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Complementary Protection in International Refugee Law

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Complementary Protection in International Refugee Law

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General Editor's Preface

The traditional western idea of the State sees the people who constitute governments as requiring their citizens to hand over power and money and to accept a duty of obedience to the Law, and in return looking after the basic needs of their citizens. In what must be the definitive betrayal of this ideal, those in power sometimes not only fail to deliver that protection but actively persecute people, not because of anything that the individual has done but simply because the individual happens to belong to a particular racial, religious, social, or other group. States accept, if not always gladly, that they have duties under the 1951 Refugee Convention towards people who flee such persecution. But at a time when xenophobia and selfishness on a national scale appear to be increasing in many countries, governments are often keen to limit that duty as far as they can, and kick off the bottom of the ladder those who flee their homes in the hope of escaping conflict and violence or other threats to their human rights, and finding a better and safer future for themselves and their families, but who fail to bring themselves within the definition of a 'refugee' in Article 1A of the Refugee Convention and its 1967 Protocol.

In this important work Dr McAdam reasserts the principles that the drafters of the 1951 Refugee Convention strove to secure, and re-establishes refugee law as a part of international human rights law. She analyses the duties that States owe to people under human rights and other instruments, which complement the duties arising under the Refugee Convention, and which may entail the duty not to expel vulnerable people from the State. She seeks to answer questions that are now arising in an acute form, both for governments and in the courts: which people are entitled to the same kind of protections as are given to those who can bring themselves within the technical definitions of the Refugee Convention, and what rights should they have, and what should their legal status be? Her study offers an incisive legal analysis without losing sight of the moral principles that the law must serve, and in doing so it will both inform those concerned with these issues and lead by example.

AVL

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Jane McAdam
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Earlier versions of some parts of this book have been published elsewhere: 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 Intl J of Children's Rights 251; 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection Status' UNHCR *New Issues in Refugee Research* Research Paper No 125 (Geneva June 2006); 'Complementary Protection and Beyond: How States Deal with Human Rights Protection' UNHCR *New Issues in Refugee Research* Working Paper No 118 (Geneva August 2005); 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 IJRL 461; 'Alternative Asylum Mechanisms: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2004) 27 Intl J of L and Psychiatry 627.

Some of the research in this book has been presented at conferences and seminars, including the International Law Association (British Branch) Conference (London 2006); International Association of Refugee Law Judges Seventh World Conference (Mexico City 2006); Conference on the Qualification Directive: Central Themes, Problem Issues, and Implementation (Nijmegen 2006); Fostering a Scholarly Network: International Law and Democratic Theory (joint project of the American, Canadian, Japanese, and Australian and New Zealand Societies of International Law) (Wellington 2006); Australian and New Zealand Society of International Law Conference (Canberra 2005); Moving On: Forced Migration and Human Rights Conference (Sydney 2005); *Nation–Empire–Globe* Interdisciplinary Research Cluster, University of Sydney (Sydney 2006); UNHCR National Legal Meeting (Melbourne 2006); 29th International Congress on Law and Mental Health (Paris 2005); Conference on Human Rights and Refugees, IDPs, and Migrant Workers in Honour of Joan Fitzpatrick and Arthur Helton (New York 2005); Asylum and Migration, Policy and Practice in the EU Acceding Countries (Prague 2004); 28th International Congress on Law and Mental Health (Sydney 2003).

The law in this book is correct as at October 2006.

Contents—Summary

Contents

Table of Cases

CASES BEFORE INTERNATIONAL BODIES

Committee against Torture

Human Rights Committee

International Court of Justice

International Criminal Tribunal for the Former Yugoslavia

CASES BEFORE REGIONAL BODIES

European Commission/Court of Human Rights

European Court of Justice

Inter-American Court of Human Rights

CASES BEFORE DOMESTIC COURTS AND TRIBUNALS

Australia

Canada

France

New Zealand

South Africa

United Kingdom

United States

Table of Treaties and Other Instruments

INTERNATIONAL TREATIES

EUROPEAN REGIONAL INSTRUMENTS

COUNCIL OF EUROPE

OTHER REGIONAL INSTRUMENTS

EXECUTIVE COMMITTEE OF UNHCR

Table of Abbreviations

1933 Convention	Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199
1951 Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
ACHR	American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
AHC	Ad Hoc Committee on Statelessness and Related Problems
AJIL	American Journal of International Law
API	Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3
APII	Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
ATCSA	Anti-Terrorism, Crime and Security Act 2001 c 24 (UK)
Cartagena Declaration	Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CM	Committee of Ministers (Council of Europe)
COE	Council of Europe
Comm No	Communication Number
Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
Court	European Court of Human Rights
CP	Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

CPSS	Conference of Plenipotentiaries on the Status of Stateless Persons
CRC	Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
CRR	Commission des recours des réfugiés (France)
Cth	Commonwealth
CUP	Cambridge University Press
Declaration on Territorial Asylum	Declaration on Territorial Asylum UNGA Res 2312 (XXII) of 14 December 1967
Dept of Intl Protection	Department of International Protection (UNHCR)
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950)
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council
ECRE	European Council on Refugees and Exiles
EJML	European Journal of Migration and Law
ELENA	European Legal Network on Asylum
ESCOR	Economic and Social Council Official Records
EU	European Union
European Court	European Court of Human Rights
ExCom	Executive Committee of the High Commissioner's Programme (UNHCR)
Family Reunion Directive	Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12
FCTD	Federal Court Trial Division (Canada)
GC1	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
GC2	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
GC3	Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

GC4	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
HC	High Commissioner
HL	House of Lords
HR	Human Rights
HRC	UN Human Rights Committee
HRQ	Human Rights Quarterly
IARLJ	International Association of Refugee Law Judges
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171
ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Tribunal for Rwanda (adopted November 1994) UNSC Res 955 (1994)
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 8 May 1993) UNSC Res 827 (1993)
IIHL	International Institute of Humanitarian Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILM	International Legal Materials
ILPA	Immigration Law Practitioners' Association
INA	Immigration and Nationality Act (US)
IRO	International Refugee Organization
IRRC	International Review of the Red Cross
JHA	Justice and Home Affairs
JRS	Journal of Refugee Studies
LN	League of Nations
LNTS	League of Nations Treaty Series

Migrant Workers Convention	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families UNGA Res 45/158 of 18 December 1990 (entered into force 1 July 2003)
NASS	National Asylum Support Service (UK)
NY	New York
NZ	New Zealand
OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal
OR	Official Records
OUP	Oxford University Press
PA	Parliamentary Assembly (Council of Europe)
Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13
Protocol	Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
Qualification Directive	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 L304/12
Reception Conditions Directive	Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18
Refugee Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
Rome Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3
RSC Archive	Archive of the Refugee Studies Centre, University of Oxford

TEC	Treaty establishing the European Community [2002] OJ C325/33
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12
TEU	Treaty on European Union [2002] OJ C325/5
TPS	Temporary Protected Status (US)
UDHR	Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III)
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNHCR	United Nations High Commissioner for Refugees
UNHCR Handbook	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/IP/4/Eng/Rev.1 (2nd edn Geneva 1992)
UNHCR Statute	Statute of the Office of the United Nations High Commissioner for Refugees UNGA Res 428 (V) of 14 December 1950
UNTS	United Nations Treaty Series
UP	University Press
US	United States

1

The Evolution of Complementary Protection

A Introduction

Complementary protection has a long history, both internationally and in the European context. Ever since the international community has sought to regulate the movement of refugees through international law, States have recognized that not all persons seeking protection fit neatly within legal definitions. Accordingly, some countries have allowed persons who are not technically 'refugees', but who nonetheless have a valid need for protection, to remain in their territories. However, there are discrepancies between different States' understandings of who should benefit from such extended protection, and, crucially, the status to which they should be entitled.

This chapter shows that protection is not a fixed concept in international law, and that its meaning at any given time is inextricably linked to the dominant legal definition of who is a 'refugee'. It establishes the relationship between the 1951 Refugee Convention, as a specialist human rights instrument, and the protection function of human rights law more generally. By examining the human rights foundations of the Convention, it introduces the argument, developed in the final chapter, that the Convention acts as a form of *lex specialis* for all persons protected by the principle of *non-refoulement*, irrespective of that obligation's source.

B Defining Complementary Protection

1 'Protection'

There is no singular concept of 'protection' in international law. Although 'protection' forms the essence of States' obligations vis-à-vis refugees, the term itself is not defined in any international or regional refugee or human rights instrument. It is a term of art.[1]

[1] GS Goodwin-Gill, 'The Language of Protection' (1989) 1 IJRL 6, 6. See also P Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press, London 1996) on de facto refugees.

The need for international protection is predicated on the breakdown of national protection—a lack of the basic guarantees which States normally extend to their citizens. It is this factor that distinguishes refugees from people simply in need of humanitarian assistance. UNHCR says that '[t]he protection that States extend to refugees is not, properly speaking, "international protection", but national protection extended in the performance of an international obligation',[2] and is better described simply as 'asylum'. In contemporary practice, protection is triggered not merely by a *de jure* loss of nationality, but by a loss of 'the protection *resulting from* nationality', and it is this that provides the link between the individual and international law.[3] In fact, when the term 'international protection' was first coined by the French delegation during the drafting of the UNHCR Statute in the 1950s, its purpose was to distinguish between international protection extended by UNHCR and national protection extended by States.[4] Accordingly, international protection provides a substitute for national protection, which lasts until the refugee is able to benefit again from national protection, either in the country of origin or by assuming a new nationality.

Protection comprises two elements: the threshold qualification (refugee) and the rights that attach (status). How these two elements are defined in international law at any given time crystallizes a particular conceptualization of refugee protection. Since every definition reflects the particular features of forced migration sought to be regulated at the time of drafting—'formaliz[ing] the political consensus . . . about the groups that should be given refugee status'[5]—the notion of protection must necessarily evolve over time.[6] When determining whether an individual has an international protection need, the assessment focuses on the scope of the threshold qualification (underscored by the principle of *non-refoulement*), rather than the rights that ensue.

2 What is 'Complementary Protection'?

A large number of States permit persons to remain in their territory who are not Convention refugees, but for whom return to the country of origin is either not

[2] UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 14109/01 ASILE 54 (16 November 2001) [10].

[3] P Weis, 'Human Rights and Refugees' Lecture, Yale University Law School (7 November 1967) 1 (RSC Archive WEIS A21.6 WEI) (emphasis added).

[4] ECOSOC Official Records (OR) 9th Session (1949), 'Summary Record of the 326th Meeting' 628–29; UNGA OR 4th Session Third Committee, 'Summary Record of the 256th Meeting', cited in UNHCR's Observations (n 2) [10] fn 16. See Statute of the Office of the United Nations High Commissioner for Refugees UNGA Res 428 (V) of 14 December 1950.

[5] CM Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press, Oxford 1995) 111; O Jaszi, 'Political Refugees' Annals 203 (May 1939) 83.

[6] This was already recognized in a 1930s Swedish report: G Melander, 'The Personal Scope of an Asylum Convention' International Institute of Humanitarian Law Round Table on Some Current

possible or not advisable. The obligation not to return an individual to serious harm may be express, as in article 33 of the Refugee Convention and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), or implied, as in article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of the European Convention on Human Rights (ECHR).

In other cases, permission to remain may be granted for compassionate reasons such as age, health, or family connections unrelated to an international protection need;[7] or for practical reasons, such as the inability to obtain travel documents.[8] While such protection is humanitarian in nature, it is not based on an international protection obligation and therefore does not come within the legal conception of 'complementary protection'.[9]

In legal terms, 'complementary protection' describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework. It may be based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.[10] In this pure form, as a matter of international law, it is not constrained by exclusion clauses but simply operates as a form of human rights or humanitarian protection triggered by States' expanded *non-refoulement* obligations.

Problems of Refugee Law (San Remo 8–11 May 1978) 18; P Hartling, 'Concept and Definition of "Refugee"—Legal and Humanitarian Aspects' (1979) Nordisk Tidsskrift for Intl Ret 125, 125–26.

[7] Sometimes health or family reasons may also be tied to an international protection need, such as under arts 3 or 8 ECHR, and there remains some scope to test the extent to which compassionate reasons may in fact have a legal basis. However, generally they describe reasons for stay not linked to any legal ground. See eg ExCom Conclusion No 103 (LVI) 'The Provision of International Protection including through Complementary Forms of Protection' (2005) (j).

[8] ExCom Standing Committee 18th Meeting, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime' UN Doc EC/50/SC/CRP.18 (9 June 2000) [4]–[5]. During the drafting of the 1951 Convention, France had proposed that refugee status should extend to a person 'unable to obtain from [his or her] country [of origin] permission to return': Ad Hoc Committee on Statelessness and Related Problems (AHC), 'France: Proposal for a Draft Convention Preamble' UN Doc E/AC.32/L.3 (17 January 1950).

[9] Chapter 4 discusses exceptional cases where certain 'compassionate' reasons fall within the scope of art 3 ECHR. As at 2001, Belgium, Greece, Italy, and the UK were the only European States to provide complementary protection to persons who could not be deported for compassionate reasons: D Bouteillet-Paquet, 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in D Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant, Brussels 2002) 238.

[10] See D Perluss and JF Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia J of Intl L 551; GS Goodwin-Gill, '*Non-Refoulement* and the New Asylum Seekers' (1986) 26 Virginia J of Intl L 897; cf K Hailbronner, '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26 Virginia J of Intl L 857; UNHCR 'Note on International Protection' UN Doc A/AC.96/914 (7 July 1999) [13]. On the relevance of international human rights and humanitarian law to refugee situations, see UNHCR, 'Note on International Protection' UN Doc A/AC.96/975 (2 July 2003) [49]–[54]; UNHCR, 'Note on International Protection' UN Doc A/AC.96/930 (7 July 2000) [38].

Whereas article 33(2) of the Refugee Convention permits derogation from the principle of *non-refoulement* where there are reasonable grounds for regarding a refugee as 'a danger to the security of the country in which he is' or 'who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country', *non-refoulement* under human rights law is absolute.[11] This means that there are some persons whom States cannot remove, however dangerous or undesirable they may be.[12] The unconditional nature of human rights-based *non-refoulement* may in fact render article 33(2) nugatory, since persecution must, by definition, also constitute at least inhuman or degrading treatment.[13]

Codified forms of complementary protection, such as 'subsidiary protection' in the EU; Temporary Protected Status (TPS), 'withholding of removal', and 'deferral of removal' in the US; and 'persons in need of protection' in Canada,[14] may exclude particular persons from protection for reasons similar to the exclusion clauses in the Refugee Convention, but may also specify the rights and status to which beneficiaries are entitled. Typically, such legal status is less comprehensive than that accorded to Convention refugees. Yet while States have oscillated between granting 'extra-Convention' refugees[15] an identical status to Convention refugees[16] and a

[11] Lauterpacht and Bethlehem say this forms part of customary international law: E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP, Cambridge 2003). This view is supported by GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn OUP, Oxford forthcoming 2007) Chapter 6; cf JC Hathaway, *The Rights of Refugees under International Law* (CUP, Cambridge 2005) 363.

[12] This is the subject of a challenge before the European Court of Human Rights in the case of *Ramzy v The Netherlands* App No 25424/05.

[13] I am grateful to Guy Goodwin-Gill for this argument. Lauterpacht and Bethlehem assume that in some cases persecution may not equate to inhuman or degrading treatment, but they do not elaborate when that might be so: Lauterpacht and Bethlehem (n 11) [253]. It is difficult to imagine when 'persecution' would not constitute inhuman or degrading treatment, especially as courts frequently interpret the former by reference to the latter. See examples from State practice in J-Y Carlier, 'General Report' in J-Y Carlier and others, *Who is a Refugee?: A Comparative Case Law Study* (Kluwer Law International, The Hague 1997) 703–04, especially The Netherlands [25]ff, Canada [43]–[44], Belgium [37]–[38], Denmark [45], Spain [40], Greece [13], Austria [53], Switzerland [51], Germany [39].

[14] Immigration and Refugee Protection Act 2001 s 97(1).

[15] This term is used to signify persons who fall outside the scope of art 1A(2) of the 1951 Convention. The prefix 'extra' has the added advantage of connoting persons who are *additional* to Convention refugees. Others use the term 'non-Convention' refugee: eg R Mandal, 'Protection Mechanisms outside of the 1951 Convention ("Complementary Protection")' UNHCR Legal and Protection Policy Research Series, PPLA/2005/02 (June 2005) ix and [17]; UNHCR, 'Note on International Protection' UN Doc A/AC.96/830 (7 September 1994) [40].

[16] eg Canada (Immigration and Refugee Protection Act 2001 s 97); The Netherlands (Aliens Act 2000 s 27), cited in H Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 ICLQ 161, 177; Ecuador, Brazil, South Africa, and Tanzania, cited in Mandal (n 15) [105]; Annex. Mandal incorrectly states (at xii and [106]) that Australia provides an identical status to persons recognized under its complementary protection regime. Australia does not have a complementary protection regime. Protection needs outside the scope of the Refugee Convention may only be taken into account if the Minister for Immigration and Multicultural Affairs chooses to exercise his or her non-compellable, non-reviewable

subsidiary status,[17] the question of how to treat non-removable persons who would be excludable under the Refugee Convention but for the operation of human rights *non-refoulement* remains unresolved in State practice. While international law mandates that their treatment by the host State must not itself be inhuman or degrading, its actual content remains ill-defined and unresolved. This is examined in Chapter 6.

3 The 'Complementary' Aspect

At the outset, it is essential to appreciate that the 'complementary' aspect of 'complementary protection' is not the form of protection or resultant status accorded to an individual, but rather the *source* of the additional protection. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the dominant legal instrument, presently the 1951 Convention.

By nature, the term 'complementary protection' is relational. The existence of *complementary* protection is predicated on the existence of a formal refugee protection regime, and contemporary understandings of 'protection' inform its content and function. Its meaning shifts, depending on the meaning ascribed to that other protection source at a given point in time. The content of complementary protection in international law is therefore not fixed, but 'fluid', its 'contours' varying significantly.[18] Furthermore, in examining historical examples of complementary protection, it should be recalled that the concept is not unified, organic law, but a posterior, synthetic classification—a modern label describing an historical practice.

4 Historical Origins (Pre-1951)

Although the term 'complementary protection' was not coined until the 1990s,[19] a rudimentary concept can be traced back to the first attempts to regulate refugees

discretion in a particular case, pursuant to the Migration Act 1958 (Cth) s 417. In such cases, the Minister may grant any type of visa (not just a protection visa). While Ministerial Guidelines refer to protection needs arising from international human rights treaties, it is not mandatory for the Minister to take those instruments into account: see 'Guidelines on Ministerial Powers under Sections 345, 351, 391, 417, 454 and 501J of the *Migration Act 1958* (MSI 386)' in Senate Select Committee on Ministerial Discretion in Migration Matters, *Inquiry into Ministerial Discretion in Migration Matters* (Cth of Australia, Canberra 2004) Annex 5. Although Australia has an offshore special humanitarian resettlement programme, there is an annual quota, and applicants must have an Australian proposer (individual or organization) willing to cover the cost of the journey and provide support in Australia.

[17] See eg 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 L304/12; see also examples in Mandal (n 15) [105]–[110].

[18] Bouteillet-Paquet (n 9) 226.

[19] UNHCR, 'Note on International Protection' UN Doc A/AC.96/799 (25 July 1992) [5].

under international law by the League of Nations.[20] These early instruments were based on a juridical concept of protection aimed at rectifying the breakdown in the international legal order caused by States' denial of diplomatic and consular protection to their citizens,[21] and they defined refugees by national categories. Accordingly, the Arrangement concerning the Legal Status of Russian and Armenian Refugees of 12 May 1926[22] defined as refugees:

> *Russian*: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired another nationality.
> *Armenian*: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.[23]

Subsequent definitions applied this standard formula to other categories of refugees defined by national group,[24] thereby extending protection incrementally by nationality. Even when notions of social and political upheaval subsequently came to inform refugee definitions, these remained circumscribed by *particular* crises and linked to ethnic or national origin.

[20] For history: JH Simpson, *The Refugee Problem: Report of a Survey* (OUP, London 1939); LW Holborn, 'The Legal Status of Political Refugees, 1920–1938' (1938) 32 AJIL 680; MR Marrus, *The Unwanted: European Refugees from the First World War through the Cold War* (2nd edn Temple UP, Philadelphia 2002); P Weis, 'The International Protection of Refugees' (1954) 48 AJIL 193; JC Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 ICLQ 348; Skran (n 5).

[21] JC Hathaway, *The Law of Refugee Status* (Butterworths, Canada 1991). Generally for this section, see Hathaway (n 20). This conception of 'protection' had a long precedent. Debating the *Loi relative aux étrangers réfugiés qui résideront en France* in 1832, Charles Dupin had stated that 'on appelle *réfugiés* tous ceux qui resident en France sans la protection de leur gouvernement': 1832 *Duvergier* 210, cited in A Grahl-Madsen, *The Status of Refugees in International Law* (AW Sijthoff, Leyden 1966) 95. It is interesting to note that the populist conception of a 'refugee' was a political exile. As early as 1921, the High Commissioner for Russian Refugees had emphasized differences between popular understandings of the term 'refugee' and legal definitions, noting that within the various categories of Russian exiles were 'groups of individuals who have abandoned Russia for political reasons': League of Nations Memorandum by the Secretary-General, 'Russian Refugees: General Statement on the Question' (Geneva 17 August 1921) (CRR.2) 2. Holborn noted that popular discourse distinguished between 'bona fide refugees' and 'others'—the latter denoting persons entitled to identity certificates but who were not *political* refugees: Holborn (n 20) 685.

[22] 89 LNTS 47. This supplemented and amended the Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees of 5 July 1922, 13 LNTS 237 and the Plan for the Issue of a Certificate of Identity to Armenian Refugees of 31 May 1924, LN Doc C.L.72(a).1924.

[23] There are more recent instances of domestic refugee definitions adopting protection concepts from the early League instruments. In the Tanzanian Refugees (Declaration) Order 1966, a refugee was described as a person of a certain origin who entered Tanzania after a particular date: G Melander, 'The Concept of the Term "Refugee" ' in AC Bramwell (ed), *Refugees in the Age of Total War* (Unwin Hyman, London 1988) 11. See also Zambian Refugee (Control) Act 1970, permitting the Minister to 'declare, by statutory order, any class of persons who are, or prior to their entry into Zambia were, ordinarily resident outside Zambia to be refugees for the purposes of this Act'. US TPS status (see Chapter 3 below) and EU temporary protection follow similar patterns.

[24] Arrangement (Russian and Armenian Refugees) (n 22); Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees of 30 June 1928, 89 LNTS 63.

Determining whom the League would protect was a selective, political process.[25] In a 1926 report, the High Commissioner identified over 150,000 people from eight national categories in analogous circumstances to the Russian and Armenian refugees: 150 Assyrians and a small number of Montenegrins in France; 19,000 Assyro-Chaldeans in the Caucasus and Greece; 9000 Ruthenes in Austria and Czechoslovakia; 100,000 refugees in Central Europe (including 10,000 former Hungarians in Austria, France and Romania); 16,000 Jews in Romania; and 150 Turks in Greece.[26] In choosing to extend legal protection to only a fraction of them,[27] the space for complementary protection was created. States became increasingly aware of the protection gaps created by refugee definitions that were legal abstractions divorced from events actually producing refugees.[28] As late as 1938, Switzerland observed that it daily received refugees who had lost their nationality on account of events during the First World War, but who remained unprotected by any international refugee instrument.[29]

One explanation for the piecemeal expansion of protection was the League of Nations' concern that extending protection to refugees threatened to arouse the hostility of certain League members or potential members. For this reason, '[a]ll political refugees were . . . a source of political embarrassment to the organization'.[30] Sjöberg argues that this attitude largely explains opposition to the incorporation of Italian and Spanish refugees within the League's mandate.[31] The Italian government had strenuously opposed their inclusion 'and most of the member states of the League Council were not willing to provoke Mussolini on such a comparatively minor issue'.[32] It was a similar situation regarding Spanish refugees in the 1930s. By contrast, Melander queries whether the political component of the League's protection policy can entirely explain its decision to protect some groups of refugees but not others. He argues that Italian and Spanish refugees were 'human rights refugees', and in this period, violations of human rights were considered matters of domestic rather than international concern. As a result, granting protection on the basis of human rights violations in another country would have been perceived as 'inconsistent with the principle of non-intervention in the internal affairs of sovereign states'.[33] Indeed, as late as 1947, an international law

[25] T Sjöberg, *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees* (Lund UP, Lund 1991) 38.

[26] League of Nations (LN), 'Russian and Armenian Refugees: Report to the Eighth Assembly' (1927) (A.48.1927.XIII) 14, as cited in Skran (n 5) 115; see also Doc XIII.Refugees.1927.XIII.3.

[27] Minutes of the 43rd Session of the Council LN OJ (February 1927), cited in Skran (n 5) 115.

[28] GS Goodwin-Gill, *The Refugee in International Law* (OUP, Oxford 1983) 4.

[29] International Conference for the Adoption of a Convention concerning the Status of Refugees Coming from Germany, 'Provisional Minutes: Third Meeting (Private)' (8 February 1938) CONF.CSRA/PV3 (8 February 1938) 4.

[30] Sjöberg (n 25) 38.

[31] ibid. For example, Italian refugees fleeing Mussolini's Fascist government were not protected by the League machinery.

[32] Sjöberg (n 25) 27.

[33] G Melander, 'Refugee Policy Options—Protection or Assistance' in G Rystad (ed), *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund UP, Lund 1990) 151.

text stated: 'General International Law imposes no duties on states towards their own citizens. The treatment of these comes entirely under the "reserved domain" which does not concern other states'.[34] Although Melander acknowledges that some refugees protected by the League instruments were clearly fleeing human rights abuses, in his view this was merely incidental to the humanitarian law justification for their protection, as victims of armed conflict or communal violence.[35]

The 1933 Convention marked the first attempt to create a comprehensive binding international legal framework for refugees to replace the earlier recommendatory instruments. Described as 'a new stage in the efforts to achieve an international legal status for refugees'[36] and a 'milestone in the protection of refugees',[37] it contained the first express prohibition on expulsion and *refoulement* in international treaty law,[38] and elementary provisions on social and economic rights.[39]

Significantly, the 1933 Convention also provided the first formal mechanism envisaging complementary protection. Article 1, which incorporated the refugee definitions set out in the 1926[40] and 1928 instruments,[41] permitted States to modify or amplify these definitions at the moment of signature or accession to the treaty. Just as Recommendation E of the Final Act to the 1951 Convention 'expresses the hope that the Convention . . . will have value as an example exceeding its contractual scope',[42] this mechanism formally contemplated the possibility of complementary protection.

Although amplification of the definition was supposed to be specified at the time of signature or accession, such as Egypt's reservation of the right to expand or

[34] A Ross, *A Textbook of International Law: General Part* (Longmans, Green and Co, London 1947) 230. Forerunners of modern human rights law that were regulated by international law at that time included laws on slavery, minority rights, labour, and humanitarian law.

[35] Melander (n 33) 146–47.

[36] Holborn (n 20) 690.

[37] G Jaeger, 'On the History of the International Protection of Refugees' (2001) 83 IRRC 727, 730.

[38] Skran (n 5) 136.

[39] The substantive rights contained in the 1938 Convention (Convention concerning the Status of Refugees coming from Germany of 10 February 1938, 192 LNTS 59) reproduced the Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199 almost verbatim. One important difference was that art 25 of the 1938 Convention allowed States to adopt the treaty in stages. Accordingly, States could bind themselves solely in relation to personal status, by adopting only Chapters I–V and XIII, or additionally with respect to refugees' economic and social rights, by adopting the whole Convention. There were also slight variations in Chapter V on labour conditions and Chapter VIII on education.

[40] Arrangement (Russian and Armenian Refugees) (n 22).

[41] Arrangement (Extension to Other Categories) (n 24).

[42] A Final Act to a treaty provides a formal summary of the conference proceedings, and may also seek to establish political, rather than legal, agreement on particular issues or set out matters for future discussion. It may also provide a useful aid for interpretation of the treaty, and at times the treaty text may even be incorporated into the Final Act: see I Brownlie, *Principles of Public International Law* (6th edn OUP, Oxford 2003) 582; A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge 2000) 73–74.

limit the definition as it wished,[43] this did not prevent France from extending the Convention's provisions to Spanish refugees in its territory in 1945. France had been a strong advocate of extending the 1933 Convention's provisions to new groups of refugees, such as to German refugees in 1938, despite resistance from States such as Belgium and the UK.[44] However, as the French delegate to the Conference of Plenipotentiaries noted, France would not have been able to grant the benefit of existing conventions to those refugees had it been required to do so under international law. 'She had done her best in an exceptional situation; and only later had it become possible for her to extend to those refugees the benefits of the 1933 Convention. . . . It seemed more natural for governments to extend their commitments subsequently rather than to set out by assuming excessively wide commitments'.[45]

A French decree of 15 March 1945 provided that in light of the Arrangement of 12 May 1926, the Convention of 28 October 1933, and relevant domestic laws, '[l]e bénéfice de la convention relative au statut international des réfugiés est étendu aux réfugiés espagnols'.[46] Spanish refugees were defined in article 2 as

> les personnes possédant ou ayant possédé la nationalité espagnole, ne possédant pas une autre nationalité et à l'égard desquelles il est établi, qu'en droit ou en fait, elles ne jouissent pas de la protection du gouvernement espagnol.[47]

As the French representative later explained at the 33rd meeting of the Ad Hoc Committee on Refugees and Stateless Persons, the protection offered was identical to the formal legal status provided by the 1933 Convention:

> France in particular gave persons in the position, but not enjoying the status, of refugees the same rights and advantages as if she were bound to do so by conventions; and . . . the French Government had extended those rights to refugees from Spain even though she was not bound to do so under any international convention.[48]

Some other States also permitted persons who did not meet international refugee definitions, but who were considered to require protection, to remain in their territories, and commonly afforded them refugee status outlined by international

[43] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (CP), 'Summary Record of the 19th Meeting' (Geneva 13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 25 (France).

[44] International Conference on German Refugees, 'Provisional Minutes: Second Meeting' (7 February 1938) CONF.CSRA/PV2, 3; International Conference on German Refugees, 'Provisional Minutes: First Meeting (Private)' (7 February 1938) CONF.CSRA/PV1 (7 February 1938) 5–6, 14. For additional examples: Perluss and Hartman (n 10) 559.

[45] CP, 'Summary Record of the 22nd Meeting' (Geneva 16 July 1951) UN Doc A/CONF.2/SR.22 (26 November 1951) 10 (France).

[46] Decret No 45–766 du 15 mars 1945 accordant aux réfugiés espagnols le bénéfice de diverses dispositions (Journal Officiel de la République Française 21 avril 1945) Gazette du Palais (1945) art 1.

[47] ibid art 2.

[48] AHC Second Session, 'Summary Record of the 33rd Meeting' (Geneva 14 August 1950) UN Doc E/AC.32/SR.33 (20 September 1950) 9.

conventions.[49] For example, French public hospitals provided free treatment to German refugees prior to the conclusion of the 1938 Convention, though the French government stressed 'its urgent need of a text on which to base its practice'.[50] The UK treated as refugees

> many thousands of persons who still enjoyed the protection of the Reich, and . . . extended its asylum to them, either for the purpose of enabling them to make a new home in the United Kingdom, or of staying there temporarily till plans for their settlement in some other country had been completed.[51]

As the Polish representative in 1938 observed, '[i]nternal legislation frequently granted to the refugees, both from the legal and social point of view, a more favourable position than that embodied in the provisions of the draft Convention'.[52] Complementary protection, extending beyond States' international protection obligations, was thus in some senses an embryonic form of subsequently formalized protection.

The content of protection was identical; it was simply the basis on which protection was granted that was 'complementary'. The same pattern is followed by the OAU Convention, which, in article 8(2), is described as the 'regional complement' to the Refugee Convention.[53] This differs from the EU's 'subsidiary protection', a regional adaptation of complementary protection that prescribes a legal status inferior to Convention refugee status. Though this echoes the European practice over the past two decades of diluting the protection granted to extra-Convention refugees, it has no solid legal basis. Chapter 6 examines this in detail.

C The 1951 Refugee Convention

Since coming into force in 1954, the Refugee Convention has been the central international instrument on refugee status, supplemented by the 1967 Protocol which extended its temporal and (with respect to some States) geographical

[49] AHC First Session, 'Summary Record of the 17th Meeting' (NY 31 January 1950) UN Doc E/AC.32/SR.17 (6 February 1950) [31] (US).

[50] International Conference on German Refugees, 'Second Meeting' (n 44) 4.

[51] International Conference on German Refugees, 'Provisional Minutes: Fourth Meeting' (Geneva 8 February 1938) CONF.CSRA/PV4 (10 February 1938) 8. For example, the British *Kindertransport*, a quasi-protection, quasi-humanitarian assistance scheme enabled Jewish children forced to flee Germany to stay in Britain. It was reminiscent of a First World War programme that admitted several thousand Belgian children to Britain, and the admission in May 1937 of 3800 Basque children as refugees of the Spanish Civil War: AJ Sherman, *Island Refuge: Britain and Refugees from the Third Reich 1933–1939* (2nd edn Frank Cass, Ilford 1994) 183–87; R Göpfert, *Der jüdische Kindertransport von Deutschland nach England 1938/39: Geschichte und Erinnerung* (Campus Verlag, Frankfurt 1999).

[52] International Conference on German Refugees, 'First Meeting' (n 44) 11.

[53] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

application. In the half-century since the Convention's inception, international human rights law has evolved as a sophisticated system of rights and duties between the individual and the State, which has affected traditional notions of State sovereignty and behaviour in an unprecedented manner.[54] Yet despite the influence of 'international human rights law' on the regulation of States' behaviour, there has been a general reluctance by States, academics, and institutions to view human rights law, refugee law, and humanitarian law as branches of an interconnected, holistic regime, particularly when it comes to triggering eligibility for protection beyond the scope of article 1A(2) of the Convention.

1 The Refugee Convention as a Human Rights Treaty[55]

The drafting of the 1951 Convention represented a 'profound re-orientation' in refugee organizations, agreements, and agendas, but it was '*evolution*, not *revolution*'.[56] In 1947, the Commission on Human Rights adopted a resolution that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation'.[57] At the request of the Economic and Social Council (ECOSOC), the Ad Hoc Committee on Statelessness and Related Problems was asked to draft a binding legal instrument to implement articles 14 and 15 of the Universal Declaration of Human Rights (UDHR),[58] firmly cementing the Convention's foundations in human rights law. Its purpose was to 'consolidate existing agreements and conventions and, further, to determine the status of those refugees who had so far enjoyed no protection under any of the existing instruments'.[59] Although the Convention took as its departure point human rights principles contained in the UDHR, it revised, consolidated, and substantially extended earlier agreements to create a new protection regime.[60] Many substantive provisions were

[54] eg Human Rights Act 1998 c 42 (UK).

[55] See generally IC Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers, The Hague 1999); UNHCR, 'Note on International Protection' (2003) (n 10) [49]–[52], which emphasizes the relevance of human rights law to refugee issues; ExCom Conclusion No 103 (n 7) (c): 'refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol and, where applicable, on regional refugee protection instruments, and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection'.

[56] GS Goodwin-Gill, 'Editorial: The International Protection of Refugees: What Future?' (2000) 12 IJRL 1, 2.

[57] Commission on Human Rights Report to ECOSOC on the 2nd Session of the Commission held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 [46], in P Weis, 'Human Rights and Refugees' (1971) 1 Israel Yearbook on HR 35, 37.

[58] AHC First Session, 'Summary Record of the First Meeting' (NY 16 January 1950) UN Doc E/AC.32/SR.1 (23 January 1950) [4] (Secretariat).

[59] CP, 'Summary Record of the Second Meeting' (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 9 (HC).

[60] Convention Preamble.

based on principles of the UDHR[61] and the embryonic ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), known then as the draft Covenant on Human Rights.[62]

The Convention's Preamble states its aim as assuring 'refugees the widest possible exercise of . . . fundamental rights and freedoms'. The Convention was to establish practical but universal standards[63] for the rights of refugees that went beyond the lowest common denominator, 'since a convention would hardly be useful if it contained only the minimum acceptable to everyone'.[64] At the same time, it also avoided aiming for 'the ideal', fearing that fewer States would ratify it. Hence it chose a 'middle course'.[65] Early UN General Assembly (UNGA) resolutions support its underlying human rights basis, with an emphasis on assisting the most needy,[66] affirming basic principles relating to solutions,[67] and recommending increased protection activities.[68]

The result is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR, and ICESCR in such provisions as the acquisition of property, the right to work, housing, public education, public relief, labour legislation and social security, and freedom of movement.[69] Indeed, it has been called a 'Convention on Human Rights for Refugees'.[70] Moreover, it reinforces States' protection of refugees as an international legal duty, arising from article 14 of the

[61] 'Comments on the Draft Convention and Protocol: General Observations' Annex II to AHC, 'Draft Report of the Ad Hoc Committee on Statelessness and Related Problems' (16 January–February 1950) UN Doc E/AC.32/L.38 (15 February 1950) 36 (art 3 non-discrimination), 46 (art 26 education); AHC, 'Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems' (Document E/1618) UN Doc E/AC.32/L.40 (10 August 1950) 31 (France on UDHR art 29(1)).

[62] 'Comments on the Draft Convention and Protocol: General Observations' (n 61) 58; see UN Doc E/1572, 12 (art 32 (then art 27) expulsion).

[63] CP, 'Second Meeting' (n 59) 18 (High Commissioner); CP, 'Summary Record of the Third Meeting' (3 July 1951) UN Doc A/CONF.2/SR.3 (19 November 1951) 10 (France).

[64] AHC First Session, 'Summary Record of the 25th Meeting' (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68].

[65] 'Comments on the Draft Convention and Protocol: General Observations' (n 61) 31.

[66] UNGA Res 639 (VI) of 20 December 1952; UNGA Res 728 (VIII) of 23 October 1953.

[67] UNGA Res 1166 (XII) of 26 November 1957; ECOSOC Res 686 (XXVI) B of 21 July 1958.

[68] UNGA Res 1284 (XIII) of 5 December 1958 [1], cited in Goodwin-Gill (n 1) 14.

[69] J Patrnogic, 'International Protection of Refugees in Armed Conflicts' (reprinted by UNHCR Protection Division from Annales de Droit International Médical (July 1981)) section 4. Art 3 on non-discrimination asserted a basic principle of the UDHR; provisions on education were linked to the UDHR; and certain labour provisions were based on ILO conventions: see 'Comments on the Draft Convention and Protocol: General Observations' (n 61) 36, 46, 47 respectively; see also AHC, 'Refugees and Stateless Persons: Compilation' (n 61) 31 (France on UDHR art 29(1)). Art 32(2) on the expulsion of refugees lawfully admitted was referenced to a provision in the Draft Covenant on Human Rights: AHC, 'Memorandum by the Secretary-General' E/AC.32/2 (3 January 1950) 47; 'Comments on the Draft Convention and Protocol: General Observations' (n 61) 58; see E/1572, 12. Art 8 on exemption from exceptional measures was based on art 44 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 287.

[70] Patrnogic (n 69) section 4.

UDHR and embodied in binding form by the principle of *non-refoulement* in article 33 of the Convention. As one commentator remarks: 'The framers' unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles'.[71] Lauterpacht and Bethlehem stress that the law on human rights that has emerged since the Convention's conclusion is 'an essential part of [its] framework . . . that must, by reference to the ICJ's observations in the *Namibia* case, be taken into account for the purposes of interpretation'.[72] UNHCR also emphasizes that:

> The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.[73]

By contrast to the category-based approach of previous refugee instruments, article 1A(2) embodies a 'universal' refugee definition,[74] requiring refugees to demonstrate a well-founded fear of 'persecution' based on nationality, religion, race, membership of a particular social group, or political opinion. Although its scope was initially constrained by temporal and geographical limitations, these were removed by the 1967 Protocol.[75] Perluss and Hartman describe article 1A(2) as a 'coalescence' of the three historical approaches: individual (subjective fear), social (objectively determined group factors), and the juridical element of a lack of

[71] MR von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law. Canadian and United States Case Law Compared* (Martinus Nijhoff Publishers, The Hague 2002) 314.

[72] Lauterpacht and Bethlehem (n 11) [75]. See also Hathaway, who argues that the Refugee Convention and its Protocol must be regarded as 'part and parcel of international human rights law', and that refugee law is 'a remedial or palliative branch of human rights law': Hathaway (n 11) 4, 5.

[73] UNHCR, 'Note on International Protection' UN Doc A/AC.96/951 (13 September 2001) [4].

[74] For debates: AHC First Session, 'Summary Record of the Third Meeting' (NY 17 January 1950) UN Doc E/AC.32/SR.3 (26 January 1950) [25], [50] (France), [54] (US); AHC, 'Refugees and Stateless Persons' (n 61) 26–27; AHC, 'Provisional Draft of Parts of the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees, Prepared by the Working Group on this Article' UN Doc E/AC.32/L.6 (23 January 1950); AHC, 'Corrigendum to the Proposal for a Draft Convention Submitted by France' UN Doc E/AC.32/L.3/Corr.1 (18 January 1950) art 1(1); AHC 'United States of America: Addendum to E/AC.32/L.4' UN Doc E/AC.32/L.4/Add.1 (19 January 1950) art IA(4); AHC, 'Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 31 January 1950' UN Doc E/AC.32/L.20 (31 January 1950) art IB; AHC, 'Draft Convention Relating to the Status of Refugees: Decisions of the Working Group Taken on 9 February 1950' UN Doc E/AC.32/L.32 (9 February 1950) art 1B.

[75] The geographical limit now only applies to the following States: Congo, Madagascar, Monaco, and Turkey: Status of ratifications as at 13 October 2006 <http://untreaty.un.org>. It cannot be applied by any State that ratified the Convention or Protocol after the latter's adoption.

de jure protection by the country of origin,[76] focusing on individual harm caused by an uprooting event, rather than the event itself.

The new orientation of the definition necessarily impacts upon the manner in which extension of the protection concept occurs. Where refugeehood is defined in law by selected[77] national categories, such as 'Russian refugee' and 'Armenian refugee', rather than by a more abstract and universal concept such as 'persecution', it is easier to contemplate (and regulate) an incremental expansion of the refugee concept. Applying the concept to new refugee situations effectively involves adding another nationality into a relatively standard definition, such that the definition itself does not substantively alter.[78] Expansion on the basis of an abstract concept such as 'persecution' is less neat and predictable than incremental growth.[79] At the institutional level, the expansion of article 1A(2) of the Convention (paralleled by article 6A of the UNHCR Statute) occurred first by widening its temporal scope (to Hungarian refugees in 1956), then by broadening its geographical application (to Chinese refugees in Hong Kong).[80] Both these elements were ultimately adopted in the 1967 Protocol. The next phase involved expansion of the protection *concept* via a widening of the principle of *non-refoulement*.

While developments in human rights law may shape interpretations of 'persecution',[81] they may also *independently* form grounds for non-removal. Article 3 CAT, article 7 ICCPR and article 3 ECHR are recognized sources of human rights *non-refoulement*—complementary protection—which prohibit removal in circumstances additional to (and sometimes overlapping with) article 1A(2). External to and independent of the Convention,[82] these instruments provide only a trigger for protection and do not elaborate a resultant legal status. The main problem with the EU Qualification Directive, and one which has characterized many recent ad hoc complementary protection schemes, is that beneficiaries do not receive the same level of rights as Convention refugees. In so far as there is no legal justification for distinguishing between the status granted to Convention

[76] Perluss and Hartman (n 10) 583, referring to Hathaway (n 21) 2–6.

[77] LN, 'Russian and Armenian Refugees' (n 26); see also Doc XIII.Refugees.1927.XIII.3.

[78] This is similar to the EU Temporary Protection Directive which applies on a case-by-case basis to declared mass influxes: Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12.

[79] Although note concerns that 'it was not always an easy matter to ascertain whether a given person did or did not possess the attributes of a refugee coming from Germany': International Conference on German Refugees, 'Second Meeting' (n 44) 17 (Liaison Committee).

[80] For a detailed account, see Jackson (n 55).

[81] See Hathaway (n 21) 112, approved in *Horvath v Sect'y of State for the Home Dept* [2001] 1 AC 489 (HL) 495 (Lord Hope of Craighead); *Sepet v Sect'y of State for the Home Dept* [2002] 1 WLR 856 (HL) [7] (Lord Bingham); *R v Special Adjudicator, ex p Ullah* [2004] UKHL 26 [32] (Lord Steyn); IARLJ Human Rights Nexus Working Party, 'Rapporteur's Report' (1998 Annual Conference, Ottawa 12–17 October 1998) 8.

[82] In domestic law, States may stipulate that a protection claim must first be assessed against the Refugee Convention, before considering it on other grounds.

and extra-Convention refugees,[83] it makes sense that the Convention, as a 'Magna Carta for the persecuted',[84] applies to both. It is argued that since the Convention is itself a specialist human rights instrument, the protection conceptualization it embodies is necessarily extended by developments in human rights law, rather than via the conventional means of a protocol. It therefore acts as a type of *lex specialis* which applies to persons encompassed by that extended concept, that is, by complementary protection.[85] It does not seek to displace the *lex generalis* of international human rights law, but rather complements and strengthens its application. This imitates the way in which UNHCR has dealt with refugees under its own expanded mandate.

Inherent in comments of the US delegate is the close link between the Convention and emergent human rights law: 'the development of an unrestricted charter for refugees would involve a certain amount of duplication of effort between the preparation of the draft International Covenant on Human Rights and the drafting of the present Convention'.[86] The UK delegate observed that he did not think that 'the universal charter referred to by the United States representative would have any different content from the present instrument. What was in question was simply how widely the latter was to be applied'.[87]

The issue of resultant legal status issue is examined comprehensively in Chapter 6, but the following sections illustrate why the Convention has the capacity to encompass refugees beyond the scope of article 1A(2). It is not suggested that the Convention definition itself embraces persons protected by human rights-based *non-refoulement*, but rather that there is nothing intrinsic in the Convention which precludes the application of the status it establishes to other beneficiaries of international protection.

2 'Humanitarian Refugees': Article 1A(1)

New legal refugee definitions do not obliterate the *existence* of other types of refugees, but simply recharacterize the formal qualities or scope of refugeehood. State practice has continually provided for 'informal' refugee categories, even if the trade-off for extended *non-refoulement* has been rudimentary legal rights.

[83] UNHCR's Observations (n 2) [46]; UNHCR, 'Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive' (March 2004) 2. As Mandal writes: 'Indeed, non-Convention and Convention refugees have similar, if not identical, needs. They are both without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes and fearful for their future. Moreover, there is no obvious reason why non-Convention refugees will be in need of international protection for a shorter period than their Convention counterparts': Mandal (n 15) xiii; see further [156]–[164].

[84] CP, '19th Meeting' (n 43) 27 (International Association of Penal Law).

[85] Chapter 6 considers the tension between the absolute nature of human rights *non-refoulement* and the Convention's exclusion clauses with respect to granting Convention status.

[86] CP, '19th Meeting' (n 43) 22 (US).

[87] ibid 24 (UK).

Analysis of the Convention's conceptualization of 'protection' invariably focuses on the refugee definition in article 1A(2), since an individual must satisfy its requirements to trigger Convention status. Article 1A(1), which extends the benefits of the 1951 Convention to any person who

> [h]as been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization

is generally overlooked as an historical remnant. Although eligibility under article 1A(1) is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant, since they typically protected victims of armed conflict or generalized violence.[88] The incorporation of these definitions necessarily broadens the Convention's conceptual basis of protection, making it difficult to sustain the argument that, conceptually, the Convention does not support the grant of its international legal status to persons fleeing situations of armed conflict or communal violence.[89] This has particular significance for persons seeking complementary protection on the basis of civil war, and challenges the EU's current approach of creating a new and separate protection status for such persons.

Secondly, even though an applicant today cannot invoke an article 1A(1) instrument as the basis of an asylum claim (just as an Armenian presenting him or herself for the first time in 1951 could not claim under article 1A(1)),[90] the fact that Convention status flows from the definitions contained in those instruments, which embody what Melander has termed the 'humanitarian refugee' concept,[91] makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds. Not only has State practice continued to recognize both 'humanitarian' and Convention refugees, but the dominant legal refugee instrument implicitly retains the humanitarian concept of protection within its definitional provision, further illuminating the Convention's object and purpose.[92]

Thus, while the text of article 1A(1) does not support an argument that the provision itself gives rise to additional grounds for claiming protection under the Convention, its implicit incorporation of earlier legal definitions of 'refugee' (and the concepts of protection which those definitions embody) supports the view

[88] Note Coles' comment that art 1A(2) cannot be read as a deliberate exclusion of other 'types' of refugees, because they are already included in art 1A(1): see GJL Coles, *The Question of a General Approach to the Problem of Refugees from Situations of Armed Conflict and Serious Internal Disturbance* (International Institute of Humanitarian Law, San Remo 1989) 24.

[89] Of course, many of those fleeing such circumstances may qualify for protection under art 1A(2). For discussion of this, see Mandal (n 15) [21]–[24].

[90] Refugee Convention art 37; CP, '22nd Meeting' (n 45) 17 (HC).

[91] Melander (n 33) 146–47.

[92] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(1).

that the Convention tolerates a broader protection concept than article 1A(2) might suggest, and that Convention status is the appropriate status for persons in need of international protection for humanitarian law-related reasons.

3 Recommendation E of the Final Act

During the drafting process, there was considerable discussion as to whether the Convention refugee definition should be expressed in general terms, or whether it ought to be restricted to enumerated categories of refugees, as had characterized previous legal instruments. Recalling the legal basis of the Committee's mandate, France advocated a reconsideration of existing refugee law in the spirit of the UDHR[93] with a definition 'as generous as possible'.[94] The French delegate explained that:

> before the proposed convention entered into force, new and undreamed-of categories of refugees might be created, [and therefore] the definition should be couched in general terms, if necessary with specific exceptions, but should not enumerate the categories to be protected. In view of the turbulent state of the world, no such list could ever be complete.[95]

Accordingly, he proposed extending refugee status to any person 'seeking asylum or having been granted asylum under the conditions specified in Article 14 of the Universal Declaration of Human Rights', but explicitly excluding any person falling within article 14(2).[96] This definition was not accepted by the other delegations, despite suggestions that a mechanism could be inserted permitting States to limit their commitments through a clarifying reservation at the time of signing the Convention, or through a special agreement with UNHCR. The benefit would be that the High Commissioner would be in a position to negotiate with those States to induce them to extend the benefit of the Convention to new groups of refugees.[97]

The US proposed expanding pre-existing national categories of refugees to include German, Austrian, Czechoslovak, Italian, and Spanish refugees,[98] provided that they were outside their country of origin and feared 'persecution on account of race, nationality, religion or political belief'. Additionally, several new categories of persons in need of protection were proposed, including neo-refugees,[99] displaced persons,[100] and unaccompanied children.[101] A 'neo-refugee' was defined as a person falling outside any of the other protected categories 'who as a result of events subsequent to the outbreak of the Second World War, is unable or

[93] AHC, 'Third Meeting' (n 74) [25].
[94] AHC, 'First Meeting' (n 58) [33]; AHC, 'Refugees and Stateless Persons: Compilation' (n 61) 26.
[95] AHC, 'First Meeting' (n 58) [33]. [96] AHC, 'Corrigendum' (n 74).
[97] AHC, 'Refugees and Stateless Persons: Compilation' (n 61) 27. [98] Arts IA(2)(a) and (b).
[99] Art IA(2)(c). [100] Art IA(3)(a).
[101] Art IA(3)(b). This was also included in a provisional draft of art 1: AHC, 'Provisional Draft' (n 74). See argument in Chapter 5 below on the protection function of the Convention on the Rights of the Child.

unwilling to avail himself of the protection of the government of his country of nationality or former nationality, and who has not acquired another nationality'.

The French delegation regarded the 'neo-refugee' category as an important concession to the French point of view, provided that it encompassed all new refugees not otherwise defined by previous legal instruments. 'New categories of refugees not explicitly covered by the convention, and which might come into existence as a result of later events, must be able to benefit from its provisions'.[102] Such individuals 'should be entitled automatically to claim the protection of the United Nations, and . . . there should be no discrimination between them and the existing categories of refugees'.[103]

However, the US did not envisage the neo-refugee category as being automatically all-encompassing. Instead, it viewed it as a mechanism that would enable additional groups of refugees to be protected under the Convention's auspices 'by means of protocols, addenda or later agreements'. In its view, States should not undertake unlimited obligations in advance.[104] In such circumstances, the French delegation favoured a simple general formula without any enumeration of categories,[105] since '[t]he present Convention was a general text designed to apply to future refugees as well'.[106]

Almost all of the draft definitions included a provision to the effect that the categories of refugees could be expanded in future in accordance with recommendations by the General Assembly.[107] Although this was ultimately not incorporated in article 1A(2), Recommendation E of the Final Act of the Conference of Plenipotentiaries, appended to the Refugee Convention, expressed the hope that the Convention would be applied beyond its contractual scope.

Recommendation E was a UK initiative based on paragraph 7 of the Preamble to the original text of the draft Convention,[108] and was prompted by the deletion of an article which would have allowed the Contracting States to add to the definition of the term 'refugee'.[109] The UK representative explained that his delegation

[102] AHC, 'Third Meeting' (n 74) [50] (France).

[103] ibid.

[104] ibid [54] (US). See also the oft-quoted phrase from the AHC's report: 'it would be difficult for a Government to sign a blank cheque and undertake obligations toward future refugees, the origins and number of which would be unknown': Report of the AHC on Statelessness and Related Problems (NY 16 January–16 February 1950) UN Doc E/1618, E/AC.32/5 (17 February 1950) 38.

[105] AHC 'Third Meeting' (n 74) [50] (France).

[106] CP, 'Summary Record of the 29th Meeting' (19 July 1951) UN Doc A/CONF.2/SR.29 (28 November 1951) 24 (France).

[107] AHC, 'Corrigendum (n 74) art 1(1); AHC, 'United States of America: Addendum' (n 74) art IA(4); AHC, 'Provisional Draft' (n 74) art IC; AHC, 'Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 31 January 1950' (n 74) art IB; AHC, 'Draft Convention Relating to the Status of Refugees: Decisions of the Working Group Taken on 9 February 1950' (n 74) art 1B.

[108] CP, 'Summary Record of the 35th Meeting' (Geneva 25 July 1951) UN Doc A/CONF.2/SR.35 (3 December 1951) 43; see original UK proposal: CP, 'United Kingdom: Recommendation for Inclusion in the Final Act' UN Doc A/CONF.2/107 (25 July 1951).

[109] CP, 'Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference' UN Doc A/CONF.2/1 (12 March 1951) 5 (citations omitted). A former art 1F had

had felt that a general recommendation was called for to cover those classes of refugees who were altogether outside the scope of article 1A.[110]

Recommendation E reveals that the drafters of the 1951 Convention to some extent 'envisaged a complementary protection system'.[111] This statement needs further explanation to avoid any suggestion that the drafters envisaged a separate complementary protection system operating outside the Convention's parameters, which is not sustained when one considers the phrasing of the Recommendation. Certainly the Recommendation envisages the expansion of the Convention to encompass additional categories of refugees not provided for by the terms of article 1A(2).[112] Its wording makes clear that what is imagined is not a complementary status for such categories, but rather that the terms of the Convention itself would be extended by the General Assembly.[113] It expresses:

> the hope that the Convention relating to the Status of Refugees will have value as an example *exceeding its contractual scope* and that all nations will be guided by it in *granting* so far as possible to persons in their territory *as refugees* and who would not be covered by the terms of the Convention, *the treatment for which it provides*. (emphasis added)

Read in this way, Recommendation E is a most useful guiding principle in the complementary protection debate. Though aspirational rather than asserting a firm legal duty, the Recommendation helps to counter claims that the Convention is too restrictive to absorb the additional groups of refugees covered by complementary protection sources, or that the Convention was not intended to apply to additional groups. This interpretation is reinforced by an earlier version of the text, which was originally proposed as part of the Preamble to the Convention:

> Expressing the hope finally that this Convention will be regarded as having value as an example exceeding its contractual scope, and that without prejudice to any recommendations the General Assembly may be led to make in order to invite the High Contracting Parties to extend to other categories of persons the benefits of this Convention, all nations will be guided by it in granting to persons who might come to be present in their territory in the capacity of refugees and who would not be covered by the following provisions, treatment affording the same rights and advantages.[114]

provided: 'The Contracting States may agree to add to the definition of the term "refugee" contained in the present article persons in other categories, including such as may be recommended by the General Assembly'.

[110] CP, '35th Meeting' (n 108) 44.

[111] H Storey and others, 'Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?' (Joint ILPA/IARLJ Symposium, 6 December 1999) (copy with author) 4.

[112] CP '35th Meeting' (n 108) 44. In 1966, it was observed that Recommendation E of the Final Act had encouraged States to 'frequently accord the treatment provided for in the Convention to persons not falling within its terms': Proposed Measures to Extend the Personal Scope of the Convention relating to the Status of Refugees of 28 July 1951 (Submitted by the High Commissioner in Accordance with Paragraph 5(b) of General Assembly Resolution 1166 (XII) of 26 November 1957) (12 October 1966) UN Doc A/AC.96/346 [2].

[113] 'Comments on the Draft Convention and Protocol: General Observations' (n 61) 34.

[114] CP, 'Texts of the Draft Convention' (n 109) 2–3.

Recommendation E is important in two respects. First, with respect to eligibility, it encourages the extension of protection to individuals not encompassed by the Convention definition of a refugee. Secondly, with respect to substantive rights, it envisages the application of the Convention framework to persons covered by extended eligibility, tacitly recognizing that the source of the harm causing flight is irrelevant for the purposes of status. This is in fact the position adopted in the 1969 OAU Convention, which, as a regional complement to the Convention, applies Convention rights to persons fleeing external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of the country of origin.[115] This is very significant in light of EU developments, where subsidiary protection status instead results in a lower form of rights than Convention status. The Recommendation supports the argument that there is no justification for creating two levels of rights simply by distinguishing between the source of harm (or the legal basis for protection).

The Hungarian refugee crisis of 1956 provided the first real challenge to the article 1A(2) definition, and reflects the first example of widespread Refugee Convention-related complementary protection. The Hungarian refugees did not strictly fall within the temporal requirements of the Convention definition, however the High Commissioner determined that since their flight was related to recent events and political changes resulting from the end of the Second World War, they should be considered as falling within the Convention's scope.[116] Austria followed this interpretation when it granted asylum to 180,000 Hungarian refugees.[117] It issued them with normal refugee eligibility certificates as soon as technically possible, unless individual status determination showed that a person was not entitled to the Convention's benefits.

Most other States granted protection on a prima facie basis, at least initially.[118] Norway granted all Hungarian citizens a residence permit for one year that included permission to work, renewed automatically on request. After two years, they could request a permanent residence permit, which was mostly granted. It was only at this point that individual status determination took place, when the police had the opportunity to deny a permit 'in specially difficult cases (criminals)'.[119] The distinction between Hungarian refugees and Convention refugees in Norway lay in the grant of travel documents. If an individual had not left Hungary for an article 1A(2) reason, then he or she was not entitled to a Convention travel document but only to an alien's passport. In reality, this did not have a substantial impact on the rights received:

> This system has the advantage that if a refugee in Norway receives travel documents, he is thoroughly screened and found to be a political refugee. Of course every refugee receives

[115] OAU Convention art 1(2).

[116] UNHCR, 'The Problem of Hungarian Refugees in Austria' UN Doc A/AC.79/49 (17 January 1957) Annex IV [4].

[117] ibid.

[118] ibid [5].

[119] Letter from A Fjellbu (Norwegian Refugee Council) to P Weis (1 July 1959), in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

the benefit of the doubt. Also those with an alien's passport is not refused residence permit, and have all the social rights.[120]

The UK did not have a special eligibility procedure for Hungarian refugees but granted them the same rights as Convention refugees. As in Norway, the only distinction was with respect to travel documents. Hungarian refugees were only given a Convention travel document if they were considered to be firmly settled in the UK; in all other cases, they received the London travel document.[121] In Germany, Hungarian refugees were subject to a simplified eligibility procedure for recognition as Convention refugees and received Convention rights, including Convention travel documents. In Italy, two methods were employed for protecting Hungarian refugees. Some were given temporary asylum pending resettlement and were not examined by the Eligibility Commission. Other arrivals were individually examined and, as at the end of March 1957, 126 of 127 cases had been found to be Convention refugees.

A 1956 Resolution on Hungarian Refugees of the Consultative Assembly of the Council of Europe requested all Member States 'to accord to all of them who are able to work the facilities available under the system established by the Statute relating to refugees and provided for under the Geneva Convention of 1951'.[122] A memo by Paul Weis the following year revealed that:

> On the whole . . . no Government has, as far as we know, raised any objection to the application of the Convention to Hungarian refugees who otherwise fulfill the conditions of Article 1 of the Convention and it can, therefore, be assumed that the interpretation of the dateline of 1 January 1951 contained in Document A/AC.79/49 Annex IV is accepted by Governments parties to the Convention.[123]

Of course, it cannot be overlooked that the policy of declaring every Hungarian to be a refugee 'suited the ideological and racial preferences of western powers'[124]—Europeans fleeing Communism. Yet, in a sense, Recommendation E reflects an optimal system of complementary protection, operating more as a theoretical concept guiding the expansion of international protection within a broadened refugee law framework, than as a separately defined system of protection (as has been created in the EU). Although from a pragmatic perspective, some form of

[120] ibid.

[121] London Agreement relating to the Issue of Travel Documents to Refugees Who Are the Concern of the Intergovernmental Committee on Refugees (15 October 1946) 11 UNTS 73.

[122] Resolution adopted by the Committee on Population and Refugees (Vienna 15 October 1956) COE Doc 587, adopted with certain amendments by Permanent Commission (Paris 19 November 1956) acting for Consultative Assembly between sessions, in Interoffice Memorandum to Mr M Pagès, Director from P Weis, 'Eligibility of Refugees from Hungary' (9 January 1957) 22/1/HUNG [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

[123] Memo from P Weis to Mr J Mersch, UNHCR Branch Office in Luxembourg, 'Application of 1951 Convention to Hungarian Refugees' (28 May 1957) Ref.G.XV.7/1/8, 6/1/HUN [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

[124] Independent Commission on International Humanitarian Issues, *Refugees: The Dynamics of Displacement* (London 1986) 33, in G Melander, 'The Two Refugee Definitions' Raoul Wallenberg Institute of Human Rights and Humanitarian Law *Report No 4* (Lund 1987) 14.

codified complementary protection would seem necessary for States to acknowledge and fulfil their international obligations,[125] the international law regime in principle already contains sufficient safeguards.

D Complementary Protection and International Law

At first glance, it appears that international law has little to say about the relatively amorphous concept of complementary protection. Just as 'protection' is not defined, the term 'complementary protection' appears in no international treaty and has no singular connotation in State practice. In 2005, the Executive Committee of UNHCR (ExCom) adopted the first international Conclusion specifically on 'complementary forms of protection',[126] but did not attempt to define the concept. The Conclusion's Preamble suggests that it encompasses 'cases not addressed by the 1951 Convention and its 1967 Protocol', including persons covered by the extended refugee definitions in the OAU Convention, the Cartagena Declaration,[127] the EU Qualification Directive, 'persons who are unable to return in safety to their countries of origin as a result of situations of conflict',[128] and others catered for in State practice.[129] Furthermore, despite the range of domestic incarnations of complementary protection, such as 'de facto refugee status', 'B status', 'war refugees', 'humanitarian asylum', 'OAU/Cartagena-type refugees, externally or internationally displaced persons, persons fleeing danger, victims of violence . . . and Temporary Protected Status cases',[130] the term itself remains absent from national legislation.[131] The EU Qualification Directive,

[125] This is the view expressed in Storey and others (n 111) 14.

[126] ExCom Conclusion No 103 (n 7). On the recommendation for an ExCom Conclusion: UNHCR, *Agenda for Protection* (2nd edn March 2003) 36 (Goal 1, Objective 3); for text of early preliminary draft: UNHCR, Global Consultations, 'Complementary Forms of Protection' UN Doc EC/ GC/01/18 (4 September 2001) [11].

[127] Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85).

[128] ExCom Conclusion No 103 (n 7) Preamble, expressly drawing on ExCom Conclusion No 74 (XLV) 'General Conclusion on International Protection' (1994) (l).

[129] The Preamble and paragraph (e) of ExCom Conclusion No 103 (n 7) appear to regard stateless persons who are not Convention refugees, not as persons who should benefit from complementary protection, but rather as covered by the two statelessness treaties: the 1954 Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 and the 1961 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175. As a matter of principle, this is correct. However, the statelessness treaties are not widely ratified or implemented domestically. Where there is no domestic means for a stateless person to obtain the status for which international law provides, then complementary protection may be an appropriate response.

[130] UNHCR, 'Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note' UN Doc EC/1992/SCP.CRP.5 (2 April 1992) [16].

[131] Bouteillet-Paquet (n 9) 226. For additional examples: Parliamentary Assembly (Council of Europe) (PA), *Report on the Situation of* de facto *Refugees* (5 August 1975) Doc 3642 'Explanatory Memorandum' [41]. UNHCR notes that European States (in particular) have been reluctant to

which is the first supranational instrument to outline a comprehensive complementary protection regime, adopts the term 'subsidiary protection' instead. In addition to codifying broadened threshold eligibility for international protection beyond article 1A(2), this regime prescribes a legal status inferior to Convention refugee status. 'Subsidiary protection' is thus a regionally-specific political manifestation of the broader legal concept of complementary protection, and is examined in Chapter 2.

1 Institutional vis-à-vis State Expansion: Temporary Refuge

Whereas UNHCR's institutional mandate[132] has been extended by UNGA,[133] the text of the Convention definition has remained static, apart from the 1967 Protocol's removal of its temporal and geographical restrictions. The result is a 'disjuncture between the functional responsibilities of UNHCR and the legal obligations of States'[134] under international law.[135]

In Africa and Latin America, the OAU Convention and Cartagena Declaration respectively contain extended refugee definitions which codify institutional practice.[136] Accordingly, in those regions, States' protection responsibilities extend beyond article 1A(2) of the 1951 Convention to encompass flight from 'external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality',[137] and 'generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'.[138]

State practice relating to extra-Convention refugees in Europe and other western countries has been characterized by highly varied ad hoc national responses, premised largely on executive discretion.[139] Despite three decades of discussions at the European and international levels to create a harmonized, legal approach to complementary protection, and the significant jurisprudence developed by the European Court of Human Rights on *non-refoulement* under article 3 ECHR,[140]

label such persons as 'refugees', eschewing the protection responsibilities which that term implies: UNHCR, 'Towards a Common European Asylum System' in CDU de Sousa and P de Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant, Brussels 2004) 242.

[132] For background: Jackson (n 55); C Ruthström-Ruin, *Beyond Europe: The Globalization of Refugee Aid* (Lund UP, Lund 1993); UNHCR (Dept of Intl Protection), 'Categories of Persons to Whom the High Commissioner is Competent to Extend International Protection' (IOM/FOM (no number) 5 August 1981).

[133] Set out in Perluss and Hartman (n 10) 584 fn 153; see also A/RES/1167(XII) of 26 November 1957; A/RES/1388(XIV) of 20 November 1959; A/RES/1499(XV) of 5 December 1960; A/RES/1671(XVI); A/RES/1673(XVI) of 18 December 1961.

[134] Goodwin-Gill (n 1) 12.

[135] For the dimensions of the gap: UNHCR, 'Protection of Persons of Concern' (n 130) [1].

[136] UNHCR (Dept of Intl Protection) (n 132) [31]; Melander 1987 (n 124) 10. For distinctions between the OAU and Cartagena definitions: UNHCR, 'Protection of Persons of Concern' (n 130).

[137] OAU Convention art 1(2).

[138] Cartagena Declaration art III(3).

[139] H Storey and others (n 111) 3.

[140] This is discussed in detail in Chapter 4.

it was only in 2004 that a binding legal instrument was adopted in the EU, and in late 2005 that a non-binding ExCom Conclusion was agreed at the international level.

Yet, despite the lack of international or regional instruments in western States specifically protecting refugees falling outside article 1A(2),[141] State practice has consistently revealed a dominant trend of offering some form of protection to 'persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin'.[142] In practice, States respect a right of refuge in cases of grave and urgent necessity, and no State has formally denied that such a right exists.[143] UNHCR asserts that persons fleeing 'serious danger resulting from unsettled conditions of civil strife' are protected from removal by a customary norm that has achieved the status of *jus cogens*.[144] A 1994 Council of Europe Parliamentary Assembly Recommendation observed that most Member States allowed rejected asylum seekers to remain in their territory on humanitarian grounds, 'particularly on account of international or domestic armed conflicts, serious violations of human rights or lack of democracy'.[145] In fact, according to Jackson, States have historically implemented similarly generous refugee policies paralleling institutional action (such as Austria's response to Hungarian refugees), with more restrictive national policies only taking hold in the 1980s.[146]

Although some States have sought to characterize such protection as a sovereign humanitarian act or a duty under national (including constitutional) law, rather than deriving from any international obligation,[147] others have acknowledged that their legal obligations encompass protection beyond the 1951 Convention's scope.[148] Perluss and Hartman's illuminating 1986 study demonstrated the emergence of a customary norm of 'temporary refuge' at the intersection of refugee law, humanitarian law, and human rights law,[149] which prohibited States from forcibly repatriating foreigners who had fled generalized violence and other threats caused by internal armed conflict within their own State, until the violence ceased and the home State could assure the security and protection of its

[141] See eg UNHCR, 'Protection of Persons of Concern' (n 130) [14].
[142] UNHCR, 'Note on International Protection' (n 15) [39].
[143] Coles (n 88) 21.
[144] Report of UNHCR to ECOSOC (1985) UN Doc E/1985/62 [22]–[23].
[145] PA Recommendation 1237 (1994) on the Situation of Asylum-Seekers Whose Asylum Applications Have Been Rejected [4].
[146] Jackson (n 55); see also PA Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe [2]–[3].
[147] UNHCR, 'Note on International Protection' (n 15) [40]; UN Doc A/AC.96/SR.430 (1988) [42] (Switzerland); Summary Records 36th Session, UN Doc A/AC.96/SR.391 (1985) [72] (The Netherlands); UN Doc A/AC.96/SR.418 (1987) [71] (Germany); UN Doc A/AC.96/SR.518 (1997) [12] (Italy).
[148] See eg UN Doc A/AC.96/SR.374 (1985) [57]–[60] (Tunisia and France); UN Doc A/AC.96/SR.507 (1996) [60] (US); UN Doc A/AC.96/SR.508 (1996) [5] (Sweden); UN Doc A/AC.96/SR.511 (1996) [6] (Egypt); UN Doc A/AC.96/SR.527 (1998) [9] (UK), [40] (Belgium), [44] (France).
[149] Perluss and Hartman (n 10).

nationals.[150] Goodwin-Gill supported this view, arguing that 'the essentially moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation (albeit at a relatively low level of commitment)'.[151] This has since been buttressed and extended by the expanded principle of *non-refoulement* in human rights law, examined in Chapters 3–5.

Although the norm of temporary refuge pertains specifically to large-scale influx, representing the legal foundation of subsequent formalized temporary protection regimes,[152] there is nothing intrinsic preventing its application to *individuals* fleeing generalized violence. Accordingly, complementary protection is its 'individual' counterpart, extending protection to single or small group arrivals on the same humanitarian basis. This was recognized by the High Commissioner in 1985, who stated that temporary refuge was encompassed within the principle of *non-refoulement*, requiring that 'no person shall be subjected to such measures as rejection at the frontier, or, if he has already entered the territory, expulsion or compulsory return to any country where he may have reason to fear persecution *or serious danger resulting from unsettled conditions or civil strife*'.[153] This section of the chapter traces State responses to individual protection needs complementary to the Convention regime, which can be seen, in part, as a logical—and legal—extension of temporary protection developed in response to mass influx.

(a) Developments at the European level

In 1976, the Council of Europe sought to harmonize European State practice[154] relating to the 'socially and legally . . . precarious position'[155] of de facto refugees through the adoption of a non-binding Recommendation 773.[156]

'De facto refugees' were defined in the Recommendation as 'persons not recognised as refugees within the meaning of Article 1 of the [Refugee] Convention . . . and who are unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin'.[157] Drawing explicitly on the language

[150] ibid 554. For examples: 571ff. [151] Goodwin-Gill (n 10) 898.

[152] J Fitzpatrick, 'Human Rights and Forced Displacement: Converging Standards' in AF Bayefsky and J Fitzpatrick (eds), *Human Rights and Forced Displacement* (Martinus Nijhoff Publishers, The Hague 2000) 8.

[153] Report of UNHCR to ECOSOC (1985) UN Doc E/1985/62 [22] (emphasis added).

[154] Sweden was the first western European State to legislate on de facto refugees (1975 amendment to Aliens Act 1954), followed by Denmark and The Netherlands.

[155] PA Report (n 131) 'Explanatory Memorandum' [9].

[156] The term 'de facto refugee' came from a study by Anne Paludan of Denmark on 'The New Refugees in Europe', undertaken for a Working Group on Refugees and Exiles in Europe. Other suggested terms were 'refugees without official status' and 'non-statutory refugees': P Weis, 'Convention Refugees and de facto Refugees' in G Melander and P Nobel (eds), *African Refugees and the Law* (Scandinavian Institute of African Studies, Uppsala 1978) 17; PA Report (n 131) 'Explanatory Memorandum' [3].

[157] PA Recommendation 773 (1976) on the Situation of *de facto* Refugees [1]. This definition was one considered by the Report of the Group of Governmental Experts on International Co-operation

of article 1A(2) of the Convention, the definition directly extends that refugee conceptualization—complementing Convention protection. However, taken as a whole, the Recommendation considerably widened the refugee concept, with non-exhaustive grounds for non-return and no persecution nexus requirement.

The Recommendation considered that de facto refugees 'need[ed] a more favourable treatment than that accorded to aliens in general' since they lacked the option of returning home.[158] Although it advocated the drafting of an agreement 'mak[ing] applicable to *de facto* refugees as many articles as possible of the Convention relating to the Status of Refugees of 28 July 1951',[159] its operative paragraphs stated only that States should be encouraged not to expel de facto refugees or subject them to restrictions regarding their political activities.[160] In this connection, Weis recalled that the main disability of de facto refugees was their lack of Convention status.[161] He considered the best solution to be 'an agreement extending the definition of the 1951 Convention so as to cover *de facto* refugees', but, correctly, considered it politically unlikely in the near future.[162] Despite frequent calls for a binding European instrument on the codification of complementary protection,[163] none was concluded until 2004.

(b) International level

It was not until the late 1980s that States began to concertedly address the concept of complementary protection at the international level.[164] The first concentrated analysis of the appropriateness of the 1951 Convention definition to contemporary refugee situations was undertaken at the UNHCR-convened San Remo Round Table of 1989 on the protection of refugees in non-international armed conflicts. The Round Table noted the necessity of 'supplementing the traditional principles of law and doctrine with complementary new principles',[165] in particular focusing on human rights law as a primary source for refugee protection at all stages of the refugee process.[166]

to Avert New Flows of Refugees, Annex to 'International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General' UN Doc A/41/324 (13 May 1986) 24.

[158] Recommendation 773 (n 155) [3]. [159] ibid 5I(b). [160] ibid 5II.

[161] See national examples: Weis (n 154) 20. [162] ibid 22.

[163] Recommendation 773 (n 155) [4]; Committee of Ministers (Council of Europe) Recommendation R 81 (16) on the Harmonisation of National Procedures relating to Asylum; PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers, 4(ii)–4(iii); PA Recommendation 787 (1976) on Harmonisation of Eligibility Practice under the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol; PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers, 6(ii); PA Recommendation 1088 (1988) on the Right to Territorial Asylum, 10(iii)–10(iv); PA Recommendation 1236 (1994) on the Right of Asylum, 8(iii)(c); PA Recommendation 1237 (n 146) 8(iii).

[164] The Council of Europe had adopted recommendations since the mid-1970s: PA Report (n 131).

[165] 'Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees' (San Remo Italy, 12–14 July 1989) [8], Annex to UNHCR, 'Solution to the Refugee Problem and the Protection of Refugees' (SCIP) UN Doc EC/SCP/55 (23 August 1989). The experts, governmental and non-governmental, attended in a personal capacity.

[166] ibid [33], Conclusion [13]. See also UNHCR, 'Note on International Protection' No 62 (XLI) (1990).

It criticized national extra-Convention responses such as 'tolerance' permits, which were typically ad hoc, unstructured, and provided only informal protection, leaving refugees in a legal 'limbo'.[167] While *non-refoulement* 'without more' might be acceptable for a very limited period (such as an emergency situation), the Round Table experts considered it unjust 'to deprive a human being of a community for many years, especially where the person lived under a continuing threat of expulsion'.[168]

A 1991 Working Group, established at ExCom's request,[169] identified seven categories of persons in need of international protection (based on relevant international instruments and UNHCR's mandate as extended by various UNGA resolutions).[170] It noted that the 1951 Convention and its 1967 Protocol were useful models for 'protection of persons fleeing a more generalized threat to their security'.[171] However, given concerns that States were not politically prepared to broaden the refugee definition through a new international instrument,[172] the Working Group recommended that the OAU Convention and Cartagena Declaration be used 'as examples on which States elsewhere might wish to draw in developing their own *national* legislation',[173] since they addressed 'protection and assistance needs not exclusive to these regions'.[174] Viewing these regional instruments as syntheses of institutional and State mandates, the Working Group argued that 'it was illogical from a legal and moral point of view to provide legal status as a refugee to a person if (s)he stayed in his/her region of the world, but not if (s)he left it'.[175]

Even though this outcome may not appear innovative, it was significant for two reasons. First, the Working Group placed the question of an expanded refugee definition on the international agenda. Although the question of an extended international definition was deferred, it was not rejected. Secondly, the suggested protection models—the OAU Convention and the Cartagena Declaration—revert to the 1951 Convention as the blueprint for legal status. Accordingly, reliance on these instruments discloses the view that the Convention itself provides an appropriate legal status for extra-Convention refugees,[176] and that complementary protection does not equate to subsidiary rights.

A 1992 Discussion Note, revealing the most comprehensive analysis of complementary protection up to that time, identified five categories of persons of

[167] Annex to UNHCR (n 163) [55]. [168] ibid. Examined further in Chapter 6.

[169] ExCom Conclusion No 56 (XL) 'Durable Solutions and Refugee Protection' (1989) (c).

[170] ExCom, 'Report of the Working Group on Solutions and Protection to the 42nd Session of the Executive Committee of the High Commissioner's Programme' UN Doc EC/SCP/64 (12 August 1991) [8]. See also Report of the Group of Governmental Experts (n 155).

[171] ExCom, 'Report of the Working Group' (n 170) [11]. [172] ibid [25].

[173] ibid Recommendation 55(b) (emphasis added); see also UNHCR, 'Note on International Protection' (n 15) [35]; UNHCR, 'Note on International Protection' (2000) (n 10) [40]–[41].

[174] ExCom, 'Report of the Working Group' (n 170) Observation 54(e).

[175] ibid [12]. See also UNHCR, 'Protection of Persons of Concern' (n 130) [1].

[176] ExCom, 'Report of the Working Group' (n 170) [11]; See Annex to UNHCR (n 165) Conclusion [12].

concern to UNHCR: (a) those who fall under the Statute/1951 Convention definition and thus are entitled to benefit from the full range of UNHCR's functions; (b) those who belong to a broader category but have been recognized by States as being entitled to both the protection and assistance of UNHCR; (c) those to whom the High Commissioner extends his 'good offices', mainly but not exclusively to facilitate humanitarian assistance; (d) returning refugees, for whom the High Commissioner may provide reintegration assistance and a certain amount of protection; and (e) non-refugee stateless persons whom UNHCR has a limited mandate to assist.[177] For the purposes of devising an expanded protection regime, the Note stated that those in category (b) were of most interest, and typically included persons covered by the definitions in the OAU Convention and the Cartagena Declaration.

The Note concluded that the common elements of existing complementary protection approaches included a generalized threat to physical safety or security, external displacement, and a temporary protection need, and that these would presumably provide the basis for determining categories of beneficiaries of any new protection framework. It was uncritical of the notion of such protection as temporary, noting that '[f]or the very large majority of persons of concern in the present context, return at some point will be the only available solution'.[178] Whether this is a pragmatic assessment based on large numbers or on the fact that once a civil war has finished, return may be possible, was not explained in the Note. Although it reflected western State practice, it was not a component of protection under the OAU Convention or Cartagena Declaration and appears to have been adopted without thorough inquiry into whether it was legally justifiable or necessary.[179] However, a concomitant right attaching to temporary protection was the right to return to the country of origin, including assistance to return once it was safe to do so. Accordingly, standards for assessing 'safety' needed to be determined.

For the first time, the minimum content of a complementary protection regime was outlined, contrasting markedly to earlier models that simply extended the Convention to additional classes of refugees. No explanation was given as to why different standards were contemplated, given that both the OAU Convention and the Cartagena Declaration apply the Refugee Convention in this respect.[180] Recommended standards were based predominantly on the 1981 ExCom Conclusion No 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx.[181] Yet, at the same time, the Note concluded that:

> There is nothing in the Convention definition which would exclude its application to persons caught up in civil war or other situations of generalized violence. Refugees are refugees

[177] UNHCR, 'Protection of Persons of Concern' (n 130) [11]. [178] ibid [7].

[179] This aspect is discussed in Chapter 2 in the context of the Qualification Directive.

[180] The Cartagena Declaration also refers to the standards in the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) and ExCom Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) as additional protection safeguards: [8].

[181] UNHCR, 'Protection of Persons of Concern' (n 130) [20]–[21].

when they flee or remain outside a country for reasons pertinent to refugee status, whether these reasons arise in civil war type situations, in international armed conflict or in peace time. Possibilities for identifying these persons should, therefore, not be precluded, but rather specifically provided for.[182]

Despite general agreement that ad hoc national responses should be strengthened into a harmonized codified protection regime to avoid differential treatment, uncertainty, and unequal burden-sharing,[183] there remained disagreement about the best means of fulfilling this task. Adopting an additional Protocol to the Convention was canvassed but discouraged as a solution, in particular because to do so would 'include the danger thereby of reopening fundamental principles and precepts in the Convention itself for further consideration'.[184] Instead, it was suggested that national legislation should first be addressed to ensure that it conformed with international and regional standards, by reference to instruments, arrangements, and internationally endorsed guidelines such as ExCom conclusions. A subsequent development could then be the establishment of an international universal regime, in the first instance through an UNGA resolution annexing a declaration, followed by a new international convention or additional regional instruments. It was noted, however, that 'this would, in all likelihood, be an ambitious and controversial endeavour'.[185]

A 1994 Note proposed four alternatives as a means of establishing an explicit[186] international complementary protection regime: a new convention, a declaration of guiding principles, regional harmonization, or concerted approaches in specific situations. UNHCR was of the opinion that while a new international instrument—'an OAU refugee Convention writ large'[187]—was the most attractive option, realistically there seemed to be little inclination by States to incur further legal obligations in relation to asylum.[188] Ironically, just as States were extending UNHCR's mandate to refugees in large-scale influxes and displaced persons in refugee-like situations,[189] their domestic policies began to oppose a general widening of the refugee definition.[190] Accordingly, it was feared that any formal renegotiation of the Convention definition could lead to a more restrictive policy with respect to States' international obligations. A set of guiding principles was therefore advocated as the most realistic means of obtaining a formalized

[182] ibid [21]. [183] ibid [3]; cf ExCom, 'Report of the Working Group' (n 170) [25].

[184] ExCom, 'Report of the Working Group' (n 170) [25]; UNHCR, 'Protection of Persons of Concern' (n 130) [7]. [185] UNHCR, 'Protection of Persons of Concern' (n 130) [9].

[186] As opposed to the 'implicit', existing complementary protection regime comprising various human rights treaties and customary international law, whose meaning varies depending on the content of States' international and regional legal obligations.

[187] UNHCR, 'Note on International Protection' (n 15) [52]. [188] ibid [53].

[189] eg UNGA Res 1499 (XV) of 5 December 1960; 1673 (XVI) of 18 December 1961; 1959 (XVIII) of 12 December 1963; 2294 (XXII) of 11 December 1967; 3143 (XXVIII) of 14 December 1973.

[190] Goodwin-Gill (n 1) 12. This was also affirmed by the 1977 Conference on Territorial Asylum: Melander 1987 (n 124) 11; A Grahl-Madsen, *Territorial Asylum* (Almqvist and Wiksell International, Stockholm 1980) 61ff.

commitment by States about providing protection to refugees fleeing from armed conflict (for which there was broad international consensus),[191] with harmonized regional approaches cited as 'perhaps the most promising option for strengthening protection'.[192] Although ad hoc responses by States to particular emergencies such as those in Indo-China in the 1980s and the former Yugoslavia in the 1990s were described as 'extremely effective in mobilizing international support on behalf of specific groups of refugees', not least due to public awareness and media attention, they were dismissed as a complementary protection model because they were not considered 'reliable . . . for ensuring the protection of refugees fleeing less accessible conflicts'.[193]

It was not until 1994 that ExCom expressly acknowledged the link between States' Convention obligations and their other international legal duties under instruments such as the CAT and the ECHR, stating that 'many of these countries are parties to other international instruments that could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would [be] in jeopardy'.[194] Up until then, extended obligations had been discussed in very general terms. At the same time, the Council of Europe Parliamentary Assembly explicitly acknowledged that States' international protection obligations were 'based on the 1951 Geneva Convention *and* the Convention for the Protection of Human Rights and Fundamental Freedoms—remembering that *the latter also implies obligations vis-à-vis persons who are not necessarily refugees in the sense of the 1951 Geneva Convention*'.[195]

Given States' political reluctance 'to undertake internationally binding obligations towards refugees beyond those that they have already assumed',[196] attention to existing human rights obligations becomes fundamental—they already provide a regime which extends to persons outside the scope of the Convention. Even in States where the Refugee Convention does not directly apply, refugees, asylum seekers, and displaced persons remain protected by 'the general principles of international law, the humanitarian practices of international organizations, the principle of humanity, and guarantees of fundamental human rights'.[197]

Within the framework of this existing body of international law, three sets of principles have tended to develop separately, although in parallel, where they could perhaps have been linked more closely at an earlier stage. These are the law of refugee protection, human

[191] UNHCR, 'Note on International Protection' (n 15) [54]. [192] ibid [55].
[193] ibid [56]. [194] ibid [40].
[195] Recommendation 1236 (n 163) 8(iii) (emphasis added); see also PA Recommendation 1309 (1996) on the Training of Officials Receiving Asylum-Seekers at Border Points, 7(ii)(a), referring to the 'basics of asylum law' as including the ECHR.
[196] UNHCR, 'Note on International Protection' (n 15) [44]; but note UNHCR, 'Note on International Protection' UN Doc A/AC.96/898 (3 July 1998) [11].
[197] UNHCR, 'Note on International Protection (submitted by the High Commissioner)' UN Doc A/AC.96/777 (9 September 1991) [56].

rights law generally and humanitarian law. Together, these three domains of law—which, in reality, are closely interrelated and often overlap—should ideally permit an individual to assert a claim, not only against his or her own country or, in certain situations, another country, but on the international community as whole—a claim to its direct involvement on humanitarian grounds. In other words, where Governments fail to recognize individual claims, or where there is no effective Government to which an individual in the first instance might turn, there is a pressing need for that person to be able to assert a claim more broadly. The international community seems already to be moving in this direction as a result of recent events and there might be value in examining how the legal foundations of this development could be strengthened.[198]

2 'Subsidiary' versus 'Complementary' Protection

Although 'subsidiary protection' is sometimes used, it may also have some weak normative significance. By entrenching a hierarchical protection structure, the Qualification Directive relegates complementary protection in the EU to an intrinsically secondary role. Although it is sometimes used interchangeably with 'complementary protection',[199] it is better characterized as a narrow form of complementary protection.

UNHCR's former Director of International Protection, Erika Feller, criticized States' increasing use of subsidiary forms of protection as a means of restricting asylum 'on their own terms', arguing that subsidiary protection implies less binding obligations on States than their obligations under international law.[200] For example, Parliamentary Assembly Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe explained that rising numbers of asylum seekers in the early 1990s, resulting in processing difficulties and public hostility stemming from economic and social tensions, led to the majority of Council of Europe Member States introducing restrictive asylum legislation, in particular through the extension of concepts such as 'temporary protected status' and 'the right to stay on humanitarian grounds'.[201] UNHCR is critical of approaches that shift Convention refugees into subsidiary protection categories,[202] especially where they could 'very

[198] ibid; see also UNHCR (n 19) [1].

[199] ExCom, 'Summary Record of the 541st Meeting' (Geneva 7 October 1999) UN Doc A/AC.96/SR.541 (6 January 2000) [9]. This is the first time 'subsidiary protection' was mentioned at the international level.

[200] ExCom, 'Summary Record of the 540th Meeting' (Geneva 7 October 1999) UN Doc A/AC.96/SR.540 (12 October 1999) [44]. The Nordic States' relatively generous complementary protection is counterbalanced by very low recognition rates of Convention refugees. In Denmark, the ratio was approximately one-third Convention refugees to two-thirds de facto refugees: KU Kjær, 'The Abolition of the Danish *de facto* Concept' (2003) 15 IJRL 254, 258.

[201] Recommendation 1327 (n 144) [2]–[3].

[202] Within Europe, three groups were commonly the subject of interpretational disputes: persons fearing persecution by non-State agents; persons fleeing persecution in areas of on-going conflict; and

probably be [encompassed] by a liberal interpretation of the 1951 Convention'.[203] This not only denies refugees their entitlements under international law to Convention protection, but can be seen as an attempt to remove them beyond the reach of international scrutiny. There is a danger of soft law edging out hard law obligations by 'diluting principles and fudging standards'.[204]

In December 2001, representatives of the Contracting States to the Convention adopted a Declaration '[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope'.[205] UNHCR has repeatedly called for States to respect the primacy of the Convention.[206] In 1994 and 1995, the General Assembly passed two resolutions reiterating

> the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status *or, as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted such protection*, while not diminishing the protection afforded to refugees under the terms of the 1951 Convention, the 1967 Protocol and relevant regional instruments.[207]

Jackson views this paragraph as cementing the primacy of the Refugee Convention and, depending on how 'refugee' is interpreted under these instruments, 'as attributing a complementary and residual character to the "additional" category'.[208] However, an alternative reading would be that the Convention and Protocol provide the minimum level of protection that ought to be accorded to all persons with an international protection need, and that in extending protection to additional categories of refugees, these minimum standards should not be jeopardized.

Creating a protection hierarchy reflects a very literal interpretation of respecting the Convention's primacy. Simply entrenching the Convention as the pinnacle of protection does not engage with the underlying protection principles it reflects, and may in fact undermine its primacy by siphoning refugees into complementary categories. Conceptually, the affirmation of the Convention's primacy is, in effect, a commitment to respect its protection principles and refrain from diluting

persons fearing gender-related persecution. In eight EU Member States, the identity of the agent of persecution was irrelevant: Belgium, Denmark, Finland, Greece, Luxembourg, The Netherlands, the UK, and Sweden. Denmark, Finland, Italy, Spain, and Sweden provided only subsidiary protection for gender-related persecution.

[203] UNHCR (Dept of Intl Protection) (n 132) [34]; Recommendation 787 (n 163) [1], [3], [4].

[204] Goodwin-Gill (n 10) 914.

[205] Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees (Geneva 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) <http://www.unhcr.ch/cgi-bin/texis/vtx/protect> Preamble [2], [4] [Accessed: 18 February 2003].

[206] eg ExCom, 'Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee: Report of the First Meeting in the Third Track (8–9 March 2001) UN Doc A/AC.96/961 [14] [Accessed: 27 June 2002].

[207] UNGA Res 49/169 of 23 December 1994 [5]; UNGA Res 50/152 of 21 December 1995 [5] (emphasis added).

[208] Jackson (n 55) 431.

its scope by developing the law outside its boundaries. The Convention's primacy would be better observed if it were recognized as the source of international protection status for all persons protected by the principle of *non-refoulement*, consistent with Recommendation E of the Final Act and the OAU Convention model. Creating a hierarchy of statuses may lead to States 'defining out' categories of persons who legitimately fall within article 1A(2) of the Refugee Convention, so as to avoid the more comprehensive entitlements that States must accord to Convention refugees. Procedurally, it may also create an incentive for beneficiaries of subsidiary protection to appeal in an attempt to 'upgrade' their status.[209]

Furthermore, the hierarchical structure places considerable emphasis on the interpretation of article 1A(2) of the Convention, since differential status makes it imperative to accurately determine whether or not an individual meets the Convention definition. A report of the International Association of Refugee Law Judges found that although decision-makers in most States implicitly incorporate a human rights approach in their analysis of 'persecution',[210] this diminishes relative to the number of different asylum options available in that State. In other words, where a complementary status exists, decision-makers may be less likely to test the boundaries of 'persecution'.[211] This is particularly problematic where complementary status does not equate to Convention status.

E Conclusion

This chapter explored the development of complementary protection from the earliest international agreements through to the 1951 Convention. By examining the human rights context in which the Convention was drafted, and its scope for expansion, it showed the capacity of human rights law to extend the Convention's application to beneficiaries beyond article 1A(2). This is analysed further in Chapters 3–5.

The next chapter turns to the development of the EU Qualification Directive. The drafting process reveals the political compromises that have turned the legal concept of 'complementary protection' into the political concept of 'subsidiary protection', fleshing out some of the problems identified above. The impetus behind the Directive was to ensure that the laws and practices of the EU Member States were harmonized to provide a minimum level of protection to extra-Convention refugees, preventing refugee flows based solely on differing levels of protection in

[209] House of Lords Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office, London 2002) [102], [111]. The Minister (Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office) acknowledged that this already happens. For a discussion of appeal processes, see J McAdam, 'Complementary Protection and Beyond: How States Deal with Human Rights Protection' UNHCR *New Issues in Refugee Research* Working Paper No 118 (Geneva August 2005).

[210] IARLJ (n 81) 8. [211] ibid 3.

different States.[212] However, harmonization has enabled a considerable narrowing of best practice, both in terms of threshold eligibility (restricted to three tightly defined categories) and resultant legal status, and has created new gaps in the protection regime.

[212] 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 September 2001) 4.