely] UNRWA."[56] On the other hand, however, it had determined to establish that all other refugees (being non-Palestinian) would fall under the aegis of the Refugee Convention 1951, so that they would be known as "Convention refugees," where in order to succeed, they would have to meet the requirement of showing that they had been specifically subjected to "persecution" for a "well-founded reason" if they were to succeed in their claims for refugee status.

The two regimes of refugee law were distinctly dissimilar from each other. 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 UNRWA in the Near East.[57] 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 displaced by events occurring in Europe between the beginning of World War I and the end of World War II were "war refugees."[58] According to Coles this is because non-Western and socialist countries at the time, "either rejected the Western approach or regarded it as relevant only to the European refugee situation."[59] Nevertheless, with respect to Palestinian refugees, working out who would or would not benefit from UNRWA's mandate remains, after all these years, a

[56] Ibid.

[57] This dealt with Resolution 212 (III), *Assistance to Palestine refugees*, GA Res 212, UNGAOR, 3rd Sess, UN Doc A/RES/212(III) (1948), which set up the *United Nations Relief for Palestinian Refugees* to provide immediate temporary assistance for such persons.

[58] Coles, *supra* note 13, 375.

[59] Ibid.

matter of not inconsiderable complexity and difficulty.[60] The case of *Al-Khatib v The Secretary of State for the Home Department*[61] has recently confirmed 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.

2. State Actors and the Search for a New "Norm" Setting

Four events occurred outside Europe soon after the 1951 Refugee Convention that demonstrate how Western countries took measures which amounted to an outright rejection of that regime. These four events are often overlooked in present-day discussions of modern refugee law practice, despite showing the role of the State as an actor in shaping refugee law and how different methodologies for refugee determination are being applied across national jurisdictions. What this tells us is that transnational processes were not just confined to the international plane, but played out on the domestic plane as well: the nation-state did not disappear in the international evolution of refugee law practices. But, it disaggregated by breaking up into different components. It is important to acknowledge this background, which Anne-Marie Slaughter famously depicted in her 2004 book, *A New World Order,* in our attempt to retrace the origins of an emerging transnational refugee law. Addressing an audience of both international relations scholars and international lawyers, Slaughter warned against the perception that the advent of globalization correlated with the end of the nation-state. Instead, she posited that "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."[62] In the light of this differentiated observation, Slaughter envisioned "a world order in which hope and despair, crime and charity, ideas and ideals are transmitted around the globe through

[60] 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.

[61] *Al-Khatib v The Secretary of State for the Home Department,* [2016] ScotCS CSIH 85.

[62] Anne-Marie Slaughter, *A New World Order* (New Haven, CT: Princeton University Press, 2004), 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."

networks of people and organizations."[63] Today, about a decade and a half after her book was published, the association of globalization with the 'disaggregated state' already seems to have entered, at least in part, the archive of international political theory. At a time, where we are confronted with more and more references to the alleged 'end of globalization' [64], we discover ourselves to be in an ever more volatile state of uncertainty with regard to who holds the cards in the complex landscape of global governance, the return of nationalism and the rise of populism worldwide. Nevertheless, Slaughter's work and that of others, who focused on the emergence of increasingly specialized and sector-specific regulatory regimes [65], marked a crucial point of observation and analysis of a situation in which the field of relevant and powerful actors in governance and policy making had become more crowded and more complex. The tension-ridden co-existence of national and international politics, on the one hand, and of specific, allegedly 'technical' rules of procedure that govern matters of border control, administration of refugee flows, housing and welfare, on the other, oftentimes remains hidden from plain sight. And, it is sometimes only in the context of a more widely perceived and publicized 'crisis' with regard to, say, 'border security', that the complexity of the disciplinary regulatory regime that makes up much of TRL becomes tangible.[66]

But, let's return to the earlier, post World War II, history of refugee regulation. 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 many Westerners."[67] The United Kingdom determined that they did not come within the ambit of the UNHCR Statute, because resettlement opportunities for Chinese refugees outside Hong Kong were unrealistic. There were also political and security factors at stake, so the 1951

[63] Ibid., 271

[64] See, for example, Michael Cox, "The rise of populism and the crisis of globalization: Brexit, Trump and beyond", *Irish Studies in International Affairs* vol. 28 (2017): 9-17.

[65] See, for example, Tim Bartley, "Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards", *Theoretical Inquiries in Law* vol. 11 no. 1 (2011): 517-542, and Marie-Laure Djelic and Kerstin Sahlin-Andersson, "Transnational Governance in the Making: Regulatory Fields and Their Dynamics," *Transnational Governance: Institutional Dynamics of Regulation* (2006): 1–47.

[66] For a compelling critique of these constellations and their dynamics in the field of international migration law, see Sarah Dehm, in this volume.

[67] Edvard Hambro, "Chinese Refugees in Hong Kong," *The Phylon Quarterly* 18, no. 1 (1957): 69-81, 69.

Refugee Convention was made to fall into abeyance, and a different approach was devised.[68] Needs an additional reference

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."[69] 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 UNHCR Statute 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, 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 contrasts with contemporary resettlement practice, "that is characterised by a scarcity of resettlement places and few resettlement states,"[70] 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,

> "[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

[68] Laura Madokoro, *"Surveying Hong Kong in the 1950s: Western humanitarians and the 'problem' of Chinese refugees"* Modern Asian Studies, (Volume 49, Issue 2 March 2015) at pp. 493-524

[69] Peter Gatrell, *The Making of the Modern Refugee* (Oxford: Oxford University Press), 228.

[70] Marjoleine Zieck, "The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement," *Amsterdam Law Forum* 5, no. 2 (2013): 45-63, 45.

> its interpretation of the outcome of the particular transfer or ademption and tell a convincing story of what has occurred."[71]

In all three of these cases discussed so far, national governments successfully managed to impose their own interpretation of the ideal outcome of refugee administration.

There was, however, also a fourth event, "which proved to be a watershed."[72] This event occurred at the end of the period described above and emerged from the upheavals that followed the communist victories in 1975 in the former French colonies of Indochina, namely of Vietnam, Cambodia and Laos.[73] 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.[74] 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."[75] The settlement program was undertaken by the UNHCR, which for the first time negotiated an Orderly Departure Programme,[76]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

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[71] David Nelken, "The Meaning of Success in Transnational Legal Transfers," *Windsor Yearbook of Access to Justice* 19 (2001): 349-366, 363.

[72] Coles, *supra* note 13, 379.

[73] Russell H. Fifield, *"The Thirty Years War in Indochina: A Conceptual Framework",* Asian Survey (Vol. 17, No. 9, Sep., 1977),at pp. 857-879. Also see, Bruce Grant, The Boat People (London, Penguin Books, 1979)

[74] Leo Goodstadt, "Race, Refugees and Rice - China and the Indo-China Triangle," *The Commonweatlh Journal of International Affairs* 68, no. 271 (1978): 253-260.

[75] Coles, *supra* note 13, 157.

[76] "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 United Nations High Commissioner For Refugees (UNHCR), "Flight from Indochina," in *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), http://www.unhcr.org/3ebf9bad0.pdf.

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."[77] 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 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."[78] This is particularly so given that the Western countries no longer enjoyed a majority in the UN General Assembly, preferring neither to re-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 the decisions taken at that time in the past. 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."[79] A global initiative would have seen the UNHCR Statute amended as soon as refugee movements shifted from Europe to the Third World. Most of these movements were either the result of rebellions by colonised populations against their Western colonial masters, or they arose directly from the instability which followed immediately after they had gained independence, with which they were invariably beset in the newly liberated countries in their bitter taste of freedom. Even though Western countries were no longer in a majority in the UN General Assembly they remained resistant to renegotiating the Statute because they were now receiving refugees from these countries over which they had previously exercised control . They accordingly remained steadfastly unwilling to develop a truly international system of refugee law. Had they done so, such a system could have embraced the plight of such refugees as the Vietnamese Boat People, in a new revamped refugee Convention which included groups like 'war refugees' and those fleeing civil war situations. Western

[77] Coles, *supra* note 13, 381.
[78] Ibid., 383.
[79] Ibid.

dominance on the international plane, as the next section below shows, could only be countered at regional levels, where bold initiatives were taken just ten years after the Refugee Convention 1951 was passed by the African countries who wanted to address their own particular refugee problems in a way that the *Geneva Convention on the Status of Refugees 1951* did not. A little over a decade later, Latin America did the same.

These two regional have exposed the poverty of an international law which has focused on solutions to world problems being provided by state actors and institutions only. They brought home the realisation that different actors and norm entrepreneurs were called for who could find a place and space for refugee law elsewhere. This realisation became all the more irresistible to resist once the UNHCR Statute showed itself as not fit for the task of effectively addressing a dramatic refugee problem of global proportions at the end of a deepening ideological divide on the one hand and the rhetoric and normative embrace of the idea of 'universal human rights', on the other. The result has been a distinct "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…"[80] In this way, refugee law has become an example of what has later been alluded to as "the concerns among international lawyers about 'legal fragmentation,'" which become strikingly visible in the situation where "the absence of a world government radicalizes the governance dilemma facing modern societies."[81] It is in that moment that the recognition of a missing 'world government' is not merely concerned with the institutional question of actors and political infrastructure on the global level, but instead begins to encompass the question of where the legitimation basis might be found for this interplay of domestic and international, public and private power brokers in the face of a rising number of refugees. Shifting, thus, the emphasis away from the sole focus on 'control', the refugee 'problem' would eventually come to be appreciated also as one of 'agency' – with regard to those who are subjected to the rules.[82] It is here where this sketched idea of a transnational refugee law reconnects back to one of transnational law's foundational

[80] Wolfgang Friedman, *The Changing Structure of International Law* (New York: Columbia University Press, 1964), 62.

[81] Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism," *Transnational Law & Contemporary Problems* 21, no.2 (2012): 305-335, 305.

[82] See, again, Dehm, above.

normative dimensions, namely "the improvement of participatory elements can strengthen the democratic foundations of global governance institutions."[83]

3. Third World Regional Responses

Further regulatory change was driven by the 1970s refugee movements from the Global South to the North. And yet, it was predominantly Western countries that were UN-donor and refugee-receiving countries, which steered and controlled the agenda for the evolving international refugee policy, utilizing 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.[84] To break this dominance, African countries created their own regional refugee system resulting, eventually in "one of the world's most flexible and innovative refugee instruments"[85], the *Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa* It extended the narrow scope of the 1951 Refugee Convention to include even people who were fleeing "events seriously disturbing public order." Thus after setting out in Section 1 the definition of a refugee postulated by the !951 refugees Convention, with its emphasis on 'persecution; for a 'well-founded reason' for one of the five adumbrated grounds, it also set out in Section 2 its own larger definition in words 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.'[86]

Given the tumultuous and violent consequences and fall-outs that accompanied Africa's decolonization process in the 1960s, the *OAU* found itself tasked with the heavy burden of articulating an adequate refugee protection regime. Such a regime would have to be drafted in acknowledgement of the specific colonial and post-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,

[83] Zumbansen, "Space of Transnational Law", 306.

[84] Myron Weiner, *"Bad Neighbors, Bad Neighborhoods: An Inquiry into the Causes of Refugee Flows*" International Security (Vol. 21, No. 1 (Summer, 1996), pp. 5-42. Also see, Myron Weiner, *"Security, Stability, and International Migration*"International Security (Vol. 17, No. 3 (Winter, 1992-1993), pp. 91-126

[85] Micah Bond Rankin, "Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On," *South African Journal of Human Rights* 21, no.3 (2005): 406-435, 406.

[86] (Available at https://www.unhcr.org/uk/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html)

> is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[87]

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 as they are inherent in the 1951 Convention definition."[88] As Coles puts it, "this definition is so wide as, in many cases, to make individual determinations of status a mere formality."[89]

In a little over a decade after the OAU Convention of 1969, Latin America too passed the *Cartagena Declaration on Refugees 1984*.[90] Such is its regional importance that many in South America continue to look to it for the resolution of their current refugees crisis, including during the Venezuelan Refugee Crisis of 2018.[91] The 1984 Cartagena Declaration is a non-binding regional instrument which followed the "Colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama"[92], held in Colombian in 1984.[93] Whilst it affirmed the importance of the right to asylum, the principle of non-refoulement and the importance of finding durable solutions, it did so in a way which also allowed for a broader category of persons in need of international protection to be considered as refugees, than either the 1951 Refugee Convention or its 1967 Protocol had done. Echoing what the 1969 OAU Convention in Africa had already announced, under 1984 *Cartagena Declaration* refugees were defined as "persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign

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[87] *Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45, art I (2) (entered into force 20 June 1974).

[88] Ruma Mandal, "Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")," UNHCR Legal and Protection Policy Research Series (2005), 13.

[89] Coles, *supra* note 13, 378.

[90] Eduardo Arboleda, "*The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention—A Comparative Perspective"* International Journal of Refugee Law, (Volume 7, Issue Special_Issue, Summer 1995), Pages 87–101. The regional faith in this instrument remans so strong that when the 20th Anniversary of 1984 Declaration was to be celebrated in Mexico City in 2004 a document was prepared 'to recognize the important contribution of Latin America and the Inter-American System to the international protection of refugees…' See, "*The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984"* International Journal of Refugee Law, (Volume 18, Issue 1, March 2006), pp 252–270

[91] See Alonso Gurmendi, *"The Cartagena Declaration and the Venezuelan Refugee Crisis,"* Opinio Juris, 27th August 2019 (Available at http://opiniojuris.org/2018/08/27/the-cartagena-declaration-and-the-venezuelan-refugee-crisis/)

[92] Available at https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf

[93] Carlos Maldonado Castillo, "*The Cartagena process: 30 years of innovation and solidarity"* Forced Migration Review, (Vo. 49, May 2015) at pp.89-91

aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order,"[94]

Both the OAU Convention and the Cartagena Declaration are 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,[95] itself a telling affirmation of the significance of TRL. It may well be asked why, however, given the severe limitations imposed by the requirement of "persecution" in the 1951 Refugee Convention, this altogether more realistic conceptualization of the modern refugee was not adopted in the West in their legal systems. The obvious answer to this question is that international refugee law has never served the interests of its consumers or its 'subjects,' but rather is geared towards maintaining the *status quo* in the hegemonic dominance of the western refugee receiving donor countries, who control its legal design for their own ends and purposes.[96]

What the developments above nevertheless point to is a need for a more explicit acceptance of a plurality of normative backgrounds for the formulation of any forward-looking refugee law regime in the future. Once we begin adopting such a perspective, it becomes possible to see the evolution of refugee law as taking place, in effect, against a still more differentiated background – historically, politically but also normatively. Echoing the post-colonial turn in present-day transnational legal studies[97], it is important to appreciate the hidden historical corpses (as in the work done by the TWAIL movement[98]) in the evolutionary accounts of international legal normativity and the continuing blind spots with regard to subaltern and "alternative knowledges"[99] and how the dominant conceptual line-drawing excludes relevant knowledge from being taken into account. It is in light of such a critical approach to

[94] At Section 3, paragraph 3 of the Cartagena Declaration (Available at https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf)

[95] UN High Commissioner for Refugees (UNHCR), "Note on International Protection," UN Doc A/AC96/830, 7 September 1994, para 32.

[96] B.S. Chimni, *"The Birth of a 'Discipline': From Refugee to Forced Migration Studies"* Journal of Refugee Studies (Volume 22, Issue 1, March 2009) at pp. 11–29,

[97] See, for example, Zumbansen, "Transnational Law as Socio-Legal Theory and Critique", above note 13. See also Prabhakar Singh, "*The Private Life of Transnational Law: Reading Jessup from the Post-colony*", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press, 2020, in print).

[98] Insert one or two references, maybe to Angie, Okafor et al

[99] Needs references, at least, to Sousa Santos, but also perhaps to other post-colonial authors -cited extensively in Zumbansen note 13 and elsewhere of course.

dominant historical and normative narratives, that a project such as TRL can play a key role in the search for new legitimacy foundations and a more inlusive law in a global context. After all, as Zumbansen argued, "[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 this line-drawing, "which is done through the identification of what 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."[100] I have myself elsewhere referred to this phenomenon as the "[P]olitics of Knowledge Recognition,"[101] 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,[102] 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, by the mid-20th century European countries had become minority members of the world community and the members of the United Nations, comprising no less than 120 states from every corner of the world, and having the most divergent aims and interests, came now to represent a vast array of different cultures ideologies, which were difficult to reconcile with those of the classical West. It is time, therefore, that the international community learnt to recognize a substantively wider range of knowledge frameworks than those usually drawn upon in reference to the universal status of human rights.[103] A transnational refugee law worthy of its name could be a crucial lever in this effort.

4. The UNHCR intervenes to assist Western State Parties.

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

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

[101] Satvinder Singh Juss, "The UNHCR Handbook and the interface between 'soft law' and 'hard law' in international refugee law," in *Contemporary Issues in Refugee Law,* eds. Satvinder Singh Juss and Colin Harvey (Cheltenham, UK: Edward Elgar, 2013), 31-67, 38-41.

[102] Henry J. Steiner and Detlev F. Vagts, *Transnational Legal Problems*, 2nd ed. (Mineola, New York: Foundation Press, 1976), 330.

[103] For the possibilities of other perspectives that exist , see: Radoslav Stojanovic, "*The Emergence of the Non-Aligned Movement: A View from Belgrade",* Case Western Reserve Journal of International Law (vo. 13, Issue 3, 1981) at pp. 443-450.

maintain that the *1951 Geneva Convention*,[104] supplemented by its 1967 Protocol,[105] is the primary source of modern refugee law. However, there remained considerable uncertainty about what had been agreed in the final text of the Refugee Convention 1951. This is unsurprising given that , "the successive drafts were subject to continual changes in the light of comments by governments and specialist agencies." [106] 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 could be heard saying that, literally, "we do not know."[107] This uncertainty was eventually settled, *inter alia*, by the 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.[108] 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 first published its *Handbook Relating to the Criteria for Determining Refugee Status*[109] (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. This confirms the role of domestic transnational actors, participating as norm entrepreneurs to help develop the meaning of key concepts of a modern refugee law. The range of the issues addressed in the book is telling of the importance of this process of norm-setting. There is guidance in the

[104] *Convention Relating to the Status of Refugees 1951, supra* note 2. http://hrlibrary.umn.edu/instree/vlcrs.htm.

[105] The re-edited version of the 1979 Handbook, which was issued in 1992, runs into 223 paragraphs, with six annexures: see the United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV. 4 (1992). It was re-issued again in 2011. The current version is available as of 2012 at: **"**Updated UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees**,"** *Refugee Archives @ UEL*, Feb. 22, 2012,

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/. "The current version is available as of February 2019 at: https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html."

[106] Per Lord Lloyd in *Secretary of State For The Home Department, Ex Parte Adan* (*R v Secretary of State For The Home Department Ex Parte Aitseguer)*, [2000] UKHL 67.

[107] Ibid.

[108] As explained in the case of *Bolbol v Hivatal*, C-31/09, [2010] ECR I-5539 at para 14 [*Bolbol*].

[109] *Supra* note 76.

Handbook on pre-Convention refugee law concerns, As State Parties had requested clear guidance on how to deal with 'pre-Convention' refugees, such as the Palestinians, the Handbook explains that after 1951 they are to be designated as 'mandate refugees' and as such are excluded from consideration as 'Convention' refugees and this is made clear in Article 1D of the Refugee Convention. The result is that in *Bolbol v Hivatal* [110] the Court of Justice of the European communities (CJEU) adhered to this guidance by quoting directly from 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." Using the assistance gleaned from the Handbook, the Court was able to explain how "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." The Handbook, as the Court noted, makes it clear 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."[111] This then, is a specific example of the Office of the UNHCR impacting on the development of TRL in a difficult area of international refugee policy which formal law does not reach.

Over the years, several Courts have expressed their appreciation with regard to the Handbook's guidance across a range of refugees related issues, ranging from international humanitarian law[112] to the exclusion of refugee status[113], as well as from the credibility assessments of unaccompanied minors[114] to the internal relocation of refugees.[115] Arguably, the Handbook has become part of the transnational legal order in terms of providing an authoritative, normative reference. This is all the more remarkable the more we recognize that it performs its role as guide for norm-setting outside the province of traditional international law.[116] A number of textbooks give the Handbook a special status, such as

[110] *Bolbol*, *supra* note 79.

[111] Ibid., at para 17.

[112] See *QD (Iraq) v Secretary of State for the Home Department,* [2009] EWCA Civ 620 [*QD*].

[113] *Bolbol*, *supra* note 80.

[114] *U. & Anor -v- MJELR & Anor,* [2010] IEHC 317.

[115] See, *AH (Sudan*) *v Secretary of State for the Home Department,* [2007] UKHL 49.

[116] Indeed, the one time Lord Chief Justice of England, Lord Bingham, even wrote an essay on how the judicial determination of factual issues is undertaken, where he drew attention to the Handbook: see, Lord Thomas Bingham, "The Judge as Juror: the Judicial Determination of Factual Issues," *Current Legal Problems* 38, no. 1 (1985): 1-27.

Fordham's, *Judicial Review Handbook*[117], Symes and Jorro's, *Asylum Law and Practice,*[118] de Smith, Woolf and Jowell's, *Judicial Review of Administrative Action,*[119] and Macdonald and Toal's, *Macdonald's Immigration Law and Practice.*[120]

Indeed, as international refugee law becomes more complex and cumbersome the role of the Office of the UNHCR can be seen to have effectively contributed to the emergence of a domain of TRL. It is clear that this is not so much a field that has come into existence through substantive or procedural extension of the body of laws which were already in existence, but a realm that has developed through a reconceptualization of refugee law as a methodological critique. This is precisely why TRL incorporates not only the socio-legal account of hard/soft, domestic/international, public/private ANPs, but – crucially – also is based on the critique of the normatively exclusionary basis of traditional law, which continues to ignore what I have referred to above as "alternative knowledges". The Handbook has been a key tool for the UNHCR in this regard over a period of more than thirty years,[121]so that 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 the central idioms of refugee law. In a case of 2002,[122] 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."[123] The Supreme Court then concluded with regard to the trial judge, that it had been *"*appropriate for him to have regard to the Handbook…"[124] More recently, a UK 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

[117] Michael Fordham, *Judicial Review Handbook*, 6th ed. (London: Hart Publishing, 2008).

[118] Mark Symes and Peter Jorro, *Asylum Law and Practice*, 2nd ed. (London: Bloomsbury Publishing, 2009).

[119] Stanley A. de Smith, Lord Harry Woolf, Jeffrey L. Jowell, *Judicial Review of Administrative Action*, 6th ed. (London: Sweet & Maxwell, 2009).

[120] Ian A. Macdonald and Ronan Toal, *Macdonald's Immigration Law & Practice*, 8th ed. (London: Butterworths, 2010).

[121] *T v Immigration Officer,* [1996] AC 742 (HL(Eng)); *Birungi v Secretary of State for the Home Department,* [1995] Imm AR 331; *R v Secretary of State for the Home Department ex parte Murat Akdogan,* [1995] Imm AR 176; *Dirisu, R (on the application of) v Immigration Appeal Tribunal,* [2001] EWHC Admin 970.

[122] *Z v Minister for Justice, Equality & Law Reform,* [2002] IESC 14 (Supreme Court of Ireland).

[123] Ibid. The guidance in the UNHCR Handbook can be found at: *supra* note 76, paras 37-42.

[124] Ibid., para 30.

expected to produce documentary corroboration of their claims. The origins of this principle are to be found in paragraph 196 of the UNHCR Handbook."[125] 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."[126] These judicial *dicta* all confirm the value of emerging normative standards, and their role in unfolding legal process and illuminating key legal concepts. It is reminiscent of what Halliday and Shaffer describe in *Transnational Legal Orders*[127] 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."[128] For Halliday and Shaffer, this necessity follows from "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[129]

'Pre-Convention' Palestinian refugees were not the only ones posing difficulties for refugee assessment boards and tribunals applying the Refugee Convention of 1951. Another group was the 'post-Convention' refugee escaping wars and civil strife, who also was not specifically catered for in the 1951 Refugee Convention, and yet became the archetypal modern refugee after the wars in Iraq, Afghanistan, and Syria in the late twentieth century. This was the 'war refugee' and it is to this category to which we must finally now turn.

5. 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

[125] 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...."

[126] *ON -v- Refugee Appeals Tribunal & ors,* [2017] IEHC 13 at para 62 (High Court, Ireland).

[127] Terrence C. Halliday and Gregory Shaffer, "Transnational Legal Orders," in *Transnational Legal Orders,* eds. Terrence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press, 2015), 4.

[128] Ibid., where they refer to Twining (2000); Tamanaha (2007); Berman (2012); Zumbansen (2010); Shaffer (2013).

[129] Ibid., 5.

not fall into the category of refugees as defined by the 1951 Refugee Convention,[130] but is nevertheless 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[131] dealt with "war refugees" it did so only under the heading of "Special Cases."[132] The UNHCR Handbook 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 the 1967 Protocol."[133] Yet, it still recognized an exception and concluded 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.[134] The result was to emphasize the central importance of the requirement of "persecution" in international refugee law.

A particular problem arose, however, when the Handbook alluded 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, while "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 country during armed conflict, and whether such protection can be considered to be *effective* (emphases added).[135]

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[130] See, *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 art 1A(2) (entered into force 4 October 1967), http://hrlibrary.umn.edu/instree/v2prsr.htm.

[131] See UNHCR, *supra* note 77.

[132] Ibid., Chapter V, para 164.

[133] Ibid. This provision goes on to add that, "They do, however, have the protection provided for in other international instruments, e.g. 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 Refugee Convention 1951 does afford immediate protection.

[134] See UNHCR, *supra* note 77, Chapter V, para 165.

[135] Ibid., para 165.

Nevertheless, because direction given in the UNHCR Handbook in this section is that, "…every case has to be judged on its merits,"[136] this has meant that the plight of "war refugees" has remained an intractable one for the world ever since.[137] Clearly, therefore, the UNHCR has not been able to resolve everything that it has had to grapple with.

The regional systems which fell outside the 1951 Refugee Convention come again into play today because over half a century after the passage of the Refugee Convention in 1951, it was European Union law that developed a basis of protection for refugees which was itself not grounded on the requirement of "persecution." This, in turn, 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. Extolling the virtues of the EU, Anne-Marie Slaughter and William Burke-White 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.[138] 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."[139]

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,[140] required only that there is a risk of "serious harm" to the individual asylum-seeker. This was defined, *inter alia*, as a

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[136] Ibid., para 166.

[137] Hugo Storey, "Armed Conflict in Asylum Law: The 'War-Flaw,'" *Refugee Survey Quarterly* 31, no. 2 (2012): 1-32, 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* 31, no. 3 (2012): 161-176, 174, where he critiques Hugo Storey.

[138] Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)," *Harvard International Law Journal* 47, no.2 (2006): 327-352), 350.

[139] Ibid., 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…."

[140] *QD, supra* note 84 at para 8.

"serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[141] In this 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."[142] See citation below.

In the landmark case of *Elgafaji v Staatssecretaris van Justitie (Elgafaji)*[143] 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."[144] *Elgafaji* shaped the scope and criteria of application of Article 15 (c). Lord Burns, in a subsequent judgment, 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)."[145]

In *Aboubacar Diakité v Commissaire Général Aux réfugiés et aux Apatrides*,[146] a second decision of the CJEU dealing with Article 15(c), the meaning of "internal armed conflict,"

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[141] EC, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, [2004] OJ, L 304/12, article 15. In full, Article 15 defines the serious harm as follows: "Serious harm consists of: 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."

[142] Ibid., article 2(e).

[143] *Elgafaji v Staatssecretaris van Justitie*, C-465/07, [2009] ECR I-921[*Elgafaji*].

[144] Ibid., at para 39.

[145] *Opinion of Lord Burn 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*).

[146] *Aboubacar Diakité v Commissaire Général Aux réfugiés et aux Apatrides*, C-285/12, ECLI:EU:C:2014:39.

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."[147] 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."[148]

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[149] and the Trans Pacific Partnership.[150] Meanwhile, the UK embarked on

[147] Ibid., at para 28.

[148] See, *AA (Article 15(c)) (Rev 2) Iraq CG*, [2015] UKUT 00544 at para 86 (IAC) (UK Upper Tribunal, Immigration and Asylum Chamber), 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*, para 43)." The applicable CJEU jurisprudence is also referred to in *MOJ & Ors (Return to Mogadishu) Somalia CG*, [2014] UKUT 442 at para 30-33 (IAC) (UK Upper Tribunal, Immigration and Asylum Chamber).

[149] 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, "Paris Pact on Water and Adaptation to Climate Change in the Basins of Rivers, Lakes, and Aquifers," *United Nations Sustainable Development Goals*, https://sustainabledevelopment.un.org/partnership/?p=9546)

[150] 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

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.[151] 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."[152] This makes the inquiry into refugee law all the more compelling.

In the context of the here presented analysis, we have demonstrated the shift away from identifying the "persecution" of victims and towards a hostile and deeply xenophobic rhetoric and discourse through which refugees are described in relation to their flight from events while they are associated with the disruption of and even threat to "public order", "security", by representing a "foreign invasion".[153] Yet, despite such mis-characterisation the stark reality is that the northern richer States of the West must deal with the "war refugees" who become displaced in the face of a "serious harm" which can arise from "indiscriminate

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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, *Trans-Pacific Partnership Agreement*, February 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text).

[151] Ron Martin, Peter Tyler, Michael Storper, Emil Evenhuis and Amy Glasmeier , "Globalization at a critical conjuncture?"*Cambridge Journal of Regions, Economy and Society*, (Volume 11, Issue 1, March 2018) Pages 3–16 who explain how "democratic politics in nations is also challenged by the increase in social and spatial inequalities" means that , "such concentrations also foster the rise of resentful populisms" so that, " The role played by globalisation (and the geographical inequalities it has helped to create) in the rise of populism in a number of countries (the USA, the UK, Germany, the Netherlands, Austria, Spain and Italy) over the past few years is a key issue" (at p.12) . Also see, Jeffrey Frieden, *"The backlash against globalization and the future of the international economic order"* (February 2019) (Available at https://scholar.harvard.edu/files/jfrieden/files/frieden_future_feb2018.pdf), who makes the point that in America, " the current direction of American international economic policy is not an aberration, and not a passing fancy " because, "the 2016 election was a watershed in modern American politics. It signaled the rejection of the current international economic order by large segments of the public" (at p. 10). Further see, Steve Turley, The New Nationalism (2018). Also see, Gideon Rose, *"The New Nationalism",* Foreign Affairs, (March/April 2019) (Available at https://www.foreignaffairs.com/articles/2019-02-12/new-nationalism)

[152] Wolfgang Streeck, "The Return of the Repressed," trans. Rodney Livingstone, *New Left Review* 104 (March-April 2017): 5-18, 14.

[153]See the excellent, Nikos Papastergiadis, (2006) *"The invasion complex: the abject other and spaces of violence,"* Geografiska Annaler: Series B, Human Geography, (2006, Vol.88, Issue 4) at 429-442, Also Sharon Pickering, *"The New Criminals: Refugees and Asylum Seekers"* (in Anthony Thalia and Chris Cuneen, The Critical Criminology Companion (Hawkins Press, 2008) at pp. 169-189

violence" in situations 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[154] 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[155] 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?

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[154] See, *AA (Article 15(c)) (Rev 2) Iraq CG*, [2015] UKUT 00544 at para 86 (IAC) (UK Upper Tribunal, Immigration and Asylum Chamber), 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 at para 30-33 (IAC) (UK Upper Tribunal, Immigration and Asylum Chamber). Should this be the same as footnote 120?

[155] As the EctHR explained at para 241 in *Sufi and Elmi v The United Kingdom*, No 8319/07 and 11449/07, [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 & AM (armed conflict: risk categories) Somalia CG*, [2008] UKAIT 00091 (UK, Asylum and Immigration Tribunal), 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."

It will fall to the domain of TRL to answer all of these questions. 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 "off-duty" is killed?[156] 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 single authority, with a single agreed meaning will fail–and is indeed, 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."[157] 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."[158] 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."[159] See citation below. David A. Martin rightly reminds us that in the aftermath of World War II and during the Cold War, such a premise

[156] The European Asylum Support Office's, "Country of Origin Information Report: Afghanistan" recognises the concept of part-time civilian fighters: see, "Country of Origin Information Report: Afghanistan," *European Asylum Support Office* (July 2012), Section 3.2.1, 26, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/european-asylum-support-office/bz3012564enc_complet_en.pdf.

[157] David A. Martin, "The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource" in *Refugee Policy: Canada and the United States*, ed. Howard Adelman (Toronto: York Lanes Press, 1991), 30-51, 31.

[158] Ibid.

[159] Ibid.

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."[160] Again, how TRL develops the field of refugee law, in circumstances where it is widely accepted that the 1951 Convention is only about the status of refugees, will be a question that a project of TRL has to continue 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."[161] The result has been to give less then 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."[162] 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."[163] 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"[164] The view has been widely echoed by other renowned writers in refugee law.[165] Already, within forty years of the Refugee Convention

[160]Ibid.

[161] Ibid., 30.

[162] Loescher, *supra* note 18, 33.

[163] Mathew E. Price, "Recovering Asylum's Political Roots," in *Rethinking Asylum: History, Purpose and Limits* (Cambridge: Cambridge University Press, 2009), 24-68, 51.

[164] Ibid., 30

[165] James Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," *Harvard International Law Journal* 31, no. 1 (1990): 129-184, 129, 150, 163-65; Michael G. Heyman, "Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife," *San Diego Law Review* 24, no.2 (1987): 449-484; Andrew E. Shacknove, "Who is a Refugee," *Ethics* 95, no.2 (1985): 274-284, 274; Peter Singer and Renata Singer, *"The Ethics of Refugee Policy"* in *Open Borders? Closed Societies?: The Ethical and Political Issues*, ed. Mark

1951 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"[166] If, going forward, new rules are to be developed in the emerging new order of the 21st Century – to determine as Philip Jessup once said – "the rules men live by", then we must acquire an understanding of the "dispersal of authority," in which the transnational legal order operates, in what is today an evolving international framework of emerging rules and norms, that is far removed from its traditionally authorised moorings. [167]

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[166] Joseph Nocera, "No Way to Judge Refugees," *New York Times*, May 8, 1986, A27.

[167] Jessup, *supra* note 1.

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