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A Counterbalancing Exception: The Refugee Concept as a Normative Idea

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Abstract

The refugee concept is a point of normative contentions. While the state is generally considered free to regulate access to its territory, the refugee concept refers to an exceptional claim to access. The article explores origin and structure of this concept and its legal codification. The term "refugee" emerges in the 17th century, a time in which the political order changes. In the developing framework of the territorial state, the territorial community is viewed as basis of all law. Against the general rule that the state is free to regulate access, political philosophers recognize in different versions the existence of an exception: that the state has an obligation towards the stranger at its border who otherwise faces serious harm. This normative idea of an exception successively joins with the refugee concept. It responds to the basic tension in the territorial state framework, which is based on universalist principles of human equality and freedom, while delimitating rights and obligations along territorial borders. The refugee concept reflects the idea that this delimitation must be corrected in extreme cases for the tension to remain tolerable. In that role of a constitutive exception, the refugee concept forms today both an object and an engine of critique: it can be seen to bolster the state's discretion in regulating entry, yet it can also assume a role in unsettling this prerogative, representing a cosmopolitan rights claim.

French Translation

Le concept de réfugié est un point de controverse normatif. Alors que l'État est généralement considéré comme libre de réglementer l'accès à son territoire, le concept de réfugié fait référence à une demande exceptionnelle d'accès. L'article explore l'origine et la structure de ce concept et sa codification juridique. Le terme "réfugié.e" apparaît au XVIIe siècle, une époque où l'ordre politique change. Dans le cadre de l'évolution de l'État territorial, la communauté territoriale est considérée comme la base de tout droit. Contre la règle générale selon laquelle l'État est libre de réglementer l'accès, les philosophes politiques reconnaissent dans différentes versions l'existence d'une exception : que l'État a une obligation envers l'étranger à sa frontière qui, autrement, risque de subir un préjudice grave. Cette idée normative d'exception rejoint successivement le concept de réfugié. Elle répond à

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la tension fondamentale du cadre de l'État territorial, qui est fondé sur les principes universalistes d'égalité et de liberté de l'être humain, tout en délimitant les droits et les obligations le long des frontières territoriales. Le concept de réfugié reflète l'idée que cette délimitation doit être corrigée dans les cas extrêmes pour que la tension reste tolérable. Dans ce rôle d'exception constitutive, le concept de réfugié constitue aujourd'hui à la fois un objet et un moteur de critique : on peut considérer qu'il renforce le pouvoir discrétionnaire de l'État dans la réglementation de l'entrée, mais il peut aussi jouer un rôle dans le dérèglement de cette prérogative, en représentant une revendication de droits cosmopolite.

Spanish Translation

El termino refugiado/a es un concepto que genera contención normativa. Aun cuando generalmente le compete al estado regular el acceso de individuos dentro de su territorio, el concepto de refugiado/a hace un llamado excepcional a este acceso. El articulo explora el origen y la estructura de este concepto y su codificación legal. El termino "refugiado/a" surge en el siglo XVII, en un momento histórico en el que el orden político cambia. En el marco que surge alrededor del estado territorial, la comunidad territorial es considerada la base legal. En contraposición a la regla general de que el estado es libre para regular el acceso al mismo, los filósofos políticos identifican una excepción: que el estado tiene una obligación a los extranjeros que acuden a su frontera con el objetivo de evitar un daño serio a su persona. De la idea normativa de esta excepción se deduce el concepto de refugiado/a. Responde a la tensión elemental que existe en el marco normativo territorial que esta basado en principios universalistas de equidad y libertad humana, al mismo tiempo que delimita los derechos y obligaciones relacionados con las fronteras territoriales. El concepto de refugiado/a refleja la idea de que esta delimitación debe corregirse en casos extremos para permitir que esta tensión sea manejable. Ante la presencia de esta excepción constitutiva, el concepto de refugiado/a presenta hoy en día tanto un objeto como un propulsor de critica: puede fortalecer la discreción del estado en regular el acceso territorial a la vez que pudiera poner en entredicho esta prerrogativa, representando una demanda de derecho cosmopolita.

Introduction

Conversations about the topics of migration and refugees regularly include debates regarding the proper use of terms. One illustrating instance was in the summer of 2015 when the broadcaster *Al Jazeera* announced that it would no longer use the term "migrants" to refer to persons risking their lives to reach Europe *via* the Mediterranean Sea, but would instead use "refugees."[1] The article calls out media outlets on their dehumanizing use of the term "migrants," emphasizing the severe reasons that force persons to flee. The majority of persons trying to cross the Mediterranean from Turkey to Greece were Syrians, along with others from Afghanistan, Iraq, and elsewhere. The situation in Syria was especially well known to the European public, as were the circumstances in surrounding countries such as Lebanon, Jordan, and Turkey, all of which received many refugees while their reception conditions successively deteriorated, making the dangerous journey onwards the sole choice for many. But, what exactly does *Al Jazeera's* statement refer to when it speaks of "refugees"? The article does not explicitly mention the definition of "refugee" in international law, although its mention of the UN High Commissioner for Refugees (UNHCR) references international legal structures. In contrast to the pejorative use of the term "migrants" that the article decries, "refugee" is taken to signify the recognition of a legitimate claim.

The fact that the term "refugee" is taken to indicate a legitimate claim is seen in other instances as well. Earlier, in January 2014, persons from mostly Eritrea and Sudan were protesting in southern Tel Aviv, holding up "We are refugees" signs.[2] While these signs referenced a legal distinction between "economic migrants" – the label they opposed – and "refugees," they also seemed to appeal to a moral recognition by the public. The power of the refugee notion is equally visible in the "real refugee" trope, which is mostly used in negation. In that vein, the Daily Mail wrote about a group rescued before the Sicilian coast: "The tragic but brutal truth: They are not REAL refugees."[3] Similarly, the French newspaper *Figaro* wrote about the shutting down of Calais' informal settlements, known as "the jungle": "The truth must be said: the migrants of the jungle are not refugees."[4] Similar tropes are indeed found in academic contexts, such as when use of the term 'refugee' is considered "label fraud."[5] What is it about the notion of the refugee that prompts such invocations of truth and truthfulness? That authors reference the existence of a legal definition can hardly explain this. It is the nature of legal definitions that their applicability to a person or a situation remains contested at least until a judicial decision is rendered, and sometimes beyond. Whether a person is legally considered a refugee is up to designated state agents or courts to decide. Asylum statistics in the context of the concrete invocations in Europe suggest that the legal qualification of migrants was at least unclear. The existence of a legal definition does not explain the vehement invocation of truth as in the trope of the "real refugee." Numerous terms for which a legal definition exists also have a broader or diverging meaning in everyday language. Usually, the existence of a legal definition is not seen as a reason to police public usage of the term. The references to truth and truthfulness in using the label "refugees" indicate that the term as such carries a strong normative significance. To

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[1] Barry Malone, "Why Al Jazeera will not say Mediterranean 'migrants'", *Al Jazeera* (20 August 2015), online: <www.aljazeera.com> [perma.cc/2UUY-K7JP].

[2] Maeve McClenaghan, "Israeli protests: a refugee's story", *The Guardian* (6 January 2014), online: <www.theguardian.com> [perma.cc/SA5B-S4AQ].

[3] Sue Reid, "The tragic but brutal truth: They are not REAL refugees! Despite drowning tragedy thousands of economic migrants are still trying to reach Europe", *The Daily Mail* (27 May 2016), online: <www.dailymail.co.uk> [perma.cc/M435-C6V4]

[4] Xavier Saincol, "Il faut dire la vérité, la plupart des migrants de la jungle de Calais ne sont pas des réfugiés", *Le Figaro* (24 October 2016), online: <www.lefigaro.fr> [perma.cc/RUQ2-QZP5] [translated by author].

[5] Christian Hillgruber, "Flüchtlingsschutz oder Arbeitsmigration. Über die Notwendigkeit und die Konsequenzen einer Unterscheidung" in Otto Depenheuer and Christoph Grabenwarter, eds, *Der Staat in der Flüchtlingskrise: Zwischen gutem Willen und geltendem Recht*, 2nd ed (Leiden NL: Verlag Ferdinand Schöningh, 2016) 185 at 185, 191.

call persons "refugees," or to claim this label, expresses more than a belief about their legal status – it expresses a belief about the legitimacy of their presence or arrival. The refugee concept, apparently, has the potential to unsettle.

The refugee concept is complex, not only in the ways its use is embraced or resented, but also in the ways it is rejected. In July 2015, the movement which formed in the Oranienplatz in Berlin under the name "refugee movement" launched a campaign with the slogan, "stop calling freedom fighters refugees."[6] Open border proponents often oppose the refugee notion because it not only signifies a claim to entry and protection but, along with it, also backs the general rule of a state's discretionary decision about the crossing of a border. Among the various reactions that Al Jazeera's statement prompted were also such that took issue with the underlying distinction between refugees and other migrants.[7] This distinction forms a central point of contention that pervades migration scholarship in the social sciences, law, and political theory: is the distinction of refugees and migrants something to uphold or to overcome? Is it useful analytically, is it adequate as a matter of legal categories, it is appropriate as a broader normative differentiation?

This paper seeks to shed light on these various contestations around the refugee concept. It advances an understanding of the refugee concept as a normative idea, offering a critical background to the legal regulation of refugee status while arguing in favor of the conceptual distinction. The refugee concept, it argues, represents the normative idea that in exceptional cases, the state has an obligation towards the stranger at its border. This idea developed alongside the framework of the territorial state, building on its underlying universalist principles of human equality and freedom, and counterbalancing their general territorial delimitation. Its central position in the legitimacy framework of the state can explain the ambivalence of the refugee concept, and the vehemence of its invocations and rejections. Since the refugee concept is entangled with fundamental questions of legitimacy, its contestations concern the balance between the universalism at the basis of modern law and the necessity of particular institutions. In that function, the concept retains a critical potential for a universalist discourse today.

The paper unfolds as follows: the subsequent section (2) looks at the different uses of the concept, including the legal definition of the 1951 Geneva Refugee Convention (GRC), which forms a central reference point of discussions today. Tracing the origins of the GRC definition, the third section (3) explores the emergence of the refugee notion in the 17th century and corresponding ideas in the political thought of the 18th and 19th centuries. Based on social contract theories and the emergence of the territorial state, the discretionary decision about access to territory is conceived as a legitimate expression of sovereign power. However, this rule of discretionary decision is accompanied by the idea of an exception: the stranger at the border has a claim to be accepted if he otherwise faces destruction. The fourth section (4) explores this normative idea and suggests viewing it as a counterbalancing exception: the obligation towards the stranger in dire need is necessary to reconcile the universalism at the basis of the territorial state with its delimitation along borders. While this normative idea is not per se linked to the refugee notion, the two become firmly joined in the early 20th century. The fifth section (5) traces the history of refugee protection becoming

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[6] "Stop Calling Freedom Fighters Refugees" (3 July 2015), online: *Berlin Refugee Movement* <oplatz.net/stop-calling-freedom-fighters-refugees/> [perma.cc/Y46C-456V].

[7] See Jørgen Carling, "Refugees are also Migrants. All Migrants Matter" (3 September 2015), online (blog): *Border Criminologies*, *University of Oxford Faculty of Law* <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also> [perma.cc/ZL3B-4MM6].

codified and discusses questions that this raises. Firstly, the legislation of criteria for refugee status takes place through institutions of the state, unlike the individual claim which confronts the state from outside. Secondly, the successive codification in international law spotlights the European history of the refugee concept and its premises. When the GRC became formally universalized with the 1967 Protocol, this also gave rise to contestations of the definition's particular assumptions. The sixth section (6) looks at competing refugee definitions in international law and interprets the different regional approaches in light of the concept's universalist content. The paper closes with a section (7) that discusses how the refugee concept's emancipatory potential and a critique of its particular assumptions can go together. It suggests to understand the contestations of the refugee concept today as democratic iterations,[8] which reflect the significance of the normative idea and its interrelation with the legal rules.

I. **Dimensions of the Refugee Concept**

There are different uses of the refugee concept, which are not mutually exclusive. The term is used descriptively, it is defined in law and used as a legal concept, and it has a broader normative dimension. In a most general sense, the term "refugee" refers to a person migrating or having migrated for reasons of hardship.[9] The English word "refugee," over the French "réfugié," goes back to the Latin *refugium*: a place where a person can find shelter.[10] These terms highlights the aspect of a refugee being a person in search for, or who has found, shelter. In other languages, the corresponding term puts the emphasis on the flight itself.[11] What characterizes the refugee is thus foremost a movement from one place to another, and secondly an element of hardship and involuntariness, as the notions of flight and shelter indicate.

A descriptive use of the refugee concept builds on this general understanding. In that sense, the term is used with the view of displacement of various kinds and for various reasons, in relation to war, to environmental disasters, or most widely to persons migrating under deprived conditions. Even in this general descriptive sense, the refugee notion involves a dual demarcation: from persons not migrating, and from those migrating without reasons and conditions of hardship. It is along these demarcations that questions of definition arise. What constitutes hardship? How can one assess the often mixed and entangled motives for migration? And, up to which point in time do we distinguish persons who have "found shelter" from permanent members of a community? These questions gain relevance where a consequence is attached to someone being called a refugee.

The main consequence that international law attaches to the refugee notion is the prohibition of refoulement: the prohibition to expel or return a person to the place she is fleeing. The GRC, in this regard, contains a detailed stipulation of who is to be considered a refugee.[12] It states that for its purposes, the term "refugee" shall apply to any person who:

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[8] See Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (New York: Cambridge University Press, 2004) at 178–81.

[9] *Cf* "Refugee" (last modified 14 March 2019), online: *Encyclopaedia Britannica* <https://www.britannica.com/topic/refugee> [perma.cc/V7BN-38QF].

[10] The same is the case for the term in Roman languages, such as "rifugiato" in Italian.

[11] This is the case for "Flüchtling" in German, "פָּלִיט" in Hebrew, or "беженец" in Russian.

[12] *Final Act and Convention Relating to the Status of Refugees*, 2 July 1951, 189 UNTS 150 art 1 (entered into force 26 November 1952) [*GRC*].

> "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[13]

Several additions and specifications are contained in the GRC, to which I will turn below. This core definition, however, is pivotal today not only for international refugee law, but has shaped the understanding of who is a refugee further. It formulates three main criteria for refugee status: having crossed an international border, a well-founded fear of persecution, and the causality of one of the five enumerated reasons for persecution.

In addition to the quoted passage, the GRC stipulates several qualifications and exceptions as to whom the definition applies. It begins with a temporal limitation to flight resulting from events before 1 January 1951, which was lifted by the 1967 Protocol, which almost all state parties to the GRC have ratified.[14] Moreover, the GRC included the possibility to declare a geographical limitation of its applicability in order for it to exclusively apply to refugees coming from Europe.[15] This possibility was ended by the 1967 Protocol. Declared geographical limitations remained, however, valid.[16] Furthermore, the GRC contains exclusion clauses in its Article 1 D and F. Article 1 D exempts from its application persons who are under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[17] It does not mention the UNRWA explicitly but speaks of "persons […] receiving from organs or agencies of the United Nations other than the UNHCR protection or assistance"; the UNRWA has remained, however, the only case in which this applies. Article 1 F exempts from protection as a refugee persons who have committed serious crimes.

The refugee definition of the GRC is thus elaborate in its wording, and each of the criteria has been subject to interpretation by courts and administrative bodies.[18] Particularly, the criterion of "membership of a particular social group" has enabled a dynamic interpretation, which successively included for instance also persecution based on gender or sexual orientation.[19] The UNHCR issues, since 1979, a handbook that summarizes and guides the interpretation of the GRC refugee definition.[20] However, there is no institution

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[13] *Ibid*, art 1A(2).

[14] See United Nations High Commissioner for Refugees, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol" (2015) at 1, online (pdf): *UNHCR* <www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

[15] *Supra* note 12, art 1B.

[16] *Ibid* (Four states have declared such limitations: Congo, Madagascar, Monaco and Turkey at 3).

[17] *GRC*, *supra* note 12, art 1D.

[18] See generally Andreas Zimmerman & Claudia Mahler, "Part Two General Provisions, Article 1 A, para. 2" in Andreas Zimmerman, Jonas Dörschner & Felix Machts, eds, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011).

[19] Maryellen Fullerton, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1993) 26:3 Cornell Intl LJ 505 at 505, 520—21, 534—35, 539—40.

[20] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV. 4 (February 2019).

with a binding last word on the interpretation of the GRC. The refugee concept of the GRC is complex and subject to evolving and competing interpretations. Nonetheless, the GRC definition has shaped the discourse on the refugee concept far beyond the legal realm. In contestations about states' obligations towards migrants, the definition often serves as a reference point. Yet despite its legal significance, the GRC definition must be seen in its specific context, embedded in a preceding history of the refugee concept and a subsequent development.[21] It neither forecloses differing legal definitions nor answers the question of who *should* receive protection.

Besides the descriptive uses of the refugee concept and its legal definition, the refugee is also referred to as a normative category in political philosophy.[22] Refugees, in that understanding, are a category of migrants with special entitlements; persons towards whom states have special obligations.[23] Such a perspective focuses on the claim to inclusion and to rights that is linked to the refugee concept. There has been much discussion about formulating a definition of the refugee in relation to this normative specificity.[24] The philosophical debate thereby does not take place in a legal void,[25] yet with the aim to arrive at an abstract understanding of what is specific to the refugee and what are adequate criteria of distinction.

Another strand of the debate, particularly in social and political sciences, engages with the specificity ascribed to the refugee concept, yet focuses on its exclusionary side. The refugee concept, as seen in its very basic definition, contains a dual demarcation: from other migrants and from the citizens at the place of a refugee's presence. Regarding conditions of mobility, the refugee is a category of entitlement, which strengthens the perception that other migrants have no legitimate claim to access. In that vein, the refugee concept is criticized as part of an order, which unfairly distributes freedom of movement. For instance, Simon Behrman describes how refugee law works as a means of controlling, placing the person claiming asylum in dependence on criteria they have no influence over.[26] Heaven Crawley and Dimitris Skleparis argue that the monopolization of claims to territorial entry under the refugee notion tends to ultimately reduce the schemes for legal migration.[27]

The perspectives on the refugee concept that I have described in this section do not require adjudication. They do not always mean a disagreement in substance, although some views do. Foremost, they highlight the complexity of the refugee concept. Rather than searching for a "right view," my interest in the following is to unpack this complexity by exploring the concept's history and its theoretical position in thinking about law.

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[21] Competing legal definitions are discussed in Section VI, below.

[22] The strand of political philosophy summarized here could be called Kantian approaches, in opposition to critical theory approaches, *Cf* Dana Schmalz, "Social Freedom in a Global World: Axel Honneth's and Seyla Benhabib's Reconsiderations of a Hegelian Perspective on Justice" (2019) 26:2 Constellations 301 at 314.

[23] See David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge: Harvard University Press, 2016) at 78.

[24] See Matthew Lister, "Who Are Refugees?" (2013) 32:5 Law & Phil 645 at 648. Cf Andrew E Shacknove, "Who is a Refugee?" (1985) 95:2 Ethics at 274.

[25] *Cf* Max Cherem, "Refugee Rights: Against Expanding the Definition of a "Refugee" and Unilateral Protection Elsewhere" (2016) 24:2 J Political Phil 183 at 183–87.

[26] See Simon Behrman, "Refugee Law as a Means of Control" (2018) 32:1 J Refugee Stud 42 at 42; Simon Behrman, *Law and Asylum. Space, Subject, Resistance* (New York: Routledge, 2018) at 116. See also Patricia Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996) at 24.

[27] See Heaven Crawley & Dimitris Skleparis, "Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis'" (2017) 43:1 J Ethnic & Migratory Stud 48 at 48–49. See generally Robert Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization" (2007) 20:2 J Refugee Stud 172.

II. The Emergence of the Refugee Concept Alongside the Territorial State

The terms "réfugié" in French and "refugee" in English appear in the 16th and 17th centuries.[28] The flight of about 200,000 Huguenots from France in the late 17th century is referred to as the first case of refugees in this sense,[29] although several events of forced migration took place within Europe around that time.[30] What can explain the emergence of the refugee notion during that period, and how is it distinct from prior concepts dealing with persecution and flight?

When the refugee concept emerges in Europe, it is a time in which the political order and legal thinking undergo fundamental changes. From an order mainly structured by religious belonging, a process of change towards a territorially defined order begins. The Westphalian Peace Treaties from 1648 are in that sense viewed as the birthdate of the territorial state order.[31] They ended the Thirty Years' War, which had been fought between Catholic and Protestant states, and were largely concerned with religious groups and belonging. Already, the Peace of Augsburg in 1555 had introduced the principle *cuius regio eius religio*, according to which the confession of the ruler should determine the religion of the population, leaving the option to move away or to change one's religion.[32] While by no means an instantaneous change, these treaties mark an attempted aligning of religious and territorial belonging.

Hand in hand with the changes in political order, legal and political thought changes fundamentally. While the Westphalian Peace Treaties were negotiated, Thomas Hobbes wrote his book *The Leviathan*, which appeared in 1651 and introduced the idea of a social contract, by which individuals establish a society and submit to a governing authority. John Locke's *Two Treatises of Government* in 1689 builds on this conception of the social contract and develops it further, complementing the focus on peace and security with one of property and rights. Together with further thinkers of their time, these works on the social contract mark a turn to the individual as a reference point of legitimacy.[33] From the idea of natural or divine law and the discretionary ruling of a monarch, the understanding of law moves towards the notion of agreement. The social contract represents an imagined first agreement of individuals about the existence of society and the necessity of government.

The refugee concept emerging during this time period can be understood in relation to these two changes: firstly, as territory is gaining significance as a criterion of political belonging, the perspective on migration changes. Reasons for migrating become more relevant, and the refugee concept, at the very basis, offers a distinction of reasons: it describes that a person migrates for reasons of hardship. Secondly, the refugee concept links

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[28] See Aristide Zolberg, Astri Suhrke & Sergio Aguato, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989) at 5; Patricia Tuitt, "Rethinking the Refugee Concept" in Frances Nicholson & Patrick Twomey, eds, *Refugee Rights and Realities* (Cambridge: Cambridge University Press, 1999) 106 at 110.

[29] See Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime" (2002) 14:2/3 Int J Refugee L 238 at 239; Philip Marfleet, "Refugees and History: Why We Must Address the Past" (2007) 26:3 Refugee Surv Q 136 at 140.

[30] See Heinz Schilling, *Early Modern European Civilization and Its Political and Cultural Dynamism* (Lebanon, NH: Brandeis University Press, 2008) at 37.

[31] *Cf* Hendrik Spruyt, "The End of Empire and the Extension of the Westphalian System: The Normative Basis of the Modern State Order" (2000) 2:2 Intl Stud Rev 65 at 69.

[32] See Emma Haddad, "The Refugee: Forging National Identities" (2002) 2:2 Stud in Ethnicity & Nationalism 23 at 25–6.

[33] *Cf* Volker Gerhardt, "Kants kopernikanische Wende" (1987) 78:1/4 Kant-Studien 133.

to the growing focus on the individual. What distinguishes the refugee concept from the prior concept of asylum is a turn of perspective: person, rather than place, becomes the reference point of the rule. The Greek term a-sylon expresses that something is exempt from seizure, a status often linked to the sanctuary of a religious place.[34] Asylum relates to a certain place, either in the sense of a religious place or, in the case of political or diplomatic asylum, a state; it is an expression of competing sovereignty.

There are several legal institutions today that belong to this strand. Church asylum reflects a certain sovereignty of the church within the state. Diplomatic asylum that an individual can seek in an embassy reflects the sovereignty of one state's diplomatic presence even on the territory of another state.[35] Political asylum expresses the sovereignty of one state vis-à-vis the state from which the individual flees. In all these cases, the point of contention is extradition of the individual and the contending parties are the two sovereign entities. The refugee concept, by contrast, does not link to a specific place but to a person and her act of migration. The point of contention is not primarily extradition but the access and protection. The contending parties are not two sovereigns but rather the individual or plural migrants and the state which they seek protection in. While the concepts of asylum and the refugee intersect in practice and certainly in the use of terms, the distinct angles of perspective are worth distinguishing to understand the underlying normative histories.

III. The Refugee Concept as a Counterbalancing Exception

The emergence of the refugee concept as well as the changes in the political order and legal thinking were slow, gradual and complex developments. From the refugee concept's appearance to its first codification in law, more than two centuries passed. Equally, from the Westphalian Peace Treaties, the territorial state developed in Europe over the course of the subsequent two centuries. The French Revolution marks the emphasis on a principle of popular sovereignty, where the territorial state gradually developed into a constitutional and later a democratic state.

The conception of law and legitimacy that begins to form centres on the individual, thereby building on the principles of human equality and freedom. That justice comes to be understood with reference to individual self-determination is more than a mere historical path that could run differently or be reversed.[36] The human capacity to question social orders and demand justification is asserted in practice through political movements and forms the core of our thinking about legitimacy, linking the discussed content of justice and the practice of reflecting about it. This understanding of justice means for law a continuous tension between demands of concreteness and universality.[37] In order to be concrete, law requires institutions through which persons mutually recognize and guarantee their rights. Concreteness requires delimitations, and in the case of the territorial state, the most basic delimitations are along borders and along boundaries of membership determined with reference to the territory. The territorial state constitutes the framework for institutions of public law; it is through these institutions that legal obligations and rights primarily exist.

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[34] See Kay Hailbronner & Jana Gogolin, "Asylum, Territorial" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012).

[35] See Charles Chatterjee, *International Law and Diplomacy* (New York: Routledge, 2013) at 8. See generally Gregor Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law?" (2005) 17:3 Intl J Refugee L 542.

[36] See Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life*, translated by Joseph Ganahl (New York: Columbia University Press, 2014) at 17.

[37] *Cf* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989) at 2–8 (for a general discussion of international law in terms of "normativity" rather than "universality").

These delimitations conflict, however, in some cases with law's demand of universality: the underlying principles of human freedom and equality. Based on these principles, the delimitation of membership and obligations of solidarity along territorial borders appears, in many cases, arbitrary. The claim of the individual at the border forms a particularly acute question in that regard.

The question of what right a person has to migrate, or of what claim to enter a state, occupied legal thinkers throughout the centuries. In the 16th and early 17th centuries, Francisco de Vitoria and Hugo Grotius discussed a principle of free movement.[38] Their reflections take place mainly against the background of the conquest of the New World, the right to passage on the high seas, and to settle in a place.[39] But, Grotius was also concerned to some extent with conditions of individual migration.[40] Their reflections clearly differ from later thinkers who draw on the territorial state and a social contract conception. Scholars such as Samuel von Pufendorf, Christian von Wolff, and Emer de Vattel focus less on the question of free movement, but accept the general right of a state to control immigration. Their framing of the question thus shifts from a view on conditions of movement and collective processes of settling towards individual migration and the specific claims of persons.

In these accounts, the state's right to decide about access always corresponds with the idea of an exception to the state's unilateral discretion. Hugo Grotius, in that sense, advocated for a right to stay in a foreign country if there exists a "just cause," suggesting that refugees are entitled to protection.[41] Pufendorf writes about a duty to admit strangers "driven from their former home."[42] Von Wolff, while putting large emphasis on state sovereignty, asserts an exceptional admittance of persons expelled from their homes.[43] De Vattel recognizes that a "right of necessity" under certain conditions restricts the state's sovereign prerogative to exclude persons, which amounts to a right to illegal entry.[44] Most famously, Immanuel Kant, in his essay "Perpetual Peace," speaks of the right of a stranger not to be rejected if it cannot be done without causing his destruction.[45] Kant emphasizes that this obligation towards the stranger is legal in nature and is not a mere question of philanthropy.

In the normative reasoning about conditions of migration and territorial access thus appears, in different terms, the idea of an exception. This idea of an exception should be understood against the background of the above described tension between the demands of universality and of concreteness in the territorial state framework. The exception applies to a person with a certain link to the state, either being present already or at the border, and it

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[38] See Vincent Chetail, "Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vittoria to Vattel" (2016) 27:4 Eur J Intl L 901 at 903; Jane McAdam, "An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty" (2011) 12:1 Melbourne J Intl L 27 at 33—6.

[39] See Elke Tießler-Marenda, *Einwanderung und Asyl bei Hugo Grotius* (Berlin: Duncker & Humblot, 2002).

[40] See Chetail, *supra* note 38 at 907.

[41] *Ibid* at 909, citing Hugo Grotius, *De Jure Belli Ac Pacis*, 1625 ed, edited by Richard Tuck, from the edition by Jean Barbeyrac (Indianapolis, Ind: Liberty Fund, 2005) at 1075.

[42] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, vol 2, translated by C H Oldfather & W A Oldfather, 1688 ed (Oxford: Clarendon Press; London: Humphrey Milford, 1934) at 366.

[43] See Christian von Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, translated by J H Drake, vol 2 (Oxford & London: Clarendon Press & Humphrey Milford, 1934) at 149, 175.

[44] Chetail, *supra* note 38 at 920.

[45] Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, translated by Mary Campbell Smith (London: Swan Sonnenschein, 1903) at 137ff.

regards a situation of particular necessity or hardship, in which the person's life or liberty is seriously threatened. While the limitation of the universality of rights is generally accepted in favour of the concreteness of rights, this is deemed not acceptable in certain extreme cases, when the life of a person is threatened and this person is at the border. There is thus a link to universality, the equal worth of that person and a link to concreteness, because it is not any person, but the stranger at the border who can be saved. The idea of an exception in that sense builds on the universalist principles that underlie the modern state and counterbalances their delimitation along territory and membership.

The idea of an obligation towards the stranger at the border and an exceptional limit on the state's discretion about access is thereby not bound to the refugee concept. While the concept's appearance in the same period as the territorial state is noteworthy, it is not dominant in the subsequent political and legal discourse. Several of the mentioned scholars do not speak about refugees. It is only towards the end of the 19th and beginning of the 20th centuries that the refugee notion turns omnipresent.[46] As the concept becomes prevalent, however, it firmly joins with the described idea of a normative exception, and it is this idea and its fundamental role in the legitimacy framework of the modern state which makes the refugee concept influential and its contestations so vehement. Therefore, I suggest thinking of the idea of an exceptional claim at the border as the "normative idea of the refugee."

IV. The Codification of the Refugee Concept and its Perplexities

In the course of the 19th century, the conditions of political membership and mobility in Europe successively tightened, for a variety of factors. Among them was a shift in the political significance of nationalism in Europe, from popular movements using the reference to the nation, to a form of "official [nationalism]" in which dynasties in their struggle to retain power referred to a legitimating national subject.[47] The idea of such national subject went hand in hand with an increasing focus on unified language and a projection of cultural homogeneity. How migration was treated in relation to the nation state thereby differed, yet overall, immigration became regulated in a more restrictive manner.[48] At the end of the 19th century, the assumption that the state had full discretion in regulating immigration was broadly shared and reflected in law.[49] The 1905 British Aliens Act reflects this restrictive stance towards immigration. Yet, it also contains a clause about an exception to the bar on entry, in case of persecution for political opinion or religious identity.[50]

This legal codification of an individual right to seek asylum was a novelty.[51] In concerning the conditions of entry, it reflects the described normative idea of an exception. At the same time, a second line of normative history joins refugee law, namely debates centering on the obligation between states to cooperate in criminal proceedings and the

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[46] See Nevzat Soguk, *States and Strangers: Refugees and the Displacement of Statecraft* (Minneapolis: University of Minnesota Press, 1999) at 101–103.

[47] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised ed (London, UK: Verso, 2006) at 85–86.

[48] See John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000) at 93.

[49] See Henry Sidgwick, *The Elements of Politics*, 2nd ed (London, UK: Macmillan, 1897) at 248. See also David Miller, "Immigrants, Nations, and Citizenship" (2008) 16:4 J Political Philosophy 371 at 374; *Fong Yue Ting v United States*, 149 US 698 at 711 [*Fong*] cited in Thomas Alexander Aleinikoff, "Federal Regulation of Aliens and the Constitution" (1989) 83:4 Am J Intl L 862 at 863.

[50] (UK), 5 Edw VII, c 13, s 1(3).

[51] See Alison Bashford & Jane McAdam, "The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law" (2014) 32:2 L & Hist Rev 309 at 311–12.

conditions under which a duty to extradite can be limited or excluded.[52] These debates align more with the tradition of asylum and competing sovereignty; they inform provisions regarding protection against political persecution, yet they are concerned with a question distinct from the claim to entry, and are less critical for today's debate. The paramount contestations in refugee law today do not pertain to whether a state has the right to protect the national of another state and not to extradite her, but to what rights individuals hold that no state is bent on accepting.

From the 1880s onwards, large-scale movements of flight took place in Europe, especially of Jews from Russia and Eastern Europe and of populations formerly part of the Ottoman Empire.[53] World War I further raised the extent of displacement to unprecedented levels.[54] In reaction to these events, the first international legal instruments of refugee protection were established. In 1921, Fridtjof Nansen was appointed High Commissioner for Refugees in the League of Nations.[55] The refugee notion became the term of reference for humanitarian activities, legal protection, and the surrounding normative debate.[56] At the same time, the first instruments for international protection worked without explicit definitions of the refugee. Refugees were understood as persons deprived of *de jure* protection by their states of origin, either by denaturalization or by similar forms of denying them legal membership status.[57] An abstract definition seemed, however, dispensable as international instruments applied to specifically identified groups of certain origins. The 1933 Convention Relating to the International Status of Refugees applied to Russian, Armenian, and assimilated refugees.[58] In the subsequent years, international endeavors focused on refugees from Nazi Germany and occupied European countries. A specific Convention Regarding the Status of Refugees Coming from Germany in 1938 also abstained from a specific definition; it excluded from its scope of application persons "who leave Germany for reasons of purely personal convenience."[59]

The Constitution of the International Refugee Organization (IRO) in 1946 for the first time contained a section on the "definition of refugees."[60] It sets as a general criterion the situation outside one's country of nationality or of former habitual residence, and subsequently enumerates as an additional requirement several categories of persons. On the one hand, the definition remains case-specific with a focus on "victims of the Nazi or fascist regimes" or their allies,[61] or "victims of the Falangist regime."[62] On the other hand, the definition includes, rather broadly, persons "considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion,"[63] persons

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[52] See generally Charles Brocher, "Rapport sur l'extradition et les commissions rogatoires en matière pénale" (1879-80) 3-4 Annuaire Institut Dr Intl 202.

[53] See Saskia Sassen, *Guests and Aliens* (New York: The New Press, 1999) at 77.

[54] *Ibid* at 83.

[55] See Gilbert Jaeger, "On the History of the International Protection of Refugees" (2001) 83:843 Intl Rev Red Cross 727 at 728.

[56] See e.g. Norman Angell & Dorothy Francis Buxton, *You and the Refugee: the Morals and Economics of the Problem* (Harmondsworth, Middlesex, UK: Penguin Books, 1939).

[57] See James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 2.

[58] See *Convention relating to the International Status of Refugees*, 28 October 1933, 159 LNTS 3663 art 1 (assimilated refugees encompassed Syrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks); Jaeger, *supra* note 55 at 729–30.

[59] *Convention concerning the Status of Refugees coming from Germany*, 10 February 1938, 192 LNTS 4461 art 1(2).

[60] 15 December 1946, 18 UNTS 3 at 12.

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*

who have left their state of origin in the context of World War II and are "unable or unwilling to avail [themselves] of the protection of [its] government,"[64] victims of Nazi persecution waiting to return to Germany or Austria,[65] as well as "unaccompanied children who are war orphans or whose parents have disappeared."[66]

In 1949, the UN Economic and Social Council (ECOSOC) convened a committee to discuss the possibilities of a new international convention on protection of stateless and refugees.[67] Members of the IRO also participated centrally in the first draft for the later Refugee Convention.[68] For the Convention's refugee definition, the drafters proposed three possible solutions: a competence of the United Nations General Assembly to decide in each case which groups of persons should receive legal protection, the list from the annex to the IRO Constitution, or a definition to be contained in the Refugee Convention itself.[69] After state representatives had settled on the third possibility, the negotiations revolved around the formulation of the definition.[70] After deciding in favour of a general definition, different models of refugee definitions were discussed, ranging from the reference to concrete groups of displaced persons to more abstract determinations.[71] In the end, a mixed solution was chosen, which included an abstract definition. The GRC is applicable to all persons regarded as refugees in prior international treaties,[72] but also stipulates general criteria for refugee status, as seen in the beginning.

James Hathaway described this evolution of refugee definitions as consisting in three periods:[73] a juridical perspective from 1920 to 1935, which focused on persons who lost *de jure* protection, was complemented by a social perspective in the years from 1935 to 1939, which included those who were de facto deprived of protection by their state of origin. A third period led, according to Hathaway, to an individualist perspective that became the basis for the 1951 Convention. Gilad Ben-Nun describes the evolution as an opposition between an ad-hoc and a universal approach.[74] He notes how traditions of protection underlie the League of Nations activities, while the responses before the 1951 Convention were piecemeal rather than encompassing and left non-European refugees mostly out of view.[75]

These descriptions of the beginnings of international refugee law underline how the codification revolved around questions of universality and concreteness. Responses that

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[64] *Ibid* at 13.

[65] *Ibid.*

[66] *Ibid.*

[67] See ECOSOC, *UN Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary-General*, UN Doc E/AC.32/2, 1950 [ECOSOC Memorandum].

[68] See Irial Glynn, "The Genesis and Development of Article 1 of the 1951 Refugee Convention" (2011) 25:1 J Refugee Stud 134 at 136.

[69] See ECOSOC Memorandum, *supra* note 67 at Annex art 1.

[70] See generally Paul Weis, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed, with a Commentary* (Cambridge: Cambridge University Press 1995) at 1.

[71] See especially *UN Ad Hoc Committee on Statelessness and Related Problems*, 1st Sess, 5th Mtg, UN Doc E/AC.32/SR.5 (1950); *UN Ad Hoc Committee on Statelessness and Related Problems*, 1st Sess, 6th Mtg, UN Doc E/AC.32/SR.6 (1950).

[72] *GRC*, *supra* note 12, art 1A(1).

[73] See James Hathaway, "The Evolution of Refugee Status in International Law, 1920–1950" (1984) 33:2 ICLQ 348 at 359–61.

[74] See Gilad Ben-Nun, "From *Ad Hoc* to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954" (2015) 34:2 Refugee Surv Q 23 at 30.

[75] *Ibid* at 26.

focused on specific situations were less universal in Ben-Nun's terms, because they left other regions out of view. At the same time, they were relatively inclusive for those groups. An individualist codification such as the GRC definition opened the way for a universal regime, yet also became more restrictive by setting up elaborate criteria. Of course, the choice did not have to be between a piece-meal approach and a narrow definition. The first definition proposed by Paul Weis in the drafting of the convention was both universal, not limited to specific regions or states, and rather wide in its criteria.[76] The challenge for codification was not simply a pragmatic question of how the best legal response could be designed, it was also a political contention between a commitment to the basic normative idea that refugees must receive protection, and states' endeavours to limit their responsibilities.

The perplexities around codifying the normative idea of the refugee are thus threefold. They involve firstly, the general violence of law: that the stipulation of criteria to some extent closes the negotiation of justice.[77] A piece-meal approach can allow for a more flexible look to the claims raised, although historically it did not necessarily mean a more generous approach. Secondly and more specifically, the codification of refugee law poses a democratic dilemma. The normative idea of the refugee concept is a norm that regulates the relationship between the stranger at the border and the state. The codification, however, takes place in state-centric procedures. In the negotiations for the GRC, this bias towards the state interest and states' concerns about limiting their sovereign prerogative was evident. There is, in other words, a fundamental asymmetry in the codification of refugee protection. The regulations build on the refugee concept as an exception to unilateral discretion regarding territorial access, yet the concrete implementation remains subject to that very kind of unilaterality. While Kant speaks of the obligation to not reject the stranger in need as the "one cosmopolitan law," the international legal rules are clearly not cosmopolitan in nature; they might be compared to a static print of that "cosmopolitan" law. This structural distinction is part of the explanation as to why the normative idea of the refugee retains such vigour beside the legal definition. Thirdly, the codification exposes the tension between the universalist idea behind the refugee concept and its particular history. The history is particular in that it relates to the specific history of the territorial state in Europe and emerges alongside and as a response to it. The legitimacy assumptions of the territorial state are in that sense present in the refugee concept. This dilemma is tangible in much refugee law litigation and advocacy.[78] Moreover, the particular history of the refugee concept relates to a hierarchy of reasons of hardship.[79] The described European history in which the refugee concept emerges is one of religious and political persecution. This shapes the concept's understanding. English and French were the languages in which the GRC was negotiated,[80] and the history of these terms became the reference point for international discourse.

V. Politics of Designation: Competing Refugee Definitions in Law

The European focus of the GRC was explicit in its geographic and territorial limitations. The formal universalization with the 1967 Protocol brought to the fore the question if the wording of the definition was apt to cover refugee situations globally. It was thereby of relevance that the UNHCR, which had been founded in 1950, worked without

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[76] *Ibid* at 34.

[77] *Cf* Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11:5/6 Cardozo L Rev 920 at 937.

[78] See Jacqueline Bhabha, "Internationalist Gatekeepers?: The Tension between Asylum Advocacy and Human Rights" (2002) 15 Harv Hum Rts J 155 at 160–61.

[79] See Michelle A McKinley, "Conviviality, Cosmopolitan Citizenship, and Hospitality" (2009) 5 Unbound: Harv J Leg Left 55 at 64.

[80] See generally Glynn, *supra* note 68 at 137, 146.

geographic limitations. While its mandate initially foresaw mainly the coordination of legal protection by states, UNHCR quickly broadened its scope of activities. For refugees situations outside Europe in the late 1950s and the 1960s, UNHCR began to provide material assistance under the formula of "good offices."[81] While the international treaty law on refugees remained restricted, the UN refugee agency thus already reached beyond the European focus and the narrow definition of the GRC.

The passing of the 1967 Protocol took place already in view of negotiations for an African Refugee Convention. In 1969, the Organization of African Unity (OAU) passed a convention that defines the refugee firstly with reference to the GRC-definition,[82] but furthermore states that:

> "the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[83]

Most importantly, this definition extends the refugee notion to persons fleeing indiscriminate violence, for example through civil wars. The definition contained in the OAU Convention has not only been relevant for refugee protection in Africa but also became a blueprint for broader conceptions in general, and especially for refugee definitions in states of the Global South.

The 1984 Cartagena Declaration on Refugees between Latin American states makes reference to the OAU Convention.[84] It explicitly notes that based on the experiences in the region, it appears "necessary to consider enlarging the concept of a refugee."[85] It recommends that the notion of the refugee shall also include:

> "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."[86]

This definition goes in some respects beyond the definition of the OAU Convention, especially in its reference to human rights violations. The Cartagena Declaration is not legally binding, but its refugee definition has been approved by the General Assembly of the Organization of American States (OAS), which urged member states to adhere to the

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[81] Gil Loescher, "The UNHCR and World Politics : State Interests vs. Institutional Autonomy" (2001) 35:1 Intl Migration Rev 33 at 36.

[82] See *Convention Governing Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45 art 1(1) [*OAU Convention*].

[83] *Ibid*, art 1(2).

[84] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 19–22 November 1984 (22 November 1984) at III(3) (the Declaration is available here: <www.refworld.org/docid/3ae6b36ec.html>) [*Cartagena Declaration*].

[85] *Ibid.*

[86] *Ibid.*

Declaration in their laws on refugee protection.[87] In consequence, the definition has been incorporated in the legislation of most Latin American states.[88]

For Asian countries, neither a binding regional framework of refugee protection nor a comparably uniform refugee notion exists. What offers some indication of the refugee definition endorsed in the region are the 2001 Bangkok Principles issued by the Asian-African Legal Consultative Organization (AALCO), which comprise a definition of the refugee concept identical to the OAU Convention.[89]

Other legal frameworks equally diverge from the GRC in defining the refugee.[90] The refugee concept of the United States *Refugee Act of 1980* is broader in scope in that it does not require the person to be outside her country of nationality or habitual residence, thus including internally displaced persons.[91] In contrast to these broader definitions of the refugee, other legal frameworks equally recognize the need to offer protection beyond the scope of the GRC yet created different terms to respond to that need. The *Canadian Immigration and Refugee Protection Act* distinguishes between "convention refugees" and other "persons in need of protection."[92] Within this second strand, the Canadian legislation refers to, among other bases for protection, the Convention Against Torture (CAT).[93] The Australian *Migration Act* foresees protection visas either for convention refugees, or for persons whose refoulement would result in serious harm.[94] Australia's refugee policy generally builds on the separation between a "refugee component" and a "special humanitarian component," with an increasing part of migrants being dealt with under the latter.[95] The legal framework of the European Union distinguishes between protection of persons as refugees, and "subsidiary protection" for individuals who would without protection face "serious harm."[96] The EU Qualification Directive thereby cites the GRC definition,[97] while explicitly allowing member states to employ a broader definition of the refugee.[98]

What these different choices of designation mean for the respective stance towards protection is not a simple equation. The scope of the refugee definition cannot say anything about the scope of protection offered under the respective legislation. However, the choices

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[87] See e.g. Hathaway, *supra* note 57, n 7 citing *Cartagena Declaration*, *supra* note 84.

[88] See Michael Reed-Hurtado, "Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America" (2013) Leg & Protection Policy Research Series No 32 (UN, High Commissioner for Refugees) at 16.

[89] Asian-African Legal Consultative Organization, Assembly of the Member States, 40th Sess, *Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees*, (2001), arts 1(1–2).

[90] The following comparative outlook is cursory in nature and does not claim to provide a conclusive picture.

[91] *Immigration and Nationality Act*, 8 USC § 1101 (1986), s 42(b) as amended by *Refugee Act of 1980*, Pub L No 96-212, 94 STAT 102 at Title 2 (1980). See Stephen H Legomski, "Refugees Asylum and the Rule of Law in the USA" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 122 at 131, 161.

[92] SC 2001, c 27, ss 96, 97.

[93] *Ibid*, s 97(a).

[94] (Austl) 1958/62, s 36.

[95] Susan Kneebone, "The Australian Story: Asylum Seekers Outside the Law" in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2009) 171 at 177.

[96] EC, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, [2011] OJ, L 337/9 art 2(f).

[97] *Ibid*, art 2(d).

[98] *Ibid*, art 3.

regarding the refugee definition or alternative terms of protection are not insignificant either. Given the normative role of the refugee concept, these variations of the legal definitions can be read as contestations not only of legal rights but also of the perception of legitimacy of different asylum seekers' claims. In that vein, Michael Reed-Hurtado describes how the adoption of the Cartagena Declaration responded to changing protection needs, which international law addressed insufficiently.[99] Following the large-scale flight of persons from Cuba, Bolivia, Haiti, Honduras, Nicaragua, and Paraguay in the 1960s, the Inter-American Commissioner on Human Rights diagnosed a difference from "refugees of former times,"[100] and recommended the preparation of a regional instrument.

These forms of flight and displacement were, however, not new as such, nor were they specific to Africa or Latin America. Early instruments of international refugee protection dealt with large-scale displacement rather than individual asylum seekers. Within Europe, the breakup of Yugoslavia caused the flight of large numbers of persons. And, it was also not a given that flight and displacement from African and Latin American states would have to be responded to within the regions alone. While regional political developments can explain that broader refugee definitions were adopted in the OAU Convention and the Cartagena Declaration, they do not explain the reluctance in many states of the Global North to follow suit. This reluctance, in turn, illustrates how terms serve to delimitate not only states' legal obligations but also shape the public perception of normative obligations. The creation of separate protection schemes such as subsidiary protection in Europe comes with a minus in rights for those protected under the latter notion, and it has an impact on public perception. Moreover, retaining a narrow refugee definition and adding additional designations contributes to what BS Chimni has called the "myth of difference."[101] This idea that refugee flows in and from the Global South are dissimilar in nature from former refugee flows in and from Europe tends to legitimize strategies of containment and deterrence.[102]

In that sense, the adoption of different labels for protection reflects a certain set of politics of designation. Whether a legal claim to protection is linked to the refugee notion has significance for the public debate about its legitimacy, and by framing situations as similar or dissimilar also affects the future direction of legal frameworks. On the one hand, these politics of designation highlight the normative dimension that the refugee concept has beyond its immediate legal significance. However, *vice versa*, the choice of terms also affects the broader conceptions of the refugee, as it influences the vocabulary and distinctions in public debates that yield effects even where they are contested.

VI. Democratic Iterations of the Refugee Concept

The codification of the refugee definition and of refugee law more broadly exposes a democratic dilemma. The regulations affect those who are fleeing their states of origin, whether they qualify as refugees or not; these persons, however, are mostly excluded from a political voice in the development of refugee law. The fact that refugees typically fall outside the state structures of democratic representation means that refugee law systematically lacks the political voice of those most directly affected by its rules. At the same time, we should

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[99] Reed-Hurtado, *supra* note 88 at 6–7.

[100] *Ibid* at 7.

[101] BS Chimni, "The Geopolitics of Refugee Studies: A View from the South" (1998) 11:4 J Refugee Stud 350 at 351.

[102] See Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 2.

not mistake the state-centred nature of law-making for an exclusive hold of state interests in the content of the refugee concept. The state interest in a discretionary decision about access does not equate an interest to exclude; legislation regarding refugee protection is the outcome of the diverse and conflicting normative demands inside the state. This includes on the collective level the intent of a self-conception as generous,[103] but more importantly, it is influenced by the various individual opinions of what the normative idea of the refugee means and demands. For assessing the significance of this normative idea today, the view should not be limited to formal decision-making.

The concept of the refugee is used for making claims within, outside, and against the law. Expressive of universalist values of freedom and equality, it forms a critical lens for the concretization of those values in institutions. While the refugee concept can serve as a critical lens to oppose an idealization of the state framework, it points to a cosmopolitanism that is not abstract. Instead, it links to concrete instances of encounters at the border, in which the existence of rights and obligations is petitioned and answered at each specific instance anew.[104] In this role, the refugee concept offers a lens that avoids binary oppositions between the global and local, between the universal and the particular.

These described contestations in law and in public debates can be understood as democratic iterations of the refugee concept. This notion of democratic iterations was coined by Seyla Benhabib to describe "processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society."[105] Based on the Derridian concept of the iteration, Benhabib outlines the idea that a universalist norm does not have one actual or original meaning, but is shaped by each use in different contexts.[106] Not only can a concept be used with different meanings, the respective employments constitute a part of the concept as such.

The refugee concept links to universalist claims, but also the need to justify the right to enter a territory under the scheme of an exception. Both these sides of the concept are contested and concretized in the context of legal norms and social interactions. While employing the refugee concept in different ways, whether engaging explicitly with its meaning or implicitly making use in a certain manner, its ambivalence as affirming and challenging the territorial state order is reflected. Public reports and statements that describe persons in distress as refugees, communicate their experiences, and support their claim to protection, re-introduce the general normative claim of the refugee concept. With reference to the refugee concept, the Eurocentrism of laws of international protection is also negotiated, as the "politics of designation" indicate. The concept, in its dual role as linked to the territorial state framework and forming a category of exception therein, is a site for claims about universalism and concrete institutions.

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[103] See generally Rebecca Stern, "Our Refugee Policy Is Generous: Reflections on the Importance of a State's Self-Image" (2014) 33:1 Refugee Survey Q 25.

[104] See generally Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (New-York: Cambridge University Press, 2016) at 42ff, 137ff.

[105] Benhabib, *supra* note 8 at 179; Seyla Benhabib, "The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism, and Statist Realism" (2016) 5:1 Global Constitutionalism 119 at 122.

[106] *Ibid.*

The *Al Jazeera* article in August 2015 explaining the choice of using the term "refugees" in relation to the Mediterranean migration closes with a brief reference to the question of a voice. The term "refugees," the author writes, constitutes a small attempt to give back some voice to persons regularly stripped of theirs.[107] This assertion comes unexpected: how would a denomination give back voice? While the choice of terms does, of course, not change the structure of political voices and representations, the refugee concept can indeed be understood as a call to listen to specific experiences. It represents the idea of an exceptional obligation towards the stranger at the border. This normative idea is not abstract but developed within the territorial state framework and in relation to its conception of legitimacy. As such, the refugee concept retains a surplus meaning beyond its legal definition, while the codification and practices of refugee protection also influence the understanding. In this role as a normative idea that concerns the obligations towards the stranger at the border, the refugee concept is where to begin considerations of a concrete cosmopolitanism.

[107] Malone, *supra* note 1.

International Investment Arbitration for Compensating Victims of Torture

*Martin Hemmi**

Abstract

The article deliberates upon the substantive overlap between rights protected through the human rights regime and privileges conferred to individuals by international investment agreements. In particular, it should be elaborated whether a State violates both human rights law as well as investment treaty provisions if it is responsible for torturing an individual. Subsequently, it will be discussed what consequences such an overlap would entail and what preconditions a victim of torture must fulfil to use the investor-State dispute settlement system as a means of redress. After a brief introduction into the matter, section two will give the reader a general overview of the most significant investment provisions and explain how individuals can bring a claim against a foreign State using the arbitration mechanism provided for in international investment treaties. Section three will analyse the commission of torture as a violation of investment provisions. Both Full Protection and Security clauses as well as International Minimum Standards will be considered as a possible treaty breach before the section will be concluded with deliberations on a potential application of investor-State dispute settlement in case of torture. Section four describes both the material (investment) and personal (nationality) requirements necessary for a victim of torture to bring a claim against a State through investment arbitration. The article will be completed with concluding remarks and final observations.

French translation

L'article délibère sur le chevauchement substantiel entre les droits protégés par le régime des droits de l'homme et les privilèges conférés aux individus par les accords internationaux d'investissement. En particulier, il convient de préciser si un État viole à la fois le droit des droits de l'homme et les dispositions des traités d'investissement s'il est responsable de la torture d'un individu. Ensuite, il sera question des conséquences qu'un tel chevauchement entraînerait et des conditions préalables qu'une victime de torture doit remplir pour utiliser le système de règlement des différends entre investisseurs et États comme moyen de réparation. Après une brève introduction sur le sujet, la deuxième partie donnera au lecteur un aperçu général des dispositions les plus importantes en matière d'investissement et expliquera comment les particuliers peuvent porter plainte contre un État étranger en utilisant le mécanisme d'arbitrage prévu dans les traités internationaux d'investissement. La troisième section analysera la perpétration de la torture en tant que violation des dispositions relatives aux investissements. Les clauses de protection et de sécurité intégrales, ainsi que les normes minimales internationales, seront considérées comme une possible violation de traités, et la section se conclura par des délibérations sur une application potentielle du règlement des différends entre investisseurs et États en cas de torture. La quatrième section décrit les conditions matérielles (investissement) et personnelles (nationalité) nécessaires pour qu'une victime de torture puisse porter plainte contre un État par le biais d'un arbitrage en matière d'investissement. L'article sera complété par des remarques conclusives et des observations finales.

* Dr iur. Martin J. Hemmi's research focuses on the remedy and reparation mechanisms available to individual victims of torture in international law

Spanish translation

El articulo explora la superposición entre los derechos protegidos por el régimen de derechos humanos y los privilegios conferidos a individuos por los acuerdos internacionales de inversión. En particular, sugiere la necesidad de explorar mas a fondo si un Estado, responsable por la tortura de un individuo, viola tanto las leyes sobre los derechos humanos, así como las provisiones de los tratados de inversión. Subsecuentemente, explora las consecuencias que dicha superposición presentaría, así como las condiciones previas que una victima de tortura debiera cumplir para poder invocar el Sistema de acuerdo inversionista-Estado en una disputa de compensación. Después de proveer una breve introducción en la materia, la segunda sección ofrece al lector un panorama general de las provisiones de inversión mas importantes y explica como los individuos pueden presentar una demanda a un Estado extranjero usando el mecanismo de arbitraje ofrecido por los tratados internacionales de inversión. La tercera sección analiza la tortura como violación de las previsiones de inversión. Tanto las clausulas de Protección Integral y de Seguridad como los Estándares Mínimos Internacionales son considerados como fuentes de incumplimiento a los tratados, y la sección concluye con reflexiones en relación a la aplicación potencial de mecanismos de negociación para la disputa inversionista-Estado en el caso de existir tortura. La cuarta sección describe los requisitos necesarios tanto materiales (inversión) como personales (nacionalidad) para que una victima de tortura pueda presentar una demanda en contra de un Estado por medio de la arbitración de inversión. El articulo termina con comentarios y observaciones finales.

Introduction

When discussing serious violations of international obligations, including infringements against the prohibition of torture, one does not automatically think of international investment law as providing a means to receive compensation. Human rights lawyers, notably, seem to shy away from issues relating to investment protection or trade regulations. This area of international law has, however, proven to be the most progressive field regarding individual protection. It has developed to such an extent as to give individuals an internationally enforceable right to claim responsibility even regarding States not affiliated to any regional or international human rights body. One single person may, using the investor-State dispute settlement (ISDS), receive an immense amount of reparations resulting from illegal State interference. One of the highest rewards ever granted to an individual involved the bankruptcy of a Russian Oil company (Yukos Universal limited) in 2006. Using the ISDS provision in the invsestment chapter of the *Energy Charter Treaty*,[1] Russia was ordered to pay damages as high as USD 50 billion.[2] Interestingly, Yukos later filed a claim using a human rights mechanism to sue Russia before the European Court of Human Rights (ECtHR). The Court found a violation of Article 6 ECHR[3] and two separate violations of Article 1 of Protocol No. 1 ECHR. The Court, however, issued a significantly lower award of 1.9 billion Euros - as finding a violation was otherwise considered sufficient just satisfaction.[4]

This example shows how both the human rights mechanism and international investment arbitration may be used by an individual to receive reparation. The question arises under which circumstances a victim of torture might use ISDS to receive civil remedies without needing to rely on a regional human rights body or the domestic justice system of the perpetrating State. After a short introduction into the principles of international investment law, this article focuses on what different aspects of investment protection are violated by the State in case the latter should torture a foreign investor on its territory. Only in a second step, it should be discussed what personal preconditions must be fulfilled in case a victim of torture wants to bring a claim against a State through ISDS. Lastly, an in-depth appreciation of the situation as it relates to the situation of torture victims will conclude the article.

I. International Investment Law in General

Bilateral Investment Treaties (BIT) and other International Investment Agreements (IIA) qualify as international treaties in the sense of Article 2 (1a) of the Vienna Convention on the Law of Treaties (VCLT),[5] by which two or more States agree on the terms and conditions for private investment by nationals and companies of one State in another State.[6] The main objectives of BITs are, on one hand, to "provide a stable and predictable legal environment for the management of foreign investment and to promote the economic

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[1] 17 December 1994, 2080 UNTS 95 art 26 (entered into force April 1998) [*Energy Charter Treaty*].

[2] See *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2014), 2005-04/AA227, at para 1827 (Permanent Court of Arbitration) (Arbitrators: L Yves Fortier, Charles Poncet, Stephen M. Schwebel).

[3] See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 6 (entered into force 3 September 1953).

[4] See *OAO Neftyanaya Kompaniya Yukos v Russia* (just satisfaction), 14902/04 (31 July 2014).

[5] May 1969, 1155 UNTS 331 article 2 1(a) (entered into force 27 January 1980).

[6] See W Michael Reisman et al. *International Law in Contemporary Perspective*, 2nd edition, (New York: Foundation Press, 2004) at 460. See also Chester Brown "The Evolution of the Regime of International Investment Agreements: History, Economics, and Politics" in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 153 at 154.

development of the host State."[7] As Gazzini points out, the particularity of bilateral investment treaties lies within their asymmetrical nature.[8] Similar to human rights treaties, BITs almost exclusively grant individual rights and protection from State interference while referring virtually all treaty obligations to the host State.

While the substantive obligations are subject of chapter three of this paper, it is crucial to understand the mechanism set in place by IIAs for an investor to bring a claim against a foreign State. On one hand, investors are encouraged to use the judicial system of the State in which they have invested. In distinction to the national population however, foreign investors are not limited to this option. In addition, and here investment law is unique in public international law, most IIAs provide for a direct access to international tribunals usually without the precondition of exhaustion of local remedies or prior negotiation or notification. While a majority of the approximately 3500 international investment agreements are bilateral in nature, in recent years a certain trend can be recognized to integrate investment chapters in preferential trade agreements. The 1992 North American Free Trade Agreement (NAFTA)[9] concluded between Mexico, the United States and Canada contains provisions for investor-State dispute settlement. Also, Article 26 of the *Energy Charter Treaty* allows nationals and permanent residents of all contracting parties to file for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) or the Stockholm Chamber of Commerce. More than 50 States, including Japan, Australia, Afghanistan and most of European and former Soviet States are currently member of this treaty. Even the European Union (EU) and Euratom have ratified this convention, making it the only provision in international law by which an individual can bring a claim against the EU in an international tribunal. In 2015, the European Commission made a statement on behalf of the European Union regarding the dispute settlement system contained in the *Energy Charter Treaty* (ECT):

> It is declared that, due to the nature of the EU internal legal order […] the International Energy Charter Treaty on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms would become applicable in relations between the European Union and its Member States, or between said Member States […].[10]

By this declaration the EU indirectly recognizes the ISDS provision within the *Energy Charter Treaty* and specifically accepts it for investors originating from non-EU contracting parties. Investment protection has gone so far as to give an individual not only the means to bring a claim against a sovereign State but has developed to such an extent as to allow for a direct claim against a supranational organization.

While the ISDS provisions in NAFTA and the *Energy Charter Treaty* are most often cited by an investor to bring a claim against a foreign State, the importance of bilateral

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[7] See Tarcisio Gazzini, "Bilateral Investment Treaties" in Tarcisio Gazzini & Eric de Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Boston: Martinus Nijhoff, 2012) 99 at 107. See also K Scott Gudgeon, "United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards" (1986) 4:1 BJIL 105 at 105.

[8] See Gazzini, *supra* note 7 at 107.

[9] See *North American Free Trade Agreement Canada, Mexico & United States*, 17 December 1992, Can TS 1994 No 2 at chapter 20 (entered into force 1 January 1994).

[10] Council of Europe, General Secretariat, *Declaration by the Commission on behalf of the European Union on the applicability of the part of the International Energy Charter devoted to dispute settlement mechanisms*, Notes, Doc 8917 (2015) at 2.

investment treaties should not be underestimated. The combined number of cases brought against a foreign State using a BIT provision makes up 80% of all known investment disputes.[11] While the ECT is limited to the energy sector, BITs englobe a wider range of investment and business branches.

Before a claim can be brought to the dispute centre, the specific procedure and preconditions of the BIT must be followed as otherwise the State's consent to international arbitration might be denied, leading to a lack of jurisdiction *ratione materiae* over the claim. As mentioned, the applicable BIT might contain the obligation of exhaustion of local remedies or provide for a minimum period of consultation between the investor and the State before a claim can be raised in an arbitration centre. Such provisions are, however, quite rare as their implementation could be circumvented by a most-favoured-nation clause, a provision guaranteeing the foreign investor not to be treated less favourably than other foreign investors or the national population.[12] In addition, BITs might contain a so-called "fork-in-the-road" clause by which the investor must decide to bring a claim either within the domestic court system or using international arbitration, but not both.[13]

II. Absolute Standards of Treatment

As the procedural privileges contained in a BIT will only be triggered once a substantive breach of a treaty can be identified, this chapter will focus on the obligations of a State regarding the treatment of foreign investors. What elements of an IIA are violated should the host State neglect its obligations regarding the prohibition of torture? For the purpose of coherence only the mistreatment suffered by a natural person amounting to a human rights violation should be considered, excluding any harm of business interests, such as the protection of legitimate expectations.

The so-called "absolute standards of treatment" are provisions found in a majority of IIAs guaranteeing the investor a minimum set of rights to be protected against unfair or damaging behaviour of the State.[14] In distinction to the relative standards, such as non-discrimination and most-favoured-nation treatment, absolute standards apply regardless of any point of comparison.[15] The investor is therefore protected in any circumstances while the State cannot justify neglecting obligations with the fact that its nationals are treated the same way. Foreigners can consequently be in a more advantageous position as they can directly rely on international minimum standards to apply while domestic investors are excluded from such protection.

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[11] See "Investment Dispute Settlement Navigator" (last accessed: 1 November 2018), online: *Investment Policy Hub* <investmentpolicy.unctad.org/investment-dispute-settlement> (Of the estimated 700 known investment cases roughly 550 used a BIT treaty provision to bring a claim against a State, while roughly 170 cases were brought using other treaties containing ISDS provision).

[12] See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009) at 233. See also August Reinsich, "Most Favoured Nation Treatment" in Bungenberg, *supra* note 6, 807 at 808; Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty Reinterpretation Off the Rails" (2011) 2:1 J Int'l Disp Settlement 97 at 97.

[13] *Toto Costruzioni Generali SPA v Republic of Lebanon* (2009), ICSID Case No ARB/07/12 at paras 203ff (International Centre for Settlement of Investment Disputes) (Arbitrators: Hans van Houtte, Alberto Feliciani, Fadi Moghaizel); Bruno Simma & Dirk Pulkowski, "Two Worlds, but Not Apart: International Investment Law and General International Law" in Bungenberg, *supra* note 6, 361 at 364.

[14] Newcombe, *supra* note 12 at 233. See also Marc Jacob & Stephan W Schill, "Fair and Equitable Treatment: Content, Practice, Method" in Bungenberg, *supra* note 6, 700 at 713ff (difficulty of defining absolute standards of treatment).

[15] See Newcombe, *supra* note 12. See also Jacob, *supra* note 14 at 702; Reinsich, *supra* note 12 at 808.

BITs usually contain three provisions qualifying as absolute standards: Full Protection and Security (FPS), Fair and Equitable Treatment (FET), and International Minimum Standard of Treatment (IMS). In the following chapter both FPS and IMS should be considered as possible treaty breaches in case torture occurred. Regarding FET provisions, it should be mentioned that FET might play a role for human rights litigation outside the spectrum of physical and mental abuse. FET clauses may be applied when actions of the State seem inopportune, discriminatory or inherently arbitrary. Human-rights-related interests, such as the protection of property or anti-discrimination proceedings, may in certain ways be taken into consideration for the appreciation of FET provisions. In the spirit of coherence, exclusively FPS and IMS obligation should be focused upon as official torture would unavoidably be considered unfair and inequitable behaviour of a State. While it is widely accepted that FET consists of an autonomous obligation,[16] distinguishing it from FPS and/or IMS is not an easy task and shall not be subject of this chapter. Many BITs even refuse to separate the clauses from one another as they are inherently intertwined[17] and even case law shows that physical harm may violate several norms for the same actions taken.[18] The author therefore includes FET standards within the realm of FPS and/or IMS as it relates to physical and mental harm amounting to torture.

A. Full Protection and Security (FPS)

"Full Protection and Security" are clauses found in bilateral or multilateral investment treaties that aim at the physical and legal protection of the investor and his or her assets.[19] The State agrees to take active measures to protect the investor and his or her investment from any adverse effects, may they originate from private third parties, such as demonstrators, employees or other private organizations, or be the direct result of the exercise of State power.[20] Within this chapter only the latter should be discussed and the author focuses on human rights violations being committed by the exercise of State authority such as police actions, government investigations or any other use of armed forces or coercion mechanisms within or outside an armed conflict.

As examples for FPS provision one might name Article 1105 (1) NAFTA, Article 10 (1) ECT, or Article 3 (1) of Dutch Model BIT which reads:

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[16] See Newcombe, *supra* note 12 at 234; Christoph H Schreuer, "Fair and Equitable Treatment (FET): Interactions with other Standards" (2007) 4:5 Transnational Dispute Management.

[17] See e.g. *Agreement between the Government of the Republic of Indonesia and the Government of the People's Democratic Republic of Algeria concerning the Promotion and Protection of Investments*, 21 March 2000, art 2 <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/49/download>.

[18] See *The Rompetrol Group NV v Romania* (2010), ICSID Case No ARB/06/3 (International Centre for Settlement of Investment Disputes) (Arbitrators: Donald Francis Donovan, Marc Lalonde) (the Tribunal found a violation of both FPS and FET provision for the physical harassment of individuals) [*Rompetrol*]. See also *Desert Line Projects LLC v The Republic of Yemen* (2008), ICSID Case No ARB/05/17 at para 213 (International Centre for Settlement of Investment Disputes) (Arbitrators: Jan Paulsson, Ahmed S EI-Kosheri) (in this case the harassment violated both IMS and FET norms).

[19] See Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials*, 1st ed (Cheltenham, UK: Edward Elgar, 2013) at 312; Ralph Alexander Lorz, "Protection and Security (Including the NAFTA Approach)" in Bungenberg, *supra* note 6, 764 at 764ff. See also Jacob, *supra* note 14 at 764ff.

[20] See Christoph Schreuer, "Full Protection and Security" (2010) 1:2 J Intl Disp Settlement 353 at 353. See also Giuditta Cordero Moss, "Full Protection and Security" in August Reinisch, ed, *Standards of Investment Protection,* (New York: Oxford University Press, 2008) 131.

> Each Contracting Party shall accord to […] investments full physical security and protection.[21]

Most inherent FPS obligation consists of the guarantee to protect the physical security of the investor or the investment. While a majority of cases are filed by legal entities, the main application of FPS provisions tends to demand compensation for damages caused to an object of property, such as a building, the machinery used for fabrication, the raw material or the finished goods. The State party has, however, the additional obligation to protect "the physical integrity of an investment against interference by the use of force."[22] This obligation is, nevertheless, one of performance and not of result.[23] Italy was not held responsible for the damages caused to an American Company by Italian employees during a demonstration as it took all precautionary and protection measures necessary to fulfil its FPS obligations.[24] In *AMT v Zaire*,[25] the arbitrators specified that FPS obligations were violated in case armed forces would have illegally entered the premises of foreign investors and caused material damage in the process. During several armed conflicts, the Zairian army had destroyed, damaged and confiscated certain property and objects of value belonging to an American Company situated in what later became the Democratic Republic of Congo (DRC). The DRC-United States BIT of 1986[26] had contained a provision guaranteeing full protection and security in its Article 2. As a consequence of these actions, Zaire was ordered to pay 9 Million USD in damages for having violated its obligations under the Bilateral Investment Treaty.

It is not excluded that FPS provisions may also protect a human being from illegal use of force, meaning his/her physical and mental integrity. Most authors agree that "full protection and security" must be understood as protecting the investor from bodily injuries, harassments, or threats caused by government acts.[27] Even the International Court of Justice (ICJ) distinguished the FPS provision as giving two separate obligations: One with regard to the person of the investor and another one with regard to his/her assets.[28] In *Eureko v Poland*, the ICSID arbitrators had accepted that FPS provisions may be applicable in case the police would physically harass foreign investors, however mentioned that a certain minimum threshold regarding the seriousness of the actions must be reached in order to consist of a treaty breach.[29] States hence accept the obligation to protect the physical and mental integrity of a person when it concludes an investment treaty containing a FPS provision. Should an individual therefore be severely

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[21] Internetconsultatie, "Netherlands draft model BIT" (2018) art 9(1), online (pdf): *Global Arbitration Review* <globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf>.

[22] *Saluka Investments BV (the Netherlands) v The Czech Republic*, Partial Award of March 17, 2006 (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier, Peter Behrens) at para 484; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan* (2008), ICSID Case No ARB/05/16 (International Centre for Settlement of Investment Disputes) (Arbitrators: Steward Boyd, Marc Lalonde) at para 668; Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals" in James Crawford et al, eds, *The Law of International Responsibility*, 1st ed (New York: Oxford University Press, 2010) 257 at 277–78.

[23] See Nadakavukaren Schefer, *supra* note 19 at 312.

[24] *United States of America v Italy*, See *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, [1989] ICJ Rep 15 at para 136 [*Unites States v Italy*].

[25] *American Manufacturing & Trading, Inc v Republic of Zaire* (1997), 36 ILM 1534 (International Centre for Settlement of Investment Disputes) (Arbitrators: Stomping Suchritkul, Heribert Golsong, Kéba Mbaye).

[26] *Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment*, United States and the Democratic Republic of Congo, 3 August 1986, S Treaty Doc No 99-17 (1986), IC-BT 394 (1984) (entered into force 28 July 1989).

[27] See Nadakavukaren Schefer, *supra* note 19 at 312; Schreuer, *supra* note 20 at 354. See also de Frouville, *supra* note 22 at 277–78.

[28] See *United States of America v Italy*, *supra* note 24 at 102–12.

[29] *Eureko BV v Republic of Poland* (2005), IIC 98 (2005) at paras 236–37 (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier, Stephen M Schwebel, Jerzy Rajski).

mistreated or endure any other treatment that overpasses the *Eureko* threshold, that person would consequently be entitled to use the ISDS provision for claiming compensation.

In the case of *Rompetrol v Romania*,[30] two Romanian employees of a Dutch company were arrested and detained by Romanian anti-corruption units. In addition, one of the employees, Mr. Patriciu, was further subjected to travel-bans and enhanced surveillance techniques, such as wire-tapping. ICSID arbitrations arrived at the conclusion that the conduct in question was politically motivated and thus constituted a State-sponsored harassment of the individuals through an unlawful criminal investigation. It further specified that Romanian police investigators had breached individuals' personal rights violating the full protection and security clause found in the Dutch-Romanian BIT,[31] Human rights violations therefore have been found to cause a breach of FPS in investment arbitration. Jurisprudence in the matter is, however, not consistent: The case of *Patrick Mitchell v the Democratic Republic of the Congo*[32] concerned the military intervention ordered by the Military Court of the Democratic Republic of the Congo (DRC) and its execution on the premises of an American-owned legal consulting firm. During the raid, compromising documents were seized and put under seal, additionally two local employees – both recognized lawyers – were put in prison and incarcerated for over nine months without trial. Despite the clear factual similarities between the *Mitchell* and the *Rompetrol* arbitrations, only the latter included a detailed analysis of the mistreatment endured by local employees. In *Mitchell* the arbitrators only identified an unlawful expropriation of documents and property belonging to an American investor, however refused to extend the merits of the case to breaches of FPS or FET provisions in relation to the harassment and mistreatment suffered by two local employees.[33] It must be mentioned that the *Mitchell* arbitration was later annulled by an *ad hoc* Committee as a consequence of an excess of power and failure to state sufficient reasoning.[34] The annulment was, however, based on a misqualification of the relevant services offered by the consulting firm as constituting a protected investment in the sense of international investment law. Whether the personal scope of protection may include both the investor and his/her employees remains unclear, showing the continued lack of consensus in this perspective.

B. International Minimum Standards of Treatment (IMS)

The Encyclopaedia of Public International Law defines IMS as:

> [A] concept (sometimes called the international standard of justice) [which] affirms that there are rights created and defined by international law that may be asserted against States by or on behalf of aliens [that includes] the rights of aliens to fair civil or criminal judicial proceedings […] to decent treatment if imprisoned, and to protection against disorder, violence, and against deportation in abusive ways […].[35]

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[30] *Rompetrol*, *supra* note 18.

[31] *Rompetrol*, *supra* note 18 at para 193ff; *Agreement on encouragement of reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of Romania*, 19 April 1994, 2242 UNTS 41 art 3 (entered into force 1 February 1995).

[32] (2002), Case No ARB/99/7 (International Centre for Settlement of Investment Disputes) (Arbitrators: Andreas Bucher, Yawovi Agboyibo, Marc Lalonde).

[33] *Ibid* at para 72.

[34] *Patrick H Mitchell v Democratic Republic of Congo* (2006), Case No ARB/99/7 (*Ad hoc* Committee of the International Centre for Settlement of Investment Disputes) (Arbitrators: Antonias Dimolitsa, Robert Dossou, Martina Polasek).

[35] Detlev Vagts, "Minimum Standard" in Rudolph Bernhardt, ed, *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 1997) vol 3 at 408.

States should uphold a minimum threshold recognized by the international community or otherwise be confronted with paying damages. An effective implementation of IMS in favour of foreign investors implies that an equal treatment between a national and a foreign investor was not sufficient to comply with the obligation contained in IMS but that – in some circumstances – States are obliged to treat foreigners better than the national population. IMS obligations are detached from any domestic legislation and exclusively find their basis in international customary law.[36]

The origins of IMS in relation to investor protection can be traced to the early 20th century. Already in 1915, Borchard identified "the standard of a duty of the State towards aliens and its international responsibility for violation of its obligations may be considered the result of a gradual evolution in practice, States having in their mutual intercourse recognized certain duties incumbent upon them."[37] In the 1926 *Neer case*, the mixed Claims Commission between Mexico and the United States significantly clarified the meaning and content of IMS. The case concerned an American businessman who was travelling by horseback in the northern regions of Mexico, when a group of criminals intersected him and his family and killed Mr. Neer right in front of his wife and daughter. The Tribunal established that Mexican police forces did not fulfil their duty to investigate the murder of a foreign individual. The incompetence to apprehend and punish those responsible amounted to a denial of justice in violation of internationally recognized principles:

> The propriety of governmental acts should be put to the test of international standards […] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[38]

The same year, the Mixed Claim Commission found another violation of IMS in the case of Harry Roberts.[39] Mr. Roberts, an American citizen, was unlawfully arrested and held prisoner in Mexico for an unreasonably long period without trial. The arbitrators recognized the immense physical pain and mental anguish which Mr. Roberts had to endure for an extended period which not only violated the Mexican Constitution but also international standards of the treatment of aliens:

> [T]he jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, […] and no sanitary accommodations, all the prisoners depositing their excrements in a barrel kept in a corner of the room; that

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[36] See generally *CMS Gas Transmission Company v Republic of Argentina* (2005), (International Centre for Settlement of Investment Disputes) (Arbitrators: Francisco Orrego Vicuña, Marc Lalonde, Francisco Rezek) [*CMS*]; Tarcisio Gazzini, Interpretation of International Investment Treaties (Oxford: Hart Publishing, 2016) at 97ff.

[37] See Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Law Publishing Co, 1919) at 177–178.

[38] *LFH Neer & Pauline Neer (USA) v United Mexican States* (1926), Reports of International Arbitral Awards vol IV 60 at 61–2 (Mixed Claims Commission).

[39] *Harry Robert (USA) v United Mexican States* (1926), Reports of International Arbitral Awards vol IV 77.

> thirty or forty men were at times thrown together in this single room: that the prisoners were given no facilities to clean themselves: that the room contained no furniture […] and that the food given them was scarce, unclean, and of the coarsest kind.[40]

The Tribunal qualified these conditions as inhuman and cruel treatment of an alien not in accordance with ordinary standards of civilization.[41]

Many authors tend to mention minimum standard of treatment as part of customary international law.[42] IMS clauses were only later integrated in international treaties for investment protection. Nowadays, it is broadly accepted that minimum standards of treatment apply in investment protection even when not specifically included in the text of the applicable BIT.[43] This consequently means that foreign investors will be able to use the ISDS provision integrated in an international investment agreement for violation of the minimum threshold of civilized societies. Relevant in this respect is a more recent case of 2008, whereas a Road construction business used the Oman-Yemen BIT[44] to bring proceedings against the Republic of Yemen.[45] The Tribunal had concluded that armed threats against personnel including investors' family members violated the international minimum standards and the fair and equitable treatment provision included in the BIT. In addition to paying reparations for the acts caused by Yemeni armed forces, the victims were awarded moral damages of 40 Mil. Omani Rial (1 Mil. USD).[46] The Tribunal justified this payment by the fact that "the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes."[47]

C. Do Torture Claims fit Within the Investment Mechanism?

Ben Hamida observes that certain substantive norms such as the prohibition of discrimination and the protection of property may be common to both investment and human rights law.[48] Following this premise, the case law of international investment arbitration and the legal opinions described above indicate that an overlap between investment protection and human rights also occurs in case of torture. As we have discovered, FPS provisions protect the physical and mental integrity and liberty of the investor from the exercise of use of force. Case law and doctrine seem to agree that this

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[40] *Ibid.*

[41] *Ibid.*

[42] See generally *CMS*, *supra* note 36 at para 284; Gazzini, *supra* note 36 at 97;

[43] See Lorz, *supra* note 19 at 771. See also Moss, *supra* note 20 at 136–37.

[44] *Agreement for the Reciprocal Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of* Yemen, 20 September 1998 (entered into force 1 April 2000) <edit.wti.org/document/show/3a70b787-8edd-4daf-a55d-2c088b87fb23> (The Agreement cited here is a translation of the original document, but the English version was relied on by both parties, see D*esert Line*, *infra* note 45 at para 92, 100. Note that there are minor discrepancies in translation between the text of the Agreement cited here and the text of the Agreement reproduced in *Desert Line*).

[45] *Desert Line Projects LLC v Republic of Yemen* (2008), ICSID Case No ARB/05/17 (International Centre for Settlement of Investment Disputes) (Arbitrators: Pierre Tercier, Jan Paulsson, Ahmed S. EI-Kosheri) [*Desert Line*].

[46] *Ibid* at para 283. See also Patrick Dumberry, "Moral Damages" in Christina L Beharry, ed, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration*, (Boston: Brill Nijhoff, 2018) 142 (the source provides information on moral damages within investment arbitration).

[47] *Ibid* at para 286.

[48] See Ben Hamida W, "Investment Arbitration and Human Rights" (2007) 5 Transnational Dispute Management at 10.

provision is violated in case of physical harassment, unlawful arrest, or bodily injuries. As torture necessarily implies severe pain and suffering for the individual concerned,[49] one must consequently conclude that the "Full Protection and Security" covers acts of torture as well. Alternatively, IMS obligations apply even when FPS provisions are not specifically included in the treaty. States are under the obligation to provide for a minimum level of acceptable treatment to aliens or otherwise being confronted with a breach of IIA provisions. The minimum level of treatment is clearly undermined should a State commit torture, an act internationally recognized as a *jus cogens* violation.[50] Persons like Mr. Roberts in the *Roberts ruling* who endured months of inhuman and cruel treatment in prison were able to be compensated through international arbitration for violations of IMS. Of key interests are, however, the procedural rights linked to an investment treaty breach. Both international investment law and international human rights law have established a system by which individuals may bring a claim against a State. Suddenly, victims of torture would not be limited to the human rights system but could alternatively use ISDS to have their claims heard.

A significant overlap between several disciplines was identified by the International Court of Justice in the case of *Ahmadou Diallo*.[51] Mr. Diallo was arrested, incarcerated for almost 70 days, and deported to prevent him from conducting business in the DRC. The ICJ ordered the defending State to pay damages to Guinea for illegal actions taken against one of their nationals, however mentioned that the human rights aspect of the case would have qualified him to take proceedings directly against the DRC using the Banjul Charter,[52] the regional human rights body. Interestingly, the ICJ also discussed investment law as providing a more suitable alternative to an inter-State claim.[53] The ICJ consequently accepts a substantive overlap between investment law, human rights, and diplomatic protection.

What consequences would a parallelism between the human rights and investment dispute resolution system for violations of torture entail?

As Reiner and Schreuer convincingly point out, human rights law and investment law differ considerably.[54] On one hand, investment protection offers individuals a unique setting in public international law. In no other discipline can a private person bring a direct claim against a foreign country or, as we have seen, against an international organization, without relying on exhaustion of local remedies. Secondly, in distinction to human rights law, the question of nationality is crucial in investment protection. Both the applicability of the IIA as well as the procedure set in place for ISDS will depend on the positive and negative

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[49] See Walter Kälin & Jörg Künzli, *Universeller Menschenrechtsschutz*, revised 3rd ed (Basel: Helbing Lichtenhahn Verlag, 2013) at 368ff; Mary-Hunter Morris McDonnell, Loran F. Nordgren & George Loewenstein, "Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy" (2012) 44 Vand J Transnat'l L 87 at 98; Anthony Cullen, "Defining Torture in International Law: A Critique on the Concept Employed by the European Court of Human Rights" (2003) 34 Cal WL Rev 29 at 32.

[50] See *Prosecutor v Furunžija*, IT-95-17/1-T, Trial Judgement (10 December 1998) at para 156 (International Criminal Tribunal for the former Yugoslavia); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 422.

[51] *Case concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)*, [2007] ICJ Rep 582 [*Guinea*].

[52] "African Charter on Human and Peoples' Rights" (1986) online (pdf): *African Commission on Human and Peoples' Rights* <www.achpr.org/files/instruments/achpr/
banjul_charter.pdf>

[53] *Guinea*, *supra* note 51 at 614.

[54] Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009) at 82.

requirements regarding the nationality of the claimant – an aspect discussed in more detail below.[55] In contrast, human rights law is blind to the question of nationality. It does not matter what citizenship an individual possesses as long as the human rights violation took place in the jurisdiction of the perpetrating State.[56]

Nevertheless, it must be mentioned that investment arbitration is expensive and takes significantly longer than human rights proceedings. This essentially limits torture claims being introduced by individuals who can afford international arbitration or who are supported by a non-profit organization or any other intermediary claiming protection on their behalf. Once proceedings are introduced, however, investment protection is known to award much higher compensation payments than what is practiced in the human rights framework. It should, however, briefly be mentioned that the defending State might also have an interest that torture allegations be raised in an investment forum instead of a human rights court. Due to the limited transparency setting applicable in international investment law,[57] the potentially finite impact on the State's international reputation could encourage State representatives to actively collaborate in the proceedings and recognize responsibility where recognition is due.

Regarding the issue of human rights litigated within an investment setting, legal scholars disagree on the applicable legal provisions to the dispute, an issue that should briefly be discussed here. The case of *Biloune v Ghana*[58] raised the question, whether human rights law was applicable as such in investment proceedings or if investment arbitration is a sort of "self-contained regime" not affected by rules of general international law. It concerned a Syrian investor who managed the remodelling of a restaurant situated in Accra, Ghana. During the restoration process, the Ghanaian government issued an order to stop the project, arrested and detained Mr. Biloune for 13 days and eventually deported him to Togo. Biloune specifically raised the issue of human rights violations as part of the UNCITRAL arbitration. The tribunal, however, refused to engage with the human-rights-related issues as it "lacks jurisdiction to address, as an independent clause of action, a claim of violation of human rights."[59] The Tribunal accepted that human rights made up an integral part of the minimum standard of treatment to be respected according to customary international law, however, limited its jurisdiction over a dispute in respect of foreign investment.

Reiner and Schreuer disagree as "human rights violations, cannot *per se* be excluded from its jurisdiction. If and to the extent that the human rights violation affects the investment, it becomes a dispute "in respect of" the investment and is hence arbitrable."[60] This opinion seems generally convincing as the practice of investment litigation would allow

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[55] See Section IV, below.

[56] See e.g.: Kälin, *supra* note 49 at 129.

[57] See Dimitrij Euler et al, eds, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge: Cambridge University Press, 2015); J Maupin, "Transparency in International Investment Law: The Good, the Bad and the Murky" in A Bianchi & A Peters, eds, Tra*nsparency in International Law* (Cambridge: Cambridge University Press, 2013) 142 at 143.

[58] *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investment Center and the Government of Ghana* (1989), 95 ILR 183 (UNCITRAL) (Arbitrators: Stephen Schwebel, Don Wallace, Monroe Leigh).

[59] Reiner, *supra* note 54 at 84. See also Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104:2 American J of Int Law at 215; Simma, *supra* note 13 at 363.

[60] Reiner, *supra* note 54 at 54.

for the jurisdiction of an arbitration centre even in cases not directly linked to the investment at hand. ICSID, especially in cases regarding FET and FPS clauses, has accepted jurisdiction and found treaty breaches in relation to the mistreatment of personnel or investors, regardless of their affect to the investment. The harassment charges in *Rompetrol* were recognized as a clear breach of both FPS and FET provisions despite not having shown a direct impact on the investment at hand. Including human rights law as applicable in investment arbitration must necessarily be done as many human rights, including the prohibition of torture, are part of customary international law. Certain multilateral investment treaties, such as NAFTA (Article 1131) and ECT (Article 26 (6)), mention both the text of the treaty and the rules and principles of international law as applicable in case a dispute should arise. In addition, Article 42 (1) of the ICSID Convention states that "the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable," a *lex specialis* provision with regard to the general rule of international treaty law contained in Article 31 (3c) VCLT. This conclusion is supported by ICSID arbitrators in a case against Sri Lanka, where they expressed their concern against the growing de-fragmentation of international law:

> Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[61]

The question of applying international human rights provisions within an investment context should, however, not be confused with the topic of this paper. The author proposes to reclassify severe mistreatment and violence against a person not as a human rights violation but as a violation of investment standards. Human rights law does not enter the equation directly in this scenario and the question of its applicability is rendered moot.

In January of 2016, the broadcasting network Al Jazeera filed a claim for damages at ICSID against the Arab Republic of Egypt.[62] The media company demands compensation in the name of its employees who allegedly became victims of serious human rights violations committed by the Egyptian security forces during the revolutionary period between 2011 and 2015. Al Jazeera had broadcasted images of the uprising against the Egyptian government despite a clear prohibition. As a consequence, Egyptian and foreign journalists were arrested and detained for months without charge, broadcasting facilities were attacked and destroyed as well as transmissions interrupted. Al Jazeera, with its headquarters in Doha (Qatar), used the Qatar-Egypt BIT[63] to demand redress for several international law violations as no other effective means of redress existed. Most claims forwarded by Al Jazeera focus on the breach of individual rights of its journalists, such as the liberty of expression, freedom of movement, the protection of press as prescribed by international treaties and customary international law and not just on the destruction of

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[61] See *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (1990), No ARB/87/3 at 21 (International Center for the Settlement of Investment Disputes) (Arbitrators: Ahmed Sadek El-Kosheri, Berthold Goldman, Samuel Asante). See also Simma, *supra* note 13 at 361.

[62] *Al Jazeera v the Arab Republic of Egypt* (Pending), No ARB/16/1 (International Center for the Settlement of Investment Disputes) (Arbitrators: AJ Van Den Berg, N Ziadé, A Rigo Sureda) [*Al Jazeera*].

[63] *Agreement Between the Government of the Arab Republic of Egypt and the Government of the State of Qatar on the Promotion and Reciprocal Protection of Investments*, 12 February 1999, IC-BT 1766 (1999).

property and investment. It is yet unclear how Al Jazeera intends to classify violations of individual rights within this dispute: either as human rights violation applicable to the dispute or as violations of investment standards. The case nevertheless shows the growing trend towards using investment arbitration instead of a human rights mechanism for receiving redress for severe violations of individual rights.

IV. BIT Jurisdiction

Once a substantive treaty breach has been established, the possibility of an individual bringing a claim against a foreign State through investment arbitration will depend on several elements. Next to the obvious condition that a BIT must have been concluded and have entered into force between the two States in question, only foreign investors are subject to international investment protection. This chapter will thus focus on the two main jurisdictional elements that determine the applicability of a BIT. Firstly, the jurisdiction *ratione materiae*: What elements must be understood as forming an investment in the sense of a BIT? How can an investment be defined as it applies to international investment law? As a clear definition of the term of "investment" is missing in international law, this section will, first of all, exemplify the term of investment using a selection of international treaties as well as relevant case-law. Secondly, and more importantly from a human rights perspective, this article focuses on the precondition *ratione personae* regarding the nationality of the claimant. As mentioned previously, other than in international human rights law, international investment protection inherently depends on the nationality of the applicant. Who is understood as a foreign individual? Can dual-nationals use ISDS for bringing a claim against one of their State of nationality? Would torturous acts committed against the domestic population of a State fall outside investment arbitration? These and more questions will be discussed in section two of this chapter.

A. Ratione Materiae (Investment)

States enjoy a considerable margin of appreciation on what assets they intend to include in investment protection. The delimitation of the scope of a BIT will therefore exclusively depend on the wording found in the applicable BIT.[64] Throughout the investment landscape, one might categorize different approaches on how States have defined investments within investment treaties. European countries typically take an asset-based, illustrative list approach. The so-called "Dutch Model" contains a broad definition stressing the investment's quality as an "asset" typically giving a non-exhaustive list of examples.[65] These types of BITs intentionally take a broad approach to cover a wide spectrum of investment assets, a fact that must be taken into consideration when an international tribunal determines the scope of application.[66]

> The term "investment" shall include every kind of asset and particularly:
>
> a) Movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
>
> b) Shares, parts or any other kinds of participation in companies;

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[64] See Nadakavukaren Schefer, *supra* note 19 at 60; Jan Bischoff & Richard Happ, "The Notion of Investment" in Bungenberg, *supra* note 6, 495 at 495.

[65] Nadakavukaren Schefer, *supra* note 19 at 60; Bischoff, *supra* note 64 at 500.

[66] *Fedax NV v Republic of Venezuela* (1997), No ARB/96/3 at 34 (International Center for the Settlement of Investment Disputes) (Arbitrators: Francisco Orrego Vicuna, Meir Heth, Roberts B Owen).

c) Claims to money or to any performance having an economic value;

d) Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin, know-how and goodwill;

e) Concessions under public law, including concessions to search for extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.[67]

The second group of treaties similarly contains a list of investment assets. In distinction to the "Dutch Model", however, the elements contained in the list are a mandatory and exclusive enumeration of assets protected by the treaty. No other kinds of investment shall be included, as otherwise the treaty could be used in a broader sense than initially intended by the contracting parties. Examples of "closed list" treaties include NAFTA or the Canadian Model BIT. At this point, it is important to mention that both the closed and non-exhaustive listing approaches do not distinguish between the purposes for which investments were acquired. In other words, it is not mandatory for an investment to be used in a business setting. A number of IIAs limit their applicability to investment exclusively performed in connection to the economic activity in the territory of the contracting party. The Mauritius-Swaziland BIT for examples defines protected investments as:

> [E]very kind of asset admissible under the relevant laws and regulations of the Contracting Party in whose territory *the respective business undertaking* is made […].[68]

The United States typically considers a business relation necessary. In their opinion, investments are specifically characterized as capital or other resources used with the expectation of gain or profit. This necessarily implies assuming a risk to achieve business goals. Assets used for any other purposes should not be included in the BITs jurisdiction.[69] Other IIAs even take a step further by only protecting investments that lead to the establishment of a lasting economic relation.[70] Occasional or minor investments are excluded. In relation to this issue one must cite the *Salini case*[71] before the ICSID international tribunal. The case concerned an Italian contractor commissioned to build a highway in the Kingdom of Morocco. The Moroccan government refused to pay the contractors as they finished the project with delay. The ICSID arbitrators, in a decision relating to the jurisdiction of the Tribunal, had to specify whether the work conducted by

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[67] *Agreement Between the Swiss Confederation and Barbados on the Promotion and Reciprocal Protection of Investments*, Switzerland and Barbados, 29 March 1995, TRT/BB-CH/001 art 1(2).

[68] *Agreement Between the Government of the Republic of Mauritius and the Government of the Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments*, 15 May 2000 art 1(1)(a) <edit.wti.org/document/show/ff3e967d-61dc-4dd0-af40-b2d053dcac4e> [emphasis added].

[69] US Department of State, "2012 U.S. Model Bilateral Investment Treaty" (2012), online (pdf): *US Department of State* <www.state.gov/documents/organization/188371.pdf>.

[70] *Free Trade Agreement Between the European Free Trade Association (EFTA) States and the United Mexican States*, 27 November 2000 art 45 (entered into force 1 July 2001) <www.efta.int/media/documents/legal-texts/free-trade-relations/mexico/EFTA-Mexico%20Free%20Trade%20Agreement.pdf>.

[71] *Salini Costruttori SPA and Italstrade SPA v the Kingdom of Morocco* (2001), 42 ILM 609 (International Centre for Settlement of Investment Disputes) (Arbitrators: Me Robert Briner, Me Bernardo Cremades, Pr Ibrahim Fadlallah)

the Italian contractor consisted of an "investment" in the sense of the Italian-Moroccan BIT or a simple execution of a contractual obligations for which they received monetary compensation. The Tribunal concluded that the objective criteria of investments are their significant contribution to the host State's development.[72] The fact that Salini was remunerated for building a 50km highway does not change the fact that they had significantly contributed to the infrastructural and economic development of Morocco. It is important to notice that, what was later known as the "Salini test," was specifically intended to broaden the scope of the applicable BIT by including an element which would have otherwise fallen out of investment protection. The tensions created between the subjective definition of an investment contained in a BIT and the objective requirements proposed by the *Salini ruling* is a matter that needs further development and clarification.

As this paper is only intended to give a swift summary over the issues related to the diverging definitions of investment rather than discussing the matter in detail, certain principles should be confirmed that apply in international investment law. Firstly, the realm of protection will predominantly depend on the wording found in the specific BIT. On one hand, the margin of appreciation left to States has led to a restrictive approach on investment protection where only significant investments that contribute to the lasting economic ties will enjoy investment protection. On the other hand, especially European countries, with an asset-based definition, seem to take a more liberal approach. Neither the nature nor the purpose of the asset is considered a precondition for the BIT jurisdiction. In addition, no monetary threshold exists. As even shares or other part of participation to a company incorporated in the host State, it is perfectly conceivable that even small shareholders might enjoy investment protection giving them access to ISDS. The same goes for movable or immovable property. It could be sufficient to be the owner of an apartment situated in the host State, despite the fact that it is exclusively used for personal reasons. The tendency to broaden the scope of an IIA is also shown by the introduction of the "Salini test." The way in which the proposed objective requirement limits the liberties of States to determine the material scope of a treaty is a matter that needs further development.

However small the threshold on BIT jurisdiction may be, it does not change the fact that a number of foreigners are precluded from using the inter-State dispute settlement system contained in the BIT. The distinction exclusively depends on the property or wealth of a person and the assets at his/her disposal. With a specific link to human rights victims not covered by investment protection, does it make sense to give additional means for retrieving damages to individuals simply because they own an apartment in the State in question or inherited some shares that happened to belong to a company incorporated in that State? This distinction is even more absurd when considering that investors typically choose to do business with a foreign State assuming a certain risk that the investment might not turn out profitable. The same cannot be said for victims of human rights abuses. Most victims never willingly entered in contact with the foreign government but just happen to suffer from the public authority held over them. Investment protection is often conceived as an asymmetrical system where business owners may benefit from getting access to a foreign market and receive a tool for damage control should any State action lead to unforeseeable losses.

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[72] *Ibid* at para 52. See also Bischoff, *supra* note 64 at 506.

B. Ratione Personae (Nationality)

The author would like to emphasize that the concept of nationality in investment protection was subject of an in-depth analysis within a publication he offers elsewhere.[73] For the purpose of a concise argumentation, only a brief overview should be given of the conclusions found in the mentioned article.

Firstly, when it comes to nationality, investment protection can be considered the "innovation house" within the public international framework. It proposes several unique solutions to problems found in other disciplines often emphasizing the *lex specialis* nature and choosing to take a different path to otherwise recognized principles and customary law. Usually issues related to nationality fall within the exclusive realm of sovereignty of a State constituting a classical concept of *domaine réservé*.[74] Nevertheless, investment tribunals have decided cases lifting the absolute sovereignty in this regard, so for example in *Hussein Soufraki v the United Arab Emirates*.[75] The Tribunal held that Mr. Soufraki did not possess Italian citizenship even though Italy had issued two valid passports, five certificates of nationality and a certificate specifically allowing him to use ISDS as an Italian citizen issued and signed by the Italian Foreign Ministry. Similar decisions were taken in *Siag v Egypt*.[76] In this ruling, the tribunal held that Mr. Siag was not an Egyptian national, even though Egypt had treated him as such since birth and had granted him governmental business incentives exclusive to Egyptian nationals. In addition, the practice in international investment law differs considerably in matters related to diplomatic protection as both dual citizens and permanent residents may be included in the personal scope of a BIT. Due to the continued inter-State provisions within investment treaties, the first implementation of a diplomatic protection *de jure domicili* was introduced in public international law. For more details regarding the concept of nationality and diplomatic protection the reader is referred to the opinions expressed by Hemmi.[77]

In distinction to what is practiced in human rights litigation, an applicant must show - in order to receive compensation through an ISDS provision - that he/she fulfils the nationality requirement directly or that mistreatment took place because of his/her relation to a foreign investor as defined by the applicable treaty. For the purpose of this article, it is consequently important to understand who a "foreign" investor is and who may use ISDS for compensation claims. In this regard, it is certainly true that any person non-citizen of the host State will have access to ISDS if their State of origin has concluded a BIT with the country in question. Important to retain is that the personal scope of BIT may be extended to cover the national population of the host State in two ways. Firstly, dual-citizens of both the host and the State with which a BIT was concluded may use ISDS to bring a claim against one of their home States. This was most notably decided in the case of *García Armas*

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[73] Martin Hemmi, "The Concept of Nationality and Diplomatic Protection in International Investment Law" (19 June 2017), online: *Jusletter* <jusletter.weblaw.ch/en/juslissues/2017/896.htmlprint>.

[74] Most notably expressed in *Nationality Decrees Issued in Tunis and Morocco case* (1923), Advisory Opinion, PCIJ (Ser A/B), No 4 at 24.

[75] *Hussein Nuaman Soufraki v The United Arab Emirates* (2007), ARB/02/7 (International Centre for Settlement of Investment Disputes) (Arbitrators: Florentino P Feliciano, Omar Nabulsi, Pr Brigitte Stern).

[76] *Waguih Elie George Siag and Clorinda Vecchi v the Arab Republic of Egypt* (2007), ARB/05/15 (International Centre for Settlement of Investment Disputes) (Arbitrators: Pr Michael Pryles, Pr Francisco Orrego Vicuna, David A R Williams).

[77] Hemmi *supra* note 73 at paras 12ff. See also for more details on the personal scope of bilateral investment treaties: Lucy F Reed & Jonathan E Davis, "Who is a Protected Investor?" Bungenberg, *supra* note 6, 614 at 614 ff; Roberto Aguirre Luzi & Ben Love, "Individual Nationality in Investment Treaty Arbitration: The Tension between Customary International Law and Lex Specialis" in Andrea K Bjorklund, Ian A Laird & Sergey Ripinski, eds, *Investment Treaty Law: Current Issues III* (London: British Institute for International and Comparative Law, 2009) 183.

v Venezuela[78] where two Venezuelan-Spanish dual nationals (father and daughter) successfully brought a claim against Venezuela. According to the tribunal, having the nationality of the State party to the dispute does not preclude ISDS even though their Venezuelan citizenship was predominant in the case at hand.[79] The Paris Appeals court later annulled this case at the request of the Venezuelan government.[80] The Appeals Court nevertheless reaffirmed the lower Court's findings on nationality and the continued jurisdiction *ratione personae* for dual-citizens, however annulled the arbitral decision based on a lack of jurisdiction *ratione materiae*.[81] ISDS is consequently open to dual-citizens as well as foreigners, must however be brought outside the ICSID framework as Article 25 ICSID prohibits a claim being raised against the home state of an investor.

Secondly, even regarding the national population of a State, case law has established certain mechanisms by which nationals of the defending State might enter the scope of protection of an IIA. In *Rompetrol*,[82] the Tribunal was asked to analyze a BIT treaty breach regarding harassment charges and the unlawful arrest and detention of two Romanian employees of a Dutch company. The Tribunal mentioned that a simple connection to a foreign company would not suffice to bring mistreatment of a national into the jurisdiction of the BIT.

> To come within the zone of protection something more would be required. […]. Either the conduct complained about could have been directed against the individuals for actions taken on behalf of and in the interest of the investor or its investment […]. Or the conduct complained about could have been directed against individuals (even in their personal capacity) for the purpose of harming the investor or its investment through the medium of injury to the individuals.[83]

Evidently, persons concerned, not carrying a foreign passport or a passport of a country with which an IIAs has been concluded, necessarily would need to use an intermediary claiming investment protection on their behalf. Private transnational corporations may consequently enter the sphere of providing redress for violations of individual rights in a unique way. By qualifying acts of torture as a violation of FPS and/or IMS provisions, transnational corporations may therefore hold a States responsible for the severe mistreatment of its national and foreign population. This approach is especially valuable for actions brought against States not affiliated to any individual complaint mechanism in the human rights field. The vast network of bilateral and multilateral investment treaties may – to a certain extent – reach beyond the traditional human rights spectrum by providing an implementation mechanism for actions that would have otherwise fallen within the gaps of human rights enforcement.

Additionally, *Rompetrol* considerably extends the personal scope of a BIT. Suddenly, a State may be confronted with compensation claims resulting from a damaging behaviour

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[78] *Serafín García Armas and Katarina García Gruber v Bolivarian Republic of Venezuela* (2014), CPA No 2013-3 (UNCITRAL) (Arbitrators: Pr Eduardo Grebler, Pr Guido Santiago Tawil, Rodrigo Oreamuno) [*Garcia Armas*].

[79] *Garcia Armas*, *supra* note 78 at paras 167-175.

[80] CA Paris, 25 April 2017, *Bolivarian Republic of Venezuela v Serafin García Armas* [2017] No 15/01040.

[81] *Ibid* at 4–9.

[82] *Supra* note 18.

[83] *Ibid* at para 200.

towards its own nationals even though foreign investment protection was meant to exclude such a scenario. This includes nationals who did not perform any investments. The jurisprudence in this respect is far from being coherent. In *Patrick Mitchell v the Democratic Republic of the Congo*,[84] the Tribunal was confronted with comparable facts of local employees being harassed and unlawfully detained. The tribunal refused to include the harassment in the merits of the dispute as they did not have sufficient impact on the investment in question. In *Biwater v Tanzania*,[85] on the other hand, the tribunal specifically applied the absolute standard of treatment to cover the local employees of the investor as well. Board member, other employees or even family members[86] consequently enter the sphere of protection if a violation of rights has occurred for the purpose of harming a foreign investor.

Furthermore, it shall only be mentioned that legal entities may be used for circumventing nationality provisions. In the *Soufraki ruling*, Mr. Soufraki could have used a shelf company incorporated in Italy in order to receive standing in the international investment arbitration. In *Tokios Tokeles v Ukraine* investors used a Lithuanian corporation almost entirely owned by Ukrainian citizens for the unique purpose of bringing a claim against Ukraine using the ISDS provision in the Lithuania-Ukraine BIT,[87] The Tribunal held that it did not qualify as abusive behaviour and granted Ukrainian nationals an award of compensation.[88]

V. Conclusions

This paper evaluated the overlap between human rights and investment protection for acts of torture. The author believes to have shown that torture consists on one hand of a violation of the fundamental values represented by human rights law and simultaneously represents a breach of obligations found in international investment treaties. Consequently, victims of torture would already today have standing to rely on the procedural rights found in IIAs to bring a claim against a foreign State in an international tribunal. This thesis, however, remains difficult to enforce. Firstly, an investment treaty must have been concluded and entered into force between the home State of the individual and the State that has tortured the person concerned. With more than 3500 treaties concluded among States, including innumerable investment chapters found in multilateral preferential trade agreements, this obstacle does not seem insurmountable. In reality, there are certain countries where only a small number of investment treaties are in place which leaves a considerable gap of protection. Secondly, a person concerned would need to show that it has invested in the perpetrating State prior to the treaty breach. Depending on the BIT in question, this might be challenging as either a low or high threshold of applicability exists where only significant contributions to the economy of the host State will be considered an investment relevant for the IIA. Thirdly, certain hurdles relating to the nationality of the victim exist which might hamper access to international arbitration. Foreign nationals, dual nationals of both the host State and the sending State, and even permanent resident of a

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[84] *Supra* note 32.

[85] *Biwater Gauff Ltd v United Republic of Tanzania* (2008), ARB/05/22 (International Centre for Settlement of Investment Disputes) (Arbitrators: Gary Born, Toby Landau, Bernard Hanotiau) at para 709.

[86] *Desert Line*, *supra* note 45.

[87] *Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments*, 8 February 1994, 2711 UNTS 39 art 8 (entry in force 6 March 1995).

[88] See *Tokios Tokelés v Ukraine* (2004), ARB/02/18 (International Centre for Settlement of Investment Disputes) (Arbitrators: Pr Prosper Weil, Pr Piero Bernardini, Daniel M Price).

sending State have standing to bring cases in international investment tribunals.[89] FPS and IMS provisions found in bilateral investment treaties and other IIAs may even cover board members, local employees or family members of a foreign investor regardless of their nationality or whether they have undertaken an investment. This fact significantly opens the possibility of using ISDS for all persons that have become victims of torture because of their relation to a foreign investor regardless of the nationality. The broadcasting network Al Jazeera has recently filed for arbitration in order to receive compensation in the name of both its Egyptian and non-Egyptian employees for individual rights violations suffered by the Egyptian authorities.[90] Whether the claimant will be successful remains to be seen, this might however represent an emerging path for a future human rights litigation: Individual rights enforcement through international arbitrations introduced by transnational enterprises.

Whether or not the approach described in this paper is of practical use, it does not change the fact that public international law has significantly shifted towards empowering individuals to have their rights implemented. Even if this development is somewhat less significant in the human rights context, in international investment law individuals meet sovereign States and international organizations on an equal footing.

[89] Hemmi *supra* note 73 at paras 23ff.

[90] *Al Jazeera*, *supra* note 62.

From State Security to Human Security: The Evolving Nature of the United Nations Security Council's Jurisdiction

*Artem Sergeev** & *Jen Lee***

Abstract

The article explores the changing nature of the concept of international security. It argues that the practice of the United Nations Security Council (the "UNSC") is evolving from the protection of State security to the protection of Human Security. The former primarily concerns the protection of territorial integrity and the prohibition on the use of force as traditional components of security under the United Nations Charter. On the other hand, the latter is concerned with a broader set of threats affecting individuals and peoples within a State. Such threats include grave violations of Human Rights, public health emergencies, environmental issues, and other matters that are not directly related to the protection of State sovereignty. The article explores the significance of the shift towards human security and the extent to which the shift is taking place. It suggests that the new model of international security provides a range of benefits for the development of the international legal order, including a timelier response mechanism to a broader range of threats at an international level. In the meantime, the article suggests that the expansion of the concept of international security may still be affected by the traditional political limits of the UNSC.

French Translation

L'article explore la nature changeante du concept de sécurité internationale. Il fait valoir que la pratique du Conseil de sécurité des Nations unies (le "CSNU") évolue de la protection de la sécurité de l'État à la protection de la sécurité humaine. La première concerne principalement la protection de l'intégrité territoriale et l'interdiction du recours à la force en tant que composantes traditionnelles de la sécurité en vertu de la Charte des Nations Unies. D'autre part, la seconde concerne un ensemble plus large de menaces auxquelles font face les individus et les peuples au sein d'un État. Ces menaces comprennent de graves violations des droits de l'homme, des urgences de santé publique, des questions environnementales et d'autres questions qui ne sont pas directement liées à la protection de la souveraineté de l'État. L'article explore l'importance du changement de pratique du CSNU vers la sécurité humaine et la mesure dans laquelle ce changement a lieu. Il suggère que le nouveau modèle de sécurité internationale offre une série d'avantages pour le développement de l'ordre juridique international, notamment un mécanisme de réponse plus rapide à un plus large éventail de menaces au niveau international.En attendant, l'article suggère que l'expansion du

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concept de sécurité internationale peut encore être affectée par les limites politiques traditionnelles du CSNU.

Spanish Translation

El artículo explora la naturaleza cambiante del concepto de la seguridad internacional. Argumenta que la práctica del Consejo de Seguridad de las Naciones Unidas (el "CSNU") está evolucionando desde la protección de la seguridad del Estado a la protección de la seguridad humana. El primero se refiere principalmente a la protección de la integridad territorial y la prohibición del uso de la fuerza como componentes tradicionales de la seguridad en virtud de la Carta de las Naciones Unidas. Por otro lado, este último se ocupa de un conjunto más amplio de amenazas que afectan a personas y pueblos dentro de un Estado. Tales amenazas incluyen graves violaciones a los Derechos Humanos, emergencias de salud pública, temas ambientales y otros asuntos que no están directamente relacionados con la protección de la soberanía del Estado. El artículo explora la importancia del cambio hacia la seguridad humana y hasta qué punto se está produciendo. Sugiere que el nuevo modelo de seguridad internacional proporciona una serie de beneficios para el desarrollo del orden jurídico internacional, incluyendo un mecanismo de respuesta más oportuno a una gama más amplia de amenazas a nivel internacional. Mientras tanto, el artículo sugiere que la expansión del concepto de seguridad internacional aún puede verse afectada por los límites políticos tradicionales del CSNU.

Introduction

The United Nations Security Council (the "Council") is one of the most widely discussed and criticized international bodies.[1] The Council was given high expectations in the post-WWII era, yet it performed inefficiently as a global institution as seen from its role in the Cold War and more recently in the crises in Syria and Libya.[2] Despite its imperfections, the Council has continued to engage in a range of international matters not envisaged in its original mandate. The examples span the resolution for containing the Ebola outbreak, efforts in mitigating global warming, and most prominently, the post-9/11 lawmaking resolutions for non-proliferation and anti-terrorism.[3] Such involvements of the Council have sparked a debate among scholars on the legality and necessity of the continuing expansion of its jurisdiction.[4] The present article will address this question by exploring the concept of human security as an emerging alternative to State security and the future route for the Council's evolving mandate.

The article suggests that the recent shifts in the Council's exercise of its power are rooted in a humanitarian-centred international legal order. It contends that human security will gradually replace the traditional definition of international security – from the protection of territorial integrity and non-intervention to a paradigm centred on individuals and human rights. The shift towards human security justifies the expansion of the Council's activities into new domains and its broader engagement with non-State actors and matters unrelated to sovereignty. Additionally, the article explores the prospects and drawbacks of the gradual movement towards human security as the core goal of the Council and its capacity to resolve international conflicts.

The article will proceed in three sections. The first section outlines the fundamental jurisdiction of the Council and its traditional State security functions. In reference to the Charter of the United Nations (the "Charter"), the early resolutions of the Council and notable cases, the first section provides a comprehensive overview of the functions of the Council in the post-WWII context. The second section discusses recent developments that demonstrate the expansion of the Council's jurisdiction into new realms. The research examines the initial expansion of the Council's jurisdiction and the cases concerning the lawmaking-capacity of the Council. By looking at resolutions 1373 and 1540, the research explores the Council's quasi-legislative function in its post-9/11 role. Furthermore, the section discusses matters of inconclusive legality and necessity of the Council's newfound function and its expanding jurisdiction through contemporary examples of hydro-diplomacy and pandemic outbreaks. The final section explores the fundamental shift in the Council's mandate by arguing that there has been a shift from a State-centred conceptualization of security to one that is centred around the individual. It begins by exploring the elements of human security and discusses the aforementioned activities of the Council in parallel with

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[1] See Sahar Okhovat, *The United Nations Security Council: Its Veto Power and its Reform,* CPACS Working Paper, No 15/1 (Sydney AUS: Center for Peace and Conflict Studies: University of Sydney, 2011); Andrea Bianchi "Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion" (2007) 17 EJIL 881.

[2] *Ibid.* See also Martin Hartberg, Dominic Bowen & Daniel Gorevan, "Failing Syria: Assessing the Impact of UN Security Council Resolutions in Protecting and Assisting Civilians in Syria" (2015), online (pdf): *Oxfam International* <oxfamilibrary.openrepository.com/bitstream/handle/10546/346522/bp-failing-syria-unsc-resolution-120315-en.pdf;jsessionid=5738C0D5427E8C85D8D89671CD5215E7?sequence=1>.

[3] *On Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UNSCOR, 57th Sess, Supp No 2, UN Doc A/57/2 (2001) 168 [*SC Resolution 1373*]; *On Non-Proliferation of Weapons of Mass Destruction*, SC Res 1540, UNSCOR, 59th Sess, Supp No 2, UN Doc A/59/2 (2004) 210 [*SC Resolution 1540*].

[4] See Kristen E Boon, "Coining a New Jurisdiction: The Security Council as Economic Peacekeeper" (2008) 41:4 Vand J Transnat'l L 991; Maysa Bydoon & Gasem M S Al-Own "The Legality of the Security Council Powers Expansion" (2017) 7:4 IJHSS 220; Hitoshi Nasu "The UN Security Council's Responsibility and the 'Responsibility to protect'" (2011) 15:1 Max Planck YBUN Law 377 at 412–15.

human security. It suggests that human security has become the core of international security, yet it has not entirely replaced the foundational State-focused approach to international law. The section discusses in depth the prospect of human security as a way of resolving the existing structural problems of the Council and how it may affect the Council's future development. The essay concludes that the move towards human security is an uninterrupted continuation of the development of international law, however, the shift itself cannot solve the existing limitations of the Council. The article suggests that a substantive qualitative shift in the Council's performance would require a direct effort in renegotiating its procedural and substantive norms.

I. The United Nations Security Council: Core Jurisdiction

The evolving nature of the Council's jurisdiction can be traced from its institutional history. The Council is one of the principal organs responsible for the maintenance of international peace and security.[5] Established under the Charter, the Council is a fundamental part of the contemporary international legal system. Its legal structure and composition reflect the complicated political realities at the time of its conception and the need for a more effective system of maintaining peace in the current era.

The initial foundations of the Council were built upon the Atlantic Charter, the Moscow Conference and other documents that were produced in the WWII era.[6] The Atlantic Charter is one of the first documents that outlines a commitment on the part of major States to establish a unified system of international peace and security.[7] Citing the devastating effect of the two World Wars, the Western Allied forces vowed to outlaw wars in absolute terms and established a system to ensure prohibition of wars.[8] The commitment was later supported by the Soviet Union who joined the Allied forces, followed by China and a number of other States.[9] The meetings between States eventually translated into the Charter that established the Council as the principal organ for ensuring peace and security.

The political realities at the time were reflected in the Council's conception of security as its central goal. Even though the Charter does not specifically define security, the principles of the Charter and the practice of the Council reflect its focus on State and sovereignty. According to the Charter principles, the core foundations of the international legal order as defined in the post-WWII era were territorial integrity and non-intervention.[10] Moreover, a number of primary operations after the formation of the Council were focused on upholding international peace by preventing State against State conflicts. Accordingly, the core concept of security in the post-WWII era focused on preventing States from waging wars against each other.[11] Consequently, the idea of international security became almost entirely State-centred, with some exceptions including decolonization and civil wars.[12] The

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[5] See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 arts 24, 39–42 [*UN Charter*].

[6] See "History of the United Nations", online: *United Nations* < www.un.org/en/sections/history/history-united-nations/ > ["UN History"].

[7] See "1941: The Atlantic Charter", online: *United Nations* < http://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html>.

[8] *Ibid.*

[9] See "UN History", *supra* note 6.

[10] See *UN Charter*, *supra* note 5, arts 1–2.

[11] *Ibid*; Oliver Dörr, "Use of Force, Prohibition of" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2015).

[12] See Dörr, *supra* note 11; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, Supp 16, UN Doc A/4684 (Vol I) (1960) 66 [*GA Resolution 1514*].

role of the Council in decolonization efforts was not as apparent since the Trusteeship Council and the General Assembly were heavily involved in the matter. The Council was more actively involved in resolving domestic conflicts, including the war on the Korean Peninsula and the conflict in Palestine. In the meantime, the core idea of security remained centred on States and possible military conflicts that destabilize State security. This article will discuss how the purely State-centric approach to security began to change in recent decades. Prior to this discussion, it is necessary to outline the core powers of the Council.

To uphold its primary duty of maintaining international peace, the Council was given a relatively broad range of powers. First, the Council has declarative powers derived from its ability to proclaim that certain actions of States or other entities constitute a threat to international peace.[13] The Council can thus demand States or other groups to cease hostile actions and make essential proclamations, for example, on the legality of self-defence.[14] In addition, the Council can make binding decisions on States and impose soft sanctions such as embargoes.[15] If such measures fail, the Council can authorize the use of force to restore international peace and security.[16] After the authorization, military operations may be conducted individually or jointly by States under the United Nations ("UN") flag or under their own flags.[17]

It is necessary to highlight that the primary jurisdiction of the Council was constructed relatively narrowly. In particular, the Council was designed to make promulgations and decisions concerning specific threats to peace and security. The Council can declare a threat, demand to cease activities that pose a threat, and impose sanctions or authorize the use of force.[18] As was widely discussed by legal scholars, the Council has an executive power reflected in its capacity to enforce peace-related provisions of the Charter.[19]

However, the nature of conflicts began to change since the establishment of the Council. While the founders of the Charter envisaged mainly inter-State conflicts, where State A invades State B, new conflicts emerged over time.[20] A considerable portion of conflicts were, in fact, of a domestic nature such as civil wars.[21] Moreover, the Council had to deal with a range of decolonization disputes that occurred between emerging States and those between States and colonizing powers, which gave rise to a range of complex political and legal issues.[22] On the legal side, the majority of problems were resolved by the International Court of Justice ("ICJ") with regards to what constitutes interventions, the use of force, appropriate modes of self-defence, and so on.[23] While some questions remain

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[13] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Portland: Hart Publishing, 2004) at 134.

[14] *Ibid* at 148–149; Christopher Greenwood, "Self-Defense" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011).

[15] *Ibid.*

[16] *Ibid*; *UN Charter*, *supra* note 6, art 42.

[17] Greenwood, *supra* note 14.

[18] *Ibid.*

[19] *Ibid*; Christoph Mikulaschek, *The Power of the Weak: How Informal Power-sharing Shapes the Work of the UN Security Council* (Princeton, NJ: Princeton University Press, 2017) at 5.

[20] *Ibid.* See also Max Roser, "War and Peace" (2019), online: *Our World in Data* <ourworldindata.org/war-and-peace>.

[21] *Ibid.*

[22] *Ibid.*

[23] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 [*Nicaragua*]; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, [2003] ICJ Rep 161 [*IRI*].

open to interpretation, the rules on the use of force impose similar standards.[24] However, the standards are not always complied with by States due to frequent political disagreements between them.

As was widely discussed in the literature, the core problem of the Council is its political structure. The Council consists of fifteen members.[25] Its five permanent members are China, the United States, Russia, the United Kingdom, and France.[26] The reason behind their permanent status is complicated; some attribute it to their possession of nuclear power, or to their status as allied powers who claimed victory in WWII.[27] The General Assembly elects the other ten members for a two-year term.[28]

The composition of the Council is arguably its most criticized aspect. To elaborate, only permanent members can exercise veto power to block any resolutions of the Council.[29] In particular, Russia, China, and the United States have explicitly used their veto power on a number of occasions.[30] Some of the most well-known international crises did not receive a substantial response from the Council precisely due to the existing disagreements between Western and Eastern powers.[31] The invasion of Iraq, the crisis in Syria, the contestable action in Libya, and NATO's invasion of Yugoslavia are some of the most obvious failures of the Council in performing its functions.[32] Here lies a complex problem between politics and law on the extent of veto, the legality of the use of force, and political disagreements. Accordingly, the existing structure of the Council creates significant complications in facilitating proper institutional maintenance of international peace.

A. The Security Council as the International Legislator: Terrorism and Non Proliferation

The Council has expanded its jurisdiction in the last two decades regardless of the aforementioned complications. According to its originally envisaged role, the Council was to serve an executive role and focus on addressing threats to peace through the means confined to actions for the benefit or restraint of a particular State. However, following 9/11, the Council took a stronger stance on exerting its power and adopted an unusually broad jurisdiction to address matters beyond those of States. Contrary to the past resolutions designed to accommodate particular actors for certain violations, the Council issued resolutions 1373 and 1540 that concerned all member States in the contexts of international terrorism and human security.

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[24] *Ibid*. See also Michael Wood, "International Law and the Use of Force: What Happens in Practice" (2013) 53 Ind J of Int L 345 at 346; Marc Weller et al, eds, *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) at 80.

[25] See *UN Charter*, *supra* note 5, art 23.

[26] *Ibid*.

[27] Peter Nadin, *UN Security Council Reform*, 1st ed (London: Routledge, 2016) at 43–71.

[28] See *UN Charter, supra* note 5, art 23(2).

[29] *Ibid*, art 27(3).

[30] See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 3.

[31] See *GA Resolution 1514*, *supra* note 12; Greenwood, *supra* note 14; *UN Charter*, *supra* note 5.

[32] See *Resolution 1441*, S Res 1441, UNSCOR, 58th Sess, Supp No 2, UN Doc A/58/2 (2002); B Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 4:2 Eur J of Int L; Sean D Murphy, "Assessing the Legality of Invading Iraq" (2004) 92:2 Geo LJ 173; Andrew Garwood-Gowers, "The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm" (2013) 36:2 UNSWLJ 594; Muditha Halliyadde, "Syria - Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention" (2016) 4 Ind J L & Soc Equality 215.

Starting with the resolution 1373 issued shortly after the 9/11 terrorist attack, the Council became more aggressive in enforcing both domestic and international counter-terrorism measures.[33] The Council decided that all States must refrain from financing any acts of terrorism, prevent individuals from engaging in such acts of financing, and freeze assets related to financing terrorism.[34] Moreover, the Council requested States to prevent any acts of recruitment and practical support that could be given to terrorists.[35] For example, the Council demanded that States prosecute individuals assisting with terrorist acts, financing, and recruitment.[36] Moreover, the resolution not only covered all member States but also specifically referred to terrorism as a source of threat.[37] This was significant since the resolution was not based on actions of a State, but rather on actions of a non-State entity. The question of whether the Council can tackle the matters of non-State entities is still partly in limbo.[38]

Furthermore, one of the most controversial aspects of the resolution is a provision that internally criminalizes and enforce through domestic provisions a broad range of anti-terrorism measures.[39] This provision is complex. To begin with, it can be argued that the Council cannot decide on matters of domestic State law.[40] Granted that most States already have domestic anti-terrorism provisions, the jurisdiction of the Council cannot extend so far as to make pronouncements on how and what should be governed domestically. Naturally, it can be argued that if the domestic law affects matters of international peace, the Council can make pronouncements on those matters as a form of "incidental jurisdiction," or through other plausible explanations.[41] However, claiming that all States must outlaw specific acts since they have the slightest connection to the global anti-terrorist efforts appears to be an exaggeration of the powers of the Council over States. Moreover, many disputed the role of the Council as an international legislator.[42] It was argued that the Charter did not initially envisage such broad powers to be given to the Council but reserved the capacity to make general pronouncements for States.

Following the resolution 1373, resolution 1540 was issued in 2004, taking a harder stance on preventing nuclear proliferation and the use of chemical and biological weapons.[43] It focuses broadly on domestic enforcement of non-proliferation norms and development of an internal mechanism to suppress the access of non-State actors to biological and chemical weapons.[44] The Council additionally established a committee to enforce the provisions of the resolution and obtain State reports on its implementation of non-

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[33] See Boon, *supra* note 4; Bydoon, *supra* note 4, Nasu, *supra* note 4; *SC Resolution 1373*, *supra* note 3.

[34] *Ibid* at 2.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid* at 1.

[38] See *Nicaragua, supra* note 23; *IR1, supra* note 23; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 [*DRC*].

[39] *SC Resolution 1373*, *supra* note 3.

[40] *DRC*, *supra* note 38; Stefan Talmon, "The Security Council as World Legislature" (2005) 99:1 AJIL 175 at 176; Thomas A Schweitzer, "The United Nations as a Source of Domestic Law: Can Security Council Resolutions Be Enforced in American Courts?" (1979) 4:2 Yale J Intl L 162; Eric Rosand, "The Security Council As 'Global Legislator': Ultra Vires or Ultra Innovative?" (2004) 28 Fordham Intl LJ 542.

[41] JG Merrils, *International Dispute Settlement* (New York: Cambridge University Press, 2005) at 136–140.

[42] *DRC*, *supra* note 38; Tullio Treves, "The Security Council As Legislator," in Aristotle Constantinides & Nikos Zaikos, eds, *The Diversity of International Law* (Leiden: Martinus Nijhoff Publishers, 2009) at 61.

[43] See *SC Resolution 1373, supra* note 3; *SC Resolution 1540*, *supra* note 3.

[44] See Boon, *supra* note 4; Bydoon, *supra* note 4; Nasu, *supra* note 4.

proliferation by non-State actors.[45] Accordingly, the resolution further expanded the Council's powers into domestic and legislative realms, earning the discontent of States.[46] In particular, the non-aligned movement created concerns for a mismatch between the resolution and domestic realities of States.[47] However, the fundamental question of whether the Council can make quasi-legislative pronouncements was not broadly discussed by States.

Both resolutions contributed to the Council's expansion of its jurisdiction in the post-9/11 period. In the following years, the Council became more reluctant to make broad pronouncements on domestic law. However, the Council began to tackle a broader range of international crises such as virus outbreaks, economic problem, and global warming, subsequently widening the scope of its powers. The continuing expansion of the Council's jurisdiction can be exemplified by the Council's involvement in more recent matters of hydro-diplomacy and global health.

B. Exploring the Broad Involvement of the Security Council in Contemporary Issues Related to Human Rights

The outlined developments of the Council's legislative intervention were demonstrated in matters of hydro-diplomacy and the Ebola outbreak. Regardless of its benevolent intentions, the Council's efforts in these areas may exceed the boundary of its standard acts of diplomacy. For many years, the UN has been actively involved in resolving water disputes by establishing regional bodies and international frameworks for transboundary water management.[48] The Council's increasing involvement in the matter has been perceived as legitimate,[49] for water is considered a strategic means for the maintenance of international peace and security as repeatedly highlighted by the Secretary-General.[50] While the Member States are generally supportive of the Council's leadership in hydro-diplomacy, they are also wary of the possibility of the Council overriding national interests. Such concerns were expressed at the 7959th Security Council meeting, in which delegates from Russia and China expressly stated the need for respecting national sovereignty in water management.[51] The discussion leads to two questions: whether the Council should continue to expand its jurisdiction in the matter, and what powers it can wield to address the matter.

Although the Council has so far acted in the spirit of preventive diplomacy, it is possible that it may impose obligations on the Member States by issuing a resolution if the regional UN bodies fail to mediate.[52] This is especially so for high-dispute regions such as Central Asia, where water-abundant and water-scarce States have long been in dispute, as well as areas of armed conflicts that require protection of water infrastructure and supply.

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[45] *Ibid*; Oliver Meier, "Non-cooperative arms control" in Oliver Meier & Christopher Daase, eds, *Arms Control in the 21st Century* (New York: Routledge, 2013) at 46–51.

[46] Meir, *supra* note 45 at 50–1.

[47] *Ibid.*

[48] Notably the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) that became open for signature for all Member States since March 2016.

[49] Ban Ki-Moon, "Remarks to Security Council debate on Water, Peace, and Security" (delivered to Security Council debate on Water, Peace, and Security, 22 November 2016).

[50] United Nations, Meeting Coverage, SC/12856, "Sound Water Management, Investment in Security Vital to Sustain Adequate Supply, Access for All, Secretary-General Warns Security Council" (6 June 2017).

[51] *Ibid.*

[52] Such as the United Nations Regional Centre for Preventive Diplomacy for Central Asia (UNRCCA). See "Mandate" (accessed 24 February 2019), online: *United Nations Centre for Preventive Diplomacy for Central Asia (UNRCCA)* <unrcca.unmissions.org/mandate>.

The Global High-Level Panel on Water and Peace, in its 2017 report, urged the Council to pass a resolution on water, peace, and security[53] akin to the resolution on the protection of civilians in armed conflicts.[54] This sentiment had been echoed by the participants at the inaugural UN Security Council Open Debate on Water, Peace and Security; the President of the Strategic Foresight Group suggested passing a resolution similar to resolution 2286[55] to accelerate the protection of water resources in areas of armed conflicts.[56] Doing so would enable the Council to order the Member States' compliance with the obligations under international law and human rights law.[57]

Since the right to water has been explicitly recognized as a human right,[58] and water supply infrastructure as "cross-border critical infrastructure" requiring protection against acts of terrorism,[59] the Council is likely justified in issuing resolutions for matters of hydro-diplomacy. Yet such resolutions may not be received favourably by the Member States for their lack of domestic applicability and the Council's interference in national policymaking. Since the dispute concerns vested interests of some permanent members of the Council – for example, Russia as the leading supporter of Tajikistan and its construction of Rogun Dam – the resolutions may be affected by a veto or weak regional enforcement. As with the anti-terrorism resolutions, the new resolution for water disputes may allow opportunities for abuse by the Member States with ulterior motives. The concern for abuse was voiced at the abovementioned Open Debate, in which the delegate of Crimea warned Russia not to use the problem of water shortage as a means of propaganda, highlighting the political nature of water disputes. Accordingly, expanding the power of the Council is subject to political obstacles that may impair the Council's capacity for carrying out legitimate actions.

Nonetheless, expanding the Council's jurisdiction into a broader range of global issues can be useful for resolving non-political matters. The leading example is resolution 2176 on the Ebola outbreak, which extended the UN mission to Liberia by three months to help contain the virus.[60] Two days later, the Council passed resolution 2177, which declared the Ebola outbreak "a threat to international peace and security"[61] and provided a basis for establishing the UN's first public health mission for coordinating international humanitarian support in West Africa.[62] The prompt response by the Council was commended for bridging

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[53] "A Matter of Survival: Report of the Global High-Level Panel on Water and Peace" (2017) at 28, online (pdf): G*lobal High-Level Panel on Water and Peace* <reliefweb.int/sites/reliefweb.int/files/resources/A_Matter_of_Survival_FINAL.pdf>.

[54] See *Protection of civilians in armed conflicts*, SC Res 1265, UNSCOR, 55th Sess, Supp No 2, UN Doc A/55/2 (2000) 296.

[55] See United Nations, "Secretary-General, in Security Council, Stresses Promotion of Water-resource Management as Tool to Foster Cooperation, Prevent Conflict" (22 November 2016), online: *UN Meetings Coverage & Press Releases* <www.un.org/press/en/2016/sc12598.doc.htm>.

[56] See *Protection of civilians in armed conflicts*, SC Res 2286, UNSCOR, 71st Sess, Supp No 2, UN Doc A/71/2 (2016) (Resolution 2286 was a timely strategy for protecting healthcare centres, workers, and transport from targeted attacks, and was unanimously adopted by the Council and co-sponsored by eighty Member States).

[57] See United Nations, "Security Council Adopts Resolution 2286 (2016), Strongly Condemning Attacks against Medical Facilities, Personnel in Conflict Situations" (3 May 2016), online: *UN Meetings Coverage & Press Releases* <https://www.un.org/press/en/2016/sc12347.doc.htm>.

[58] See *The Human Right to water and sanitation*, GA Res 64/292, 64th Sess, Supp No 49, UN Doc A/64/49 (Vol III) (2010) 45.

[59] *Threats to international peace and security caused by terrorist acts*, SC Res 2341, UNSCOR, 72nd Sess, Supp 2, UN Doc A/72/2 (2018) 26.

[60] See Adam Kamradt-Scott, "WHO's to blame? The World Health Organization and the 2014 Ebola outbreak in West Africa" (2016) 37:3 Third World Q 401 at 406–07.

[61] *Ibid*; *Peace and security in Africa*, SC Res 2177, UNSCOR, 70th Sess Supp No 2, UN Doc A/70/2 (2014) 177 [*SC Resolution 2177*].

[62] The United Nations Mission for Ebola Emergency Response (UNMEER); Ban Ki-Moon, *Identical letters dated 17 September 2014 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council,* A/69/389–S/2014/679, UNGAOR/UNSCOR, 69th Sess (17 September 2014); *Measures to contain and combat the recent Ebola outbreak in West Africa*, GA Res 69/1, UNGAOR, 69th Sess, Supp No 49, UN Doc A/69/49 (Vol I) (2014) 3 [*GA Resolution 69/1*]; Kamradt-Scott, *supra* note 60 at 407; *SC Resolution 2177*, *supra* note 61.

the gaps that the World Health Organization had failed to address. As such, the Council's exercise of global legislative power for containing Ebola has paved new milestones for synthesizing global health and security issues and increased synergistic efforts by the UN and other international organizations with technical expertise.[63]

As such, the Council has been expanding its jurisdiction into areas that are not necessarily related to State security. Moreover, the effectiveness of the expansion varies across different types of involvement. In particular, the presence of conflicting political interests seems to correlate to the Council's capacity to resolve an increasing number of international threats. Granted that this problem has existed since the establishment of the Council, important questions remain: what is the reason for the expansion of the Council's jurisdiction beyond the traditional State security paradigm, and what are the prospects of the expansion? The following section will explore the reasoning for the expansion by arguing a case for human security as a new model of international security. The human security angle provides a compelling argument for the continuing expansion of the Council's jurisdiction and is useful for assessing whether the expansion on this basis is a valuable development for international law and international organizations.

II. From State Security to Human Security: Understanding the Expanding Jurisdiction

In light of the above discussions, it is apparent that the Council began to rapidly expand its jurisdiction into areas that were not previously covered by its mandate. Leaving aside the question of how effectively the Council can resolve such matters, the legality of the expansion must be questioned.[64] In order to understand the legality of the expanding jurisdiction and its content, it is necessary to understand the Charter and the concepts of security that the Council was designed to protect.[65] The matters of security and peace are not clearly defined in the Charter. These matters are, however, defined in the context of "acts of aggression or other breaches of peace."[66] In this context, security was traditionally confined to the actions of States vis-à-vis other States,[67] as shown in the post-WWII context and in the attribution of significant conflicts to inter-State wars. This further explains the difficulties faced by the Council in the context of internal disturbances and civil wars that have become more prominent in the UN era.[68] Thus the changing nature of the Council's jurisdiction can be understood through the changing nature of threats to security that can be more broadly tied to the concept of human security.

In comparison to the traditional model of State security, the concept of human security is not focused only on threats to territorial integrity or acts of aggression against a State as the primary beneficiary of international security.[69] On the contrary, human security

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[63] *SC Resolution 2177*, *supra* note 61; Kamradt-Scott, *supra* note 60 (The UNMEER operates jointly under the leadership of the UN Secretariat and WHO subject to the mandate in the General Assembly Resolution 69/1); *GA Resolution 69/1*, *supra* note 62.

[64] Treves, *supra* note 42.

[65] *Ibid.*

[66] *UN Charter*, *supra* note 5, art 1.

[67] *Ibid*; Dörr, *supra* note 11; *GA resolution 1514*, *supra* note 12.

[68] Roser, *supra* note 20.

[69] See Steve Grunau, "The Limits of Human Security: Canada in East Timor" (2003) 1:1 The Dispatch: Quarterly Review of the Canadian Defence & Foreign Affairs Institute <d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/322/attachments/original/1413011405/The_Limits_of_Human_Security.pdf?1413011405>; Juergen Dedring, "Human Security and the UN Security Council" in Hideki Shinoda & How-Won Jeong, eds, *Conflict and human security: A search for new approaches of peace-building*, (Hiroshima: Institute for Peace Science, 2004) 45.

concerns threats that are associated with the violation of the rights of individuals and peoples. There are numerous examples of such rights, which can be better understood contextually. To illustrate, States have a right to territorial integrity and non-intervention.[70] The Council enforces this right. Similarly, individuals have rights that are recognized by international law. Such rights are expressed in various Human Rights documents and doctrines, as well as in international humanitarian, refugee, and criminal laws.[71] The concept of human security suggests that the same protection granted to States and enforced by the Council can likewise be applied to the entitlements of individuals by way of Human Rights and various treaties. Moreover, the concept of human security may have a broader scope of applications than the traditional State security framework since it involves human rights.

Canada proposed one of the most concrete definitions of human security in coordination with the United Nations Development Programme (UNDP), which includes the protection of civilians, peace support, conflict prevention, governance and accountability, and finally, public safety. As will become evident from the discussion, all of these elements are becoming increasingly relevant in the practice of the Council. Consequently, it is possible to make a compelling case for the Council's traditional framework of State security being gradually replaced with a new framework for international peace.

Prior to discussing the protection and content of human security, it is necessary to address the question of legality and whether it is within the powers of the Council to change the content of its jurisdiction. It will be argued that there is a consistent international practice which shows that States, through their continuous actions, can alter certain rights and obligations under treaties. On the most basic level, both the Vienna Convention on the Law of the Treaties and the concept of evolutionary interpretation suggest that the obligations under international documents can change over time.[72] Hence, it is a fairly recognized principle that the content of international norms can change over time through State practice. Moreover, the generally accepted practice of the Council indicates that States are capable of amending the internal rules of the legal bodies through which they are acting internationally.[73] The practice of counting an absent vote of a permanent member as a concurring vote under the Charter's rules is one of such examples.[74] Accordingly, it is within the capacity of the Council to amend and expand its jurisdiction through uncontested practice. Therefore, it is possible to argue that States gradually amend the concept of security through their continuous acceptance of the Council's broader involvement in humanitarian issues.

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[70] See *UN Charter, supra* note 5, arts 1, 2, 51.

[71] For example, consider the International Covenant on Civil and Political Rights, Geneva Conventions and other sources of human rights law and humanitarian law. See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*]; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) [*Geneva Convention: Armed Forces in the Field*]; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) [*Geneva Convention: Armed Forces in the Field*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) [*Geneva Convention: Armed Forces at Sea*]; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) [*Geneva Convention: Prisoners of War*]; *Geneva Convention relative to the protection of civilian persons in time of war*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [*Geneva Convention: Protection of Civilian Persons*].

[72] See *Vienna Convention on the law of treaties*, 23 May 1969, 1155 UNTS 331 arts 31–2 (entered into force 27 January 1980). See generally Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014).

[73] Bjorge, *supra* note 72. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 [*Presence of South Africa in Namibia*].

[74] See *Presence of South Africa in Namibia*, *supra* note 73 at paras 21–2. See also *UN Charter*, *supra* note 5, art 27(3).

Regarding the content of human security, one must first consider individual integrity rights that are the foundational norms of any security-centered framework. In traditional State-centered security, individual integrity rights are represented by the territorial integrity of a State and non-intervention. In the context of human security, individual integrity rights represent the same idea of personal integrity, only having an individual rather than a State as a beneficiary. As such, there is no universal embodiment of the protection of individual integrity in international law. The right to individual integrity consists of the right to life, the prohibition of torture, the prohibition of weapons causing superfluous injury or unnecessary suffering, and others.[75] The scope of human security can be broader when considering the prohibition of arbitrary imprisonment, fair trial guarantees, and others.[76] A broad range of events can thus impair the protection of individual integrity as the foundation of human security.[77] Following this, one may interpret that human security is becoming increasingly more critical in the practice of the Council.[78]

On the most basic level, the Council has been widely concerned with disturbances within States. Recent notable examples are the crises in Syria and Libya, where the Council condemned and expressed grave concern regarding Human Rights violations and the dismal humanitarian situation in the respective regions.[79] The pattern of condemning human rights abuses and acts of violence can be traced throughout the Council's recent history, including the attacks on Palestinian civilians, Human Rights abuses in South Sudan, and others.[80] Accordingly, acts of widespread violence against individuals have been largely recognized to fall within the domain of the Council's interpretation of security.

However, the scope of human security within the Council's jurisdiction goes beyond the ambit of its general role. An example of this includes the Council's involvement in the matters of non-State actors. Another obvious example is international terrorism that began in the age of the Council's lawmaking.[81] Following the devastating 9/11 attack on civilians, the Council considered terrorism, which is usually conducted by non-State actors, as a threat to international peace and security.[82] Following the narrow interpretation of the Charter, the terrorist attack did not involve any other States and, as such, did not threaten the territorial integrity of the United States.[83] This case is another example of the Council's involvement in preventing attacks targeted largely on individuals rather than purely on States. Moreover,

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[75] See e.g *ICCPR*, *supra* note 71 at arts 6–10; *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) arts 3–5 [*UDHR*].

[76] *Ibid.*

[77] *Ibid.*

[78] See generally *On a General and Complete Embargo on all Deliveries of Weapons and Military Equipment to Liberia*, SC Res 788, UNSCOR, 48th Sess, Supp No 2, UN Doc A/48/2 (1992) 389; *On Expansion of the Sanctions Until the Return of the Legitimately Elected President to Haiti*, SC Res 917, UNSCOR, 49th Sess, Supp No 2, UN Doc A/49/2 (1994) 59; *On Violations of International Humanitarian Law in the Former Yugoslavia*, SC Res 1019, UNSCOR, 51st Sess, Supp No 2, UN Doc A/51/2 (1995) 86; *On the Situation in Yemen*, SC Res 2014, UNSCOR, 67th Sess, Supp No 2, UN Doc A/67/2 (2011); see also Mariano J Aznar-Gómez, "A Decade of Human Rights Protection by the UN Security Council: A Sketch of Deregulation?" (2002) 13:1 Eur J Intl L 223 at 234.

[79] See *On Threats to Peace and Security Caused by Terrorist Acts by Al-Qaida and Associated Groups Operating in Libya*, SC Res 2214, UNSCOR, 2015, 70th Sess, Supp No 2, UN Doc A/70/2 (2015) 179 [*SC Resolution 2214*].

[80] *Ibid.*

[81] Boon, *supra* note 4; Bydoon, *supra* note 4; Nasu, *supra* note 4 at 86.

[82] See *SC Resolution 1373*, *supra* note 3; *SC Resolution 1540*, *supra* note 3.

[83] *Ibid.* For the content of a narrow interpretation see also Christian Marxsen, "Territorial Integrity in International Law – Its Concept and Implications for Crimea" (2015) 75 Heidelberg J Int'l L 7 at 13–16; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, Advisory Opinion, [2010] ICJ Rep 2010 403 at 403.

there are examples of a similar pattern being applied in cases of pro-democratic and humanitarian interventions that have concretized certain civil and political rights of individuals as sufficient reasons for State intervention.[84]

The Council's consequent practice goes further into more complex issues affecting human security. As was suggested above, human security is concerned more broadly with human rights, and its enforcement thus became a part of the international security agenda.[85] Accordingly, a broad range of other matters that were discussed above became parts of the Council's agenda.[86] Citing the abovementioned case of hydro-diplomacy, the UN recognized the right to water as a human right.[87] As a result, access to water has direct implications for human security and the matters that can be addressed by the Council. Inevitably, there are geopolitical interests associated with the access to water. Meanwhile, the Council considers the access to drinking water as a matter of concern that falls under the umbrella of human security.

A similar logic can be applied to global health concerns and the Council's involvement in the Ebola outbreak.[88] From the perspectives of both individual integrity and the general right to health, virus outbreaks are potent threats to the human race but may be viewed as limited threats to State security unless they go completely unchecked.[89] Accordingly, the activities of the Council in the context of disease control are examples of a more dominant move towards human security over State security. This illustrates a significant shift in policy, as the Council has been consistently moving towards the protection of individual and collective well-being rather than remain preoccupied with the protection of sovereignty.

The human security approach is likely to be applied to a wide range of matters. Recently, the Council began to consider the matters of global warming and financial crises as possible threats to security.[90] Both do not pose an immediate threat to Statehood *per se* but can pose danger to the world's population and cause transborder catastrophes. The increasing international concern for problems beyond inter-State disputes can be further illustrated by the reiterated focus on "building a community for the shared future for mankind" as materialized in one of the Council's resolutions.[91] Accordingly, the extent of the human security framework can also include the branch of social, economic, and cultural rights as a sub-brunch of Human Rights. The inclusion of such rights in the jurisdiction of

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[84] *Authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti*, SC Res 940, UNSCOR, 50 Sess, Supp No 2, UN Doc A/50/2 (1995) 83; Claus Kreß & Benjamin Nußberger, *Pro-democratic intervention in current international law: the case of The Gambia in January 2017*, Journal on the Use of Force and International Law, (2017), 4:2; Vaughan Lowe & Antonios Tzanakopoulos, "Humanitarian Intervention" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011).

[85] See *UN Resolution 2214*, *supra* note 79 at 1.

[86] *Ibid.*

[87] Kamradt-Scott*, supra* note 60; *SC Resolution 2177*, *supra* note 61.

[88] See generally Boon, *supra* note 4; Bydoon, *supra* note 4; Nasu, *supra* note 4; Merils, *supra* note 41; *DRC*, *supra* note 38; Treves, *supra* note 42; Kamradt-Scott, *supra* note 60; *SC Resolution 2177*, *supra* note 61.

[89] *SC Resolution 2177*, *supra* note 61.

[90] See *On Extension of the Mandate of the UN Assistance Mission in Somalia (UNSOM) Until 31 Mar 2019*, SC Res 2461, UNSCOR, 74th Sess, Supp No 2, Un Doc A/74/2 (2019) 105; *The situation in Somalia*, SC Res 2408, UNSCOR, 73rd Sess, Supp No 2, UN Doc A/73/2 (2018) 120 (extension of the UN's Assistance Mission in Somalia until 31 Mar 2019). See also *UN Charter*, *supra* note 5.

[91] *On Extension of the Mandate of the UN Assistance Mission in Afghanistan (UNAMA) Until 17 Mar 2018*, SC Res 2344, UNSCOR, 72nd Sess, Supp No 2, UN Doc A/72/2 (2017) 131 at 1.

the Council is another example of the increasing importance of Human Rights regimes in the context of the international security. This creates a prospect for the Council to engage in a very wide range of international matters concerning both civil and social matters.

All in all, it can be inferred that a significant shift in the Council's jurisdiction can be explained by a consistent movement towards human security over State security. Meanwhile, as illustrated by the problems in Syria and Libya, the human security approach does not entirely alleviate drawbacks of the political and State interest-driven character of the Council. The following section will discuss the benefits and pitfalls of the Council's new approach and explore the ways in which the international system can better respond to a growing number of newly recognized threats.

III. Human Security and Its Prospects

The shift towards human security is better understood through the prism of disputes in Syria and Libya, the NATO bombings of Yugoslavia, the recognition of Kosovo, the invasion of Iraq, and others.[92] The abovementioned events show a significant divide in the Council. The core problem is the continuing focus of the States and the Council on geopolitical matters.[93] In this regard, the shift to human security could partially alleviate the drawbacks of the traditional State-centred perspective and provide alternative approaches to the politics of international law based on humanitarian considerations. Protection of the general standard of human security from, for example, "freedom from need" and "freedom from fear", does not create a substantive political disagreement and can allow for a degree of neutrality in the Council's policy.[94] The core idea is that human security is not necessarily related to traditional State-centred concerns such as territorial integrity, thus it allows the Council to bypass political considerations and to form more effective international humanitarian responses.

Naturally, a number of issues concern both State and human security. Nonetheless, human security provides a positive space for the Council's reform. There are two elements to this argument: first, human security as a non-State centred approach, and second, as a more technocratic approach. As a non-State centred approach, human security allows for alternative discussions that are not focused on States but on individuals that exist outside of political ideologies or interests.[95] Human security in such a context could establish a more fruitful narrative for international law, theoretically as a more individuals-centred field of law and practically as an opportunity to broaden the scope of issues currently governed by international law. This narrative can allow international law to further deepen its approach of looking beyond States and focusing on the interests of non-State subjects. The second element provides a more technocratic approach based on the merit of the problem rather than the interests of the parties.[96] This could further clarify the rules of international law regarding the maintenance of peace and suggest more coherent means for their

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[92] *Ibid.* See also Anne Ryniker, "The ICRC's position on 'humanitarian intervention'" (2001) 83:842 Intl Rev Red Cross 527. See generally *Authorizing Member States to Use All Necessary Means to Implement Security Resolution 660 (1990) and All Relevant Resolutions*, SC Res 678, UNSCOR, 46th Sess, Supp No 2, UN Doc A/46/2 (1990) 85; *On the Deployment of International Civil and Security Presences in Kosovo*, SC Res 1244, UNSCOR, 54th Sess, Supp No 2, UN Doc A/54/2 (1999) 296 [*SC Resolution 1244*].

[93] *Ibid.*

[94] See Okhovat, *supra* note 1; Bianchi, *supra* note 1; Hartberg, *supra* note 2.

[95] See Okhovat, *supra* note 1; Bianchi, *supra* note 1; Hartberg, *supra* note 2; *SC Resolution 1373 supra* note 3; *SC Resolution 1540*, *supra* note 3; Boon, *supra* note 4; Bydoon, *supra* note 4; Nasu, *supra* note 4.

[96] *Ibid.* See also various cases of the UNSC-based regional administrations.

implementation.[97] It would also allow for a more consistent practice in assessing what kinds of interventions should be made and when based on the types of human security violation.

The potential benefit of applying the non-State technocratic approach can be demonstrated by the addressing of health threats to international security.[98] Such kinds of threats do not cause substantive political disagreements because they are generally devoid of particular State interests and focus more broadly on the protection of humanity from epidemics that are not limited by State borders. A similar logic can be found in resolving economic matters and protecting standards of living, for they do not concern a political status of a State but rather the level of well-being of its people. Moreover, the illustrated issues often have a technocratic nature. As a result, these problems can be consistently identified and tackled by the Council within the boundary of its new security approach. Hence, the focus on human security opens up many doors for the Council to contribute to security in a much broader and arguably a more practical way by tackling issues that endanger populations within States rather than those that purely affect State borders.

Furthermore, the extent of the Council's focus on human security could be further developed through the Council's practice. At present, the Council continues to expand its jurisdiction, yet the extent to which the Council is pursuing the goal of human security is not clear. Hence having a more well-formulated conception of international human security may take more time since it requires either direct negotiations by States and non-State parties or a more robust practice of the abovementioned human security approach by the Council. This reveals an important point that even though the maintenance of human security appears to be a priority in the Council's activities, a complete transition into a new model of security would require a broader discussion on the content of the *UN Charter* and its security norms. Even if such norms may not necessarily address veto powers, a more direct discussion on the new types of security would benefit both the legitimacy and effectiveness of the Council in its transition into the new mode of security.

Going back to the benefits of human security over State security, human security brings another benefit to the international system in general. The focus on human security can provide faster responses to international threats. Considering that the Council is one of the few bodies with the binding power over States, its broader involvement in international issues can be useful for addressing rapidly emerging threats and for bypassing lengthy processes of treaty-making and State negotiations.[99] As noted from the examples of Ebola and global warming, the Council has the potential to provide binding responses and act as a coordinator of international efforts against various threats.[100] The Council, as it has previously done, can establish temporary bodies that could tackle internal and transboundary problems that pose a significant concern for human security.[101] For example, it can establish temporary administrations in post-cataclysmic or post-war regions as it already did in multiple peacekeeping missions.[102] Furthermore, it can form non-governing bodies to assist

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[97] See generally Boon, *supra* note 4; Bydoon, *supra* note 4; Nasu, *supra* note 4; Merils, *supra* note 41; Treves, *supra* note 42; Kamradt-Scott, *supra* note 60; *SC Resolution 2177*, *supra* note 61.

[98] *SC Resolution 2177*, *supra* note 61.

[99] See e.g. the continuous problems with the ratification of UNCLOS in the USA in HN Scheiber, "Introduction: perspectives on the history of US non-ratification of the UN convention of the law of the sea, and on the prospects for an early reversal" (2009) 1:1 Publicist 1.

[100] See the discussed examples with economic and public health stability in Okhovat, *supra* note 1; Bianchi, *supra* note 1; Hartberg, *supra* note 2.

[101] *Ibid.* See also *SC Resolution 1244*, *supra* note 92.

[102] *Ibid.*

with humanitarian problems, such as shortage of food or medical support.[103] This broader power is particularly useful because States by themselves often fail to provide timely responses to threats, as illustrated by how prolonged and complex the process of treaty-making is.

To illustrate this point, one may refer to the example of the Paris Agreement. The agreement itself took approximately six years to draft.[104] In addition to the relatively lengthy drafting period, the previous efforts in creating a framework of environmental law – still without a proper enforcement structure – took decades.[105] The Council can resolve this issue much faster than they do through traditional State negotiations by considering the parts of the environmental law framework relevant to human security. In particular, the Council could impose immediate measures that do not engender strong political disagreements. This would allow the Council to create a framework of first response that would surpass the current diplomatic and political limits of States in the international community.

A way forward for the Council to strengthen its human security approach could be to reconcile its work with those of other bodies concerned with human security. For example, the Council could expand its executive role by acting more broadly in support of international courts. Aside from the already-existing connection between the Council and international criminal courts, the Council could work more closely with various regional and international human rights bodies. While adhering to the practices of the European Court of Human Rights, the Inter-American Court of Human Rights, and African Court on Human and People's Rights, the Council could classify the most rampant human rights abuses as possible threats to human security.[106] However, the Council's interference may be reserved for large-scale or urgent threats considering the limited weight of Human Rights complaints filed by individuals. Meanwhile, a closer analysis of the impact of Human Rights compliance by the Council could help to form better the extents of human security that the Council is ought to protect.

Essentially, the shift of the Council towards the protection of human security can establish a solid legal ground and provide a potentially useful space for the Council's broader involvement in international affairs. It allows for an inclusive, technocratic, and non-State-centred involvement in international security. However, several obstacles have prevented the shift towards human security from having a significant impact on international affairs, as will be discussed below.

IV. Obstacles to Human Security: From Law to Practice

There are several obstacles that may hinder the impact of the Council's approach centred on human security. On the most basic level, States might begin to question the legality of the Council's ambition for expanding its jurisdiction. Fundamentally speaking,

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[103] See Okhovat, *supra* note 1; Bianchi, *supra* note 1; Hartberg, *supra* note 2; *supra* note 5.

[104] See European Commission, "The road to Paris" (last visited 16 February 2019), online: *European Commission: policies, information, and services* <ec.europa.eu/clima/policies/international/negotiations/progress_en>.

[105] *Ibid.*

[106] See for example *Dicle for the Democracy Party v Turkey*, No 25141/94, (10 December 2002); *Yazar and others v Turkey*, No 22723/93, [2002] II ECHR 395; *Socialist Party and Others v Turkey*, No 26482/95, (12 November 2003).

international law is considered to be a product of State consent.[107] As a result, all actions taken without State consent can arguably be invalid.[108] This is one of the reasons why the Council's resolutions on several occasions were argued to be *ultra vires*.[109] In essence, the nature of the existing international legal system is generally centred on strict adherence to the limits of permissible actions given to international organizations. As was exemplified in the *WHO Nuclear Weapons* case, international organizations are governed by "the principle of specialty" that prohibits them from exceeding the jurisdiction initially conferred to them by States.[110] The Council is also subject to this restriction as it is a sub-body within an international organization. This could provide a ground for States to object to the Council's involvement in matters of human security, especially in the existence of competing political interests.[111]

In the meantime, it was suggested above that the Council's legal powers and internal procedures were not always static, and the move towards human security can be considered as an organic change in its direction.[112] Accordingly, even if several States would object to the Council's growing jurisdiction, it is unlikely that the matters of legality will block the Council's activities. Considering the lack of substantive objections to the Council's jurisdictional expansion to date, it is unlikely that States will actively reject human security as a new paradigm for international peace. As Whittle argued, the broader international community and the UN General Assembly took action to support many of the Council's extensive human security measures.[113] Meanwhile, more practical obstacles may negate the Council's human security direction.

Beyond the questions of legality, the core issue of the expansion of the Council's powers is the lack of its capacity to address long-existing limits of the Council. There are two main obstacles that the Council faces. The first issue is as old as the Council itself—any substantial or non-substantial political disagreements between the permanent members of the Council can immediately impair the capacity of the Council to address any given issues.[114] The expansion of the Council's jurisdiction in no way solves the existing problem: it merely reconfirms the Council's lack of capacity to address threats, but in this instance on a broader scale. If this continues, States may stop looking for alternative solutions to humanitarian problems and rely on the Council without any guarantee of an efficient response. In many cases, this results in a complete paralysis of international responses to humanitarian catastrophes because of the member States' veto powers.[115] In this regard, even though the Council may have more opportunities to act, there is no certainty in its capacity to address threats to peace. In the meantime, its apparent capacity to act can prevent States and non-State actors from developing alternative solutions in the hope that the

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[107] See *The Case of the SS Lotus (France v Turkey)* (1927), PCIJ (Ser A) No 10 at paras 162, 214 [*Lotus*]; Samantha Besson, "Sovereignty, international law and democracy" (2011) 22:2 EJIL 373; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) at 224–26.

[108] *Lotus*, *supra* note 107.

[109] Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra–Legal Measures Model to Chapter VII Action" (2015) 26:3 EJIL 671 at 690.

[110] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory opinion, [1996] ICJ Rep 66 at para 25.

[111] *SC Resolution 1540*, *supra* note 3.

[112] Kamradt-Scott, *supra* note 60.

[113] Whittle, *supra* note 109.

[114] See Peter Ferdinand, *The positions of Russia and China at the UN Security Council in the light of recent crises* (Belgium: European Parliament, 2013) at 17–8.

[115] See e.g. the failure in Syria and Libya, Okhovat, *supra* note 1; Bianchi, *supra* note 1; Hartberg, *supra* note 2.

Council will succeed in preventing such threats. Therefore, even if the Council's expanded jurisdiction may seem to increase the Council's capacity for addressing international issues, it will create other gaps in the system.

The second major issue is the lack of the Council's capacity to contextually address complex domestic situations, as evidenced by resolution 1540, the non-alignment movement, and several cases pertaining to anti-terrorism sanctions.[116] Essentially, the Council is limited in its capacity to contextually address complex situations in domestic contexts. Most of its resolutions are modest in their lengths and limited in their capacity to grasp the problem. As was suggested by the non-alignment movement, the proposed models of the Council's legislation did not fit in a number of domestic contexts.[117] Some mismatched the existing domestic legislations, while some placed individuals on terrorist lists without any concrete evidence.[118] As was further exemplified by *Kadi v European Commission*, States were forced to implement decisions that were not derived from proper evidence, highlighting the problem of bureaucracy in enforcement and remedies.[119] More broadly, regarding the status of the Council's resolutions as absolutely binding presents a range of problems in enforcement when the resolutions can lead to the violation of *jus cogens* and other international norms.[120] All in all, the Council's past encounters with substantive problems when addressing regionally sensitive matters warn that movement towards a broader human security might produce adverse results.

Accordingly, the new approaches to security do not fully resolve the Council's technical and procedural limitations. Even though the human security approach may potentially bolster the maintenance of international peace and generate meaningful UN-based actions, the practical limitations suggest a need for a direct reform of the Council at its source. Such a reform would address the political limits of the Council and allow for a more regionally sensitive approach in order to advance the protection of human rights while respecting State rights. A reliable alternative could be developed at regional levels based on the models of regional organizations similar to the European Union, the Organization for Security and Cooperation in Europe, or NATO, for a more practical and timely implementation of the human security approach. Such organizations could provide regionally tailored solutions to the problems emerging as a part of the human security concept and be less constrained by the geopolitical limitations of the UN. In the meantime, developing a more meaningful system of international responses requires more time and thought.

V. Conclusion

The Council's move towards a different notion of security from that initially envisaged in the Charter is both promising and challenging. On the one hand, the lean towards human security highlights a growing focus on individuals, rather than States, in international law. This allows for the Council to be more broadly involved in the

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[116] *SC Resolution 1540*, *supra* note 3; *SC Resolution 1373*, *supra* note 3; Bydoon, *supra* note 4; *Yassin Kadi v Council of the European Union and Commission of the European Communities*, C-402/05 and C-415/05, [2008] ECR I-06351 at paras 345–52 [*Kadi*].

[117] *SC Resolution 1540*, *supra* note 3.

[118] *Ibid*. See also *Kadi*, *supra* note 116 at paras 345–52. See also Ramses A Wessel, "Introduction to the forum: The Kadi case: Towards a more substantive hierarchy in international law?" (2008) 5 International Organizations Law Review 323. See also Juliane Kokott and Christoph Sobotta, "The Kadi case – constitutional core values and international law – finding the balance?" 23:4 EJIL 1015 at 1020.

[119] *Kadi*, *supra* note 116 at paras 345–52; Wessel, *supra* note 118 at 325–26; Kokott and Christoph, *supra* note 18.

[120] *Kadi*, *supra* note 116 at paras 87–92, 270; Wessel, *supra* note 118 at 325–27.

international legal system to govern matters concerning individuals and their collective well-being. Moreover, the human security approach allows the Council to exercise its binding power over a wider range of matters, which in turn could lead to its stronger binding power in international law and faster responses to non-State-related threats to peace. In addition, the approach creates a new technocratic and non-State-centered paradigm for the concept of international security. Thus, the gradual shift towards human security as the foundational principle of international law appears to be promising. However, the abovementioned drawbacks may overshadow the prospects of improvement due to the Council's inherent structure. Most fundamentally, the problem of veto power cannot be resolved by the shift towards the human security model, which may leave a growing list of international matters left unaddressed or unresolved regardless of the stronger focus on human security. Moreover, there is little evidence to suggest that the Council, as a general body under international law, can adequately address the domestic and regional issues embodied in the concept of human security.

Nonetheless, a general conceptual shift towards human security could have a substantial impact on the practical and theoretical development of international law outside the context of the Council. In many ways, the human security approach represents a significant shift in the basis of the international legal system. In particular, the approach embodies the growing importance of positive sovereignty as an obligation of a State to protect its population. Moreover, the approach signals that certain Human Rights and humanitarian norms are becoming increasingly important within the international legal system. Even though there remains an opposition to the growing recognition of liberal governance from, say, authoritarian democracies, human security promotes the growing humanitarian nature of the international legal arrangements, an increasingly visible concern in international law. The varying results of this development will become more apparent as both international law and the Council continue to muddle through the challenges of political divides, economic threats, and environmental damages.

Should Asylum Seeking Minors be Detained?: Understanding International and European Law and Policy and Seeking Alternative Solutions

Jeremy Sarkin[*] *& Catarina Tavarela*[**]

Abstract

This article deals with the issues concerning the detention of unaccompanied minors. The article examines the circumstances regarding the entry into states by such individuals, and sets out the dangers and problems that such individuals encounter to understand the issues concerning detention and the rights involved. The article analyses the international law involved. The principle of the best interests of the child is surveyed. It is contended that the best interests of the child must be understood to mean that detention is almost never in a child's best interests where asylum-seeking minors are involved. It is maintained that detention should almost never serve as a last resort for these minors. The jurisprudence involved is examined. The article investigates some of the alternatives to detention. Recommendations are made on a variety of issues, including the need for laws at the regional and national level to ensure compliance with various state obligations.

French translation

Cet article traite des questions relatives à la détention des mineurs non accompagnés. L'article examine les circonstances de l'entrée dans les États de destination par ces personnes et expose les dangers et les problèmes que ces personnes rencontrent pour comprendre les questions relatives à la détention et les droits impliqués. L'article analyse le droit international applicable. Le principe de l'intérêt supérieur de l'enfant est examiné. Il est affirmé que l'intérêt supérieur de l'enfant doit être entendu comme signifiant que la détention n'est presque jamais dans l'intérêt supérieur de l'enfant lorsque des mineurs demandeurs d'asile sont impliqués. Il est maintenu que la détention ne devrait presque jamais servir de dernier recours pour ces mineurs. La jurisprudence en la matière est examinée. L'article examine certaines alternatives à la détention. Des recommandations sont formulées sur diverses questions, notamment la nécessité d'adopter des lois aux niveaux régional et national pour garantir le respect des diverses obligations de l'État.

Spanish Translation

Este artículo trata las cuestiones con respecto a la detención de menores no acompañados. El artículo examina las circunstancias relativas a la entrada en los estados de esas personas y establece los peligros y problemas que ellas enfrentan para comprender las cuestiones relativas a la detención y los derechos involucrados. El artículo analiza el derecho

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internacional involucrado. Se examina el principio del interés superior del niño. Se sostiene que debe entenderse que el interés superior del niño significa que la detención casi nunca responde al interés superior del niño cuando se trata de menores solicitantes de asilo. Se sostiene que la detención casi nunca debería servir como último recurso para estos menores. Se examina la jurisprudencia involucrada. El artículo investiga algunas de las alternativas a la detención. Se hacen recomendaciones sobre una variedad de temas, entre ellos la necesidad de leyes a nivel regional y nacional para garantizar el cumplimiento de las diversas obligaciones estatales.

Keywords

International law, European law, unaccompanied minors, detention, best interests of the child, migration, refugees, Convention on the Rights of the Child, Convention relating to the Status of Refugees

Introduction

The last few years have witnessed a grave humanitarian migration crisis not only on the shores of Europe but in many other places around the world.[1] While Europeans believe this is a new phenomenon, it has in fact been on-going in many parts of the globe for a long time. In many places, substantial population flows have been occurring for years, in some cases for decades, as a direct result of turmoil including conflict.[2] Amidst these migration upheavals, many human rights violations have been perpetuated against asylum seekers, including unaccompanied minors, who are in search of safety and security.[3] Indeed, "the most vulnerable of the vulnerable,"[4] "symbols of the dramatic impact of humanitarian crisis on individual lives,"[5] and those "in urgent need of protection"[6] are some of the phrases that have been used to describe the situation of unaccompanied asylum-seeking minors.[7] Certainly, they are amongst the most vulnerable of all people crossing borders.[8] These are minors who are escaping international and non-international conflicts and/or are fleeing persecution.[9] Some are looking after other unaccompanied minors while traveling without a parent or guardian. Often, they have embarked on perilous journeys,[10] across borders and seas,[11] in the hopes of achieving a better, more prosperous and safer life in a destination that will provide them with the support they seek, as provided for in the 1951 Convention relating to the Status of Refugees,[12] as well as other international, regional, and domestic laws.[13]

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[1] See Erica Marat, "Labor Migration in Central Asia: Implications of the Global Economic Crisis" (May 2009), online (pdf): *Central Asia-Caucasus Institute & Silk Road Studies Program Working Paper* <www.silkroadstudies.org/resources/pdf/SilkRoadPapers/2009_05_SRP_Marat_Labor-Migration.pdf> [perma.cc/6HWV-9V4Q].

[2] See Jeremy Sarkin, "Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons" (2018) 22:2 Int'l JHR 207 at 207 .

[3] This is not a new problem in the world – see Jacqueline Bhabha, "Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers" (2001) 3:3/4 Eur J Migr & L 283. In fact there has been such crises all over the world for decades. See Stephen Castles & Mark J Miller, *The Age of Migration* (New York: The Guilford Press, 1998). On the crises in other places see also Sebastien Moretti, "Protection in the context of mixed migratory movements by sea: the case of the Bay of Bengal and Andaman Sea Crisis" (2018) 22:2 Intl JHR 237.

[4] Antonio Guterres, "Opening remarks by António Guterres, United Nations High Commissioner for Refugees; Launch of UNHCR's report 'Children on the Run'" (delivered at the Launch of UNHCR's Report "Children on the Run," 12 March 2014). See also John Tobin, "Understanding Children's Rights: A Vision beyond Vulnerability" (2015) 84 Nordic J Intl L 20 155 at 166.

[5] "Inter-Agency Guiding Principles on Unaccompanied and Separated Children" (January 2004), online (pdf): *International Committee of the Red Cross* <www.unicef.org/protection/IAG_UASCs.pdf> [perma.cc/F97B-ZGAH] at 2 [Red Cross].

[6] UNICEF, Press Release, "Unaccompanied refugee and migrant children in urgent need of protection, warns UNICEF" (6 May 2016) online: <www.unicef.org/media/media_91069.html> [perma://9XYQ-CKC8].

[7] See also Global Migration Data Analysis Centre, "IOM and UNICEF Data Brief: Migration of Children to Europe" (2015) online (pdf): *IOM* <www.iom.int/sites/default/files/press_release/file/IOM-UNICEF-Data-Brief-Refugee-and-Migrant-Crisis-in-Europe-30.11.15.pdf> [perma.cc/S9NC-AQQ5].

[8] See Aria O'Sullivan, "The 'Best Interests' of Asylum-Seeker Children: Who's Guarding the Guardian?" (2013) 38:4 Alternative L J 224 at 224.

[9] See Hélène Cristini & Claudio Lanza, "The Visible and Invisible Story of the European Migrant Crisis" in Giray Sadik, ed, *Europe's Hybrid Threats: What Kinds of Power Does the EU Need in the 21st Century?* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2017) 51.

[10] See Myriam Denov & Catherine Bryan, "Tactical Maneuvering and Calculated Risks: Independent Child Migrants and the Complex Terrain of Flight" (2012) 136 New Directions for Child and Adolescent Development 13.

[11] Sarkin, *supra* note 2.

[12] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Refugees Convention*]. See also Jacqueline Bhabha "More Than Their Share of Sorrows: International Migration Law and the Rights of Children" (2013) 22:2 St Louis U Pub L Rev 253.

[13] See Vincent Chetail, "The Human Rights of migrants in General International Law: From Minimum Standards to Fundamental Rights" in Mary Crock, ed, *Migrants and Rights* (London: Routledge, 2016) 225.

As far as the statistics show, it is difficult to get accurate data on the migration flows.[14] It does, however, seem that more than a quarter of the one million people that came to Europe in 2015 were minors. Of those, at least 90,000 were unaccompanied.[15] Again while accurate data is not available, many of these unaccompanied children have gone missing since their arrival in the host countries.[16] In the USA, the figure for unaccompanied minors arriving in the country in 2014 was 90,000, a dramatic increase from around 25,000 in 2013.[17]

In spite of the people affected, it has become clear that some destination countries are not prepared to provide refugees, in particular unaccompanied minors, with the necessary support system that is being sought.[18] The refugee flows from Afghanistan, Iran, and Syria, and elsewhere into Europe have laid bare the flaws of a system that is not equipped or willing to deal with asylum seekers,[19] as the Merkel-Erdogan deal has shown.[20] It is not foreseeable that the system will be improved upon to being more open to the reception of those in need of international protection.

The rise in populist right-wing conservative discourse around the world,[21] particularly in traditionally democratic European countries like France or the Netherlands,[22] has shown that the old continent is growing increasingly intolerant[23] of foreigners.[24] With regard to unaccompanied minors in particular, reports from non-governmental agencies and decisions made by the European Court for Human Rights (ECHR) have shown that the rights of unaccompanied minors are routinely violated.[25] As a result, the lack of oversight in the asylum granting process and irregular detention are matters frequently taken to court. Most frequently, cases relate to article 3 of the European Convention on Human Rights

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[14] See Thomas Hammarberg, "Unaccompanied and Separated Migrant Children in Europe: Legal Perspectives and Policy Challenges" in J Kanics, D Senovilla Hernández & K Touzenis, eds, *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* (Paris: UNESCO Publishing, 2010) 173 at 173.

[15] See "Almost 90000 unaccompanied minors among asylum seekers registered in the EU in 2015" (2 May 2016) online (pdf): *European Union* <ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf/> [perma.cc/9NCY-RPPT] Half the unaccompanied minors came from Afghanistan. 91 percent of all unaccompanied minors were male.

[16] See Jeremy Sarkin, "Reducing the Number of Children That Go Missing As a Result of Migration and Refugee Flows and Putting in Place the Means to Find Them" (2016) 2:1 IHRC J Hum Rts 3 at 3.

[17] See Erin B Corcoran "Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors" (2014) 47 Conn L Rev Online 1 at 1.

[18] See Amnesty International "Enter at Your Peril: Lives Put at Risk at the Gate of Europe" (July 2013) online (pdf): *RefWorld* <www.refworld.org/publisher,AMNESTY,COUNTRYREP,,51e39f594,0.html> [perma.cc/2BUV-LLZC]

[19] See Elizabeth Collett, "Destination: Europe: Managing the migrant crisis" (2017) 96 Foreign Aff at 150.

[20] See Matthew Karnitsching & Jacopo Barigazzi, "EU and Turkey Reach Refugee Deal" (18 March 2016), online: *Politico* <www.politico.eu/article/eu-and-turkey-finalize-refugee-deal/> [perma.cc/HK46-YVHP]. See also Ilker Ataç et al, "Contested B/Orders. Turkey's Changing Migration Regime. An Introduction" (2017) 3:2 J Crit Mig & Bdr Reg Studies 9.

[21] See Teun A van Dijk, "Discourse and Migration" in Ricard Zapata-Barrero & Evren Yalaz, eds, *Qualitative Research in European Migration Studies* (Cham: Springer, 2018) 227; Jenny Ritter et al, "European Perspectives and National Discourses on the Migrant Crisis" in Melani Barlai et al, eds, *The Migrant Crisis: European Perspectives and National Discourses* (Zurich: Lit Verlag, 2017) 13; Jenny Ritter & Markus Rhomberg, "European Perspectives and National Discourses on the Migrant Crisis" in Melani Barlai et al, eds, *The Migrant Crisis: European Perspectives and National Discourses* (Zurich: Lit Verlag, 2017) 357.

[22] See Gregor Aisch, Adam Pearce & Bryant Rousseau, "How Far Is Europe Swinging to the Right?" *The New York Times* (23 October 2017), online: <www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html> [perma.cc/W9CT-M7KR]

[23] See Nicholas De Genova, "The 'Migrant Crisis' as Racial Crisis: Do Black Lives Matter in Europe?" (2018) 41:10 Ethn Racial Stud 1765.

[24] See Bastian Vollmer & Serhat Karakayali, "The Volatility of the Discourse on Refugees in Germany" (2018) 16 J Immig & Ref Stud 118.

[25] See e.g. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No 13178/03, [2006] ECHR 12 [*Mubilanzila Mayeka*].

regarding the prohibition of torture, inhuman or degrading treatment or punishment.[26] However, the issue of detention of unaccompanied minors is not simply about the mistreatment of migrants or refugees but often about a deliberate policy to develop "restrictive and punitive measures" to deal with people in ways that attempt to deter others from embarking on the journey to Europe and elsewhere, so as to protect the borders of countries.[27]

This article deals with the process that unaccompanied minors face upon arrival in many countries, the asylum granting process, and how detention for these minors is dealt with. An unaccompanied minor is defined by the United Nations as "a person who is under the age of eighteen, unless, under the law applicable to the child, majority is attained earlier and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so."[28] It is, however, essential to highlight that unaccompanied minors in general can be refugees, migrants, as well as victims of human trafficking,[29] smuggling,[30] and other crimes.[31] The Committee of the Rights of the Child (CRC) has devoted a General Comment on to how to deal with unaccompanied minors.[32] The experiences of these minors and the vulnerabilities of their condition often make the distinction between who falls into which category a hard one to make.[33] Often, state officials deny the requisite protections to which such individuals are entitled. This can be seen in several ECHR decisions, as well as national court decisions, that reveal how frequently international protection is wrongly refused to unaccompanied minors.[34]

The article examines the conditions and legality of entry into a country by unaccompanied asylum-seeking minors, detailing the dangers involved, followed by the procedural guarantees and processes for being granted asylum, and the protections given if asylum is not granted. The article further analyses the situations in which unaccompanied refugee minors are detained in order to better understand the problem and the issues that are involved. Furthermore, the conditions for detention are examined in order to determine the reasons for detaining asylum seekers and what rights they should have access to.

The article critically examines international law on these matters. The Convention on the Rights of the Child; in particular article 3, relating to the best interests of the child, article 22 on refugee children, and articles 37 and 40 relating to detention, are examined to

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[26] See Nuala Mole & Catherine Meredith, *Asylum and the European Convention on Human Rights*, 5th ed (Strasbourg: Council of Europe Publications, 2010).

[27] Rachel Kronick & Cécile Rousseau, "Rights, Compassion, and Invisible Children: A Critical Discourse Analysis of the Parliamentary Debates on the Mandatory Detention of Migrant Children in Canada" (2015) 28:4 J Refugee Stud 544 at 545.

[28] "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" (February 1997) at 1, online (pdf): *UNHCR* <www.refworld.org/docid/3ae6b3360.html> ["Guidelines"].

[29] See e.g. Angeliki Dimitriadi, "The Interrelationship Between Trafficking and Irregular Migration" in Sergio Carrera & Elspeth Guild, eds, *Irregular Migration, Trafficking and Smuggling of Human beings: Policy Dilemmas in the EU* (Brussels: Center for European Policy Studies, 2016) at 64.

[30] On some of the categorization issues see S Goodman et al, "The Evolving (Re)categorisations of Refugees Throughout the 'Refugee/ Migrant Crisis'" (2017) 27 J of Comm & Appl Soc Psych 105. On the labeling see Ju-Sung Lee & Adina Nerghes, "Refugee or Migrant Crisis? Labels, Perceived Agency, and Sentiment Polarity in Online Discussions" (2018) Social Med & Soc 1.

[31] See e.g. Vasileia Digidiki & Jacqueline Bhabha, "Sexual Abuse and Exploitation of Unaccompanied Migrant Children in Greece: Identifying Risk Factors and Gaps in Services During the European Migration Crisis" (2018) 92 Children & Youth Serv Rev 114.

[32] See Rebecca Thorburn Stern, "Unaccompanied and Separated Asylum-seeking Minors: Implementing a Rights-based Approach in the Asylum Process" in Said Mahmoudi et al, eds, *Child-friendly Justice* (Leiden: Brill–Nijhoff, 2015) 242 at 245.

[33] See Kanics, *supra* note 14.

[34] Some of these cases are dealt with below.

understand the law involved.[35] The principle of the best interests of the child is one of the legal lenses through which the situation of unaccompanied minors in detention is surveyed. The argument goes further and considers how the application of this principle must account for the age of the child in question.[36] In addition, it is argued that the principle of the best interests of the child must consider the minor's familial cultural and religious circumstances.[37] It is contended that the best interests of the child must be understood to mean that detention is almost never in a child's best interests, as doing so violates numerous rights. It is maintained that detention should almost never serve as a last resort, not even for the shortest period. The article analyses the jurisprudence to show how procedural guarantees are essential to the protection of present and future rights of all asylum seekers, but especially for those most vulnerable, such as unaccompanied asylum-seeking minors.

The third part of the article explores some alternatives to detention. It is argued that the best interests of the unaccompanied refugee child can and should be complied with to a far greater extent. Various recommendations are made on issues such as education, as well as moving towards compliance with positive obligations by constructing infrastructure and by employing legal, health, and education professionals to better comply with the rights in question and to provide the necessary protection to the child. It is also argued that legal provisions ought to be created at a regional and national level to ensure that the obligations under the Convention on the Rights of the Child and the Convention relating to the Status of Refugees are met.

It must be noted that this article focuses on migrants and asylum seekers. It does not deal with the exceptional cases of minors arriving in a state who have engaged in criminal activity, served as soldiers who violated laws of war, have affiliations with extremist groups, or were involved in other crimes. It does not deal with other exceptional cases, such as serious health matters that might justify detention in the rarest of cases. These minors might present security or other types of concerns for the states in which they seek asylum. In some instances, these individuals straddle the liminal zone of being victims who have hurt others. This type of exception should not, however, be used to justify a tough approach for such minors in general.

I. Perilous Journeys and Entry into Host Countries

The journey made by a refugee to a destination begins a long time before the person flees their country. In this regard, it is important to acknowledge the geopolitical complexities, including the global economic crisis that began in 2008 and 2009.[38] It is also important to understand the causes of armed conflict and other problems that result in refugee flows.[39] In the modern world, an armed conflict, whether international or non-international, is often affected by domestic as well as international politics. In many cases, other States provide troops and/or air support, supply weapons, and economic help to the side they support.[40] Although intervention in wars is a century-old affair, and not always

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[35] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*UNCRC*].

[36] See Joyce Koo Dalrymple, "Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors" (2006) 26:1 Boston College JL & Soc Just 131 at 140.

[37] See *Darboe and Camara v Italy*, No 5797/17, [2017] ECHR 1.

[38] See Patrick Ireland, *Migrant Integration in Times of Economic Crisis: Policy Responses from European and North American Global Cities* (Switzerland: Palgrave Macmillan, 2017) at 8.

[39] There are also refugees that have fear of persecution due to their religion, ethnicity, political belief, race or other issues.

[40] See Jed Odermatt, "Between Law and Reality: 'New Wars' and Internationalised Armed Conflict" (2013) 5:3 Amsterdam L F 19 at 29.

wrong,[41] it is important that other countries recognize their own role in contributing to conflicts whether in the Middle East, Asia, Africa, or elsewhere.[42] This should become a more frequent narrative in the public sphere.[43] If there to be some recognition of the past roles played by European States, particularly during the colonial era, it would generate a more receptive and accepting view of refugees in those countries to which they are fleeing, and this view would align more with the international legal obligations of such countries. This would replace the current depiction of refugees as a burden and their reception as an act of charity.[44] More importantly, however, the right to enter a country to seek international protection should be enshrined in the legal documents of the various institutions to which States belong, such as the United Nations, European Union, African Union, and others.

It needs to be borne in mind that legal entry into a country is often not possible for an asylum seeker, many of whom are escaping their own governments. They often cannot afford a legal and safe exit from their country of origin.[45] Moreover, at times, diplomatic structures and presence are absent in the parts of the country embroiled in conflict, making it difficult to obtain the required documentation. Such individuals have few resources, and their travels to their destinations are expensive and extremely dangerous.[46] This is not only due to natural dangers, such as crossing seas, but also because of the hazards of smugglers, human traffickers, and other types of criminals who wish to take advantage of asylum seekers.[47] Children, especially those that are unaccompanied, are especially vulnerable to these perils, and, "no matter the motive, children often have little or no choice in the decisions that led to their situations."[48] Indeed, for a variety of reasons, they should be identified as being unaccompanied as early as possible through pre-existing specific identification procedures, registered through interviews, and granted the right to a legal guardian and legal counsel in all stages of the process.[49] The vulnerability of these children is not inevitable but rather a consequence of their circumstances. Maybe this vulnerability cannot be eliminated entirely, but it can be mitigated through the creation of humanitarian corridors, proper training of law and border officials, adequate registration procedures, the

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[41] See John Owen, *Confronting Political Islam: Six Lessons from the West's Past* (Princeton: Princeton University Press, 2016) at 73.

[42] See e.g. the British role in Palestine, Walter Laquer & Dan Shueftan, *The Israel-Arab Reader: A Documentary History of the Middle East Conflict*, 8th ed (New York: Penguin Books, 2016). See also Maria Birnbaum, "Emerging International Subjects: the Royal Peel Commission, Palestine Partition and the Establishment of Religious Difference at the United Nations" in Anne Stensvold, ed, *Religion, State, and the United Nations* (London: Routledge, 2016) 113 at 123.

[43] See Alexander Huepers et al, "European Union Citizens' Views on Development Assistance for Developing Countries, during the Recent Migrant Crisis in Europe" (2018) 14:61 Glob & Health 1 at 2.

[44] On some of the long term strategies adopted in Australia which are replicated elsewhere to try and stop people from coming including detention see Andreas Schloenhardt, "To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia" (2002) 14:2 Int J Ref L 302 at 303. On the issues of unaccompanied minors travelling to Australia generally see Mariana Nardone & Ignacio Correa-Velez, "Unpredictability, Invisibility and Vulnerability: Unaccompanied Asylum-Seeking Minors' Journeys to Australia" (2016) 29:3 J Ref Stud 295.

[45] See "Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox" (February 2015), online (pdf): *FRA: European Union Agency for Fundamental Rights* <fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf> [perma.cc/4ME7-LU3E].

[46] See Joseph Lelliott, "Smuggled and Trafficked Unaccompanied Minors: Towards a Coherent, Protection-Based Approach in International Law" (2017) 29:2 Int J of Ref L 238. See also Marieke Wissink & Orgun Ulusoy, "Navigating the Eastern Mediterranean: The Diversification of sub-Saharan African Migration Patterns in Turkey and Greece" in *Understanding Migrant Decisions: From Sub-Saharan Africa to the Mediterranean Region* (London: Routledge, 2016) 120.

[47] *Ibid.*

[48] "Guidelines", *supra* note 28 at 4.

[49] *Ibid* at 2.

prompt appointment of a guardian,[50] as well as placement in a short-term care facility, and not in a detention centre.[51]

II. Detaining Unaccompanied Asylum-Seeking Minors

Unaccompanied minors are regularly detained in many parts of the world. For example, the European Directive on the rights of asylum seekers states that these minors may be detained in order to have their "right to enter territory" ascertained.[52] However, seeing as there are other ways to ascertain their right to an asylum claim, detention for this purpose is a violation of the principle of detention as a "last resort" and for "the shortest time possible."[53] Placing unaccompanied minors in detention merely because they are seeking asylum is a grave violation of human rights. It worsens the likelihood of minors trusting the authorities of countries and places them in a position of further vulnerability because they will further try and avoid legal routes and processes.[54]

Asylum seekers should not be prosecuted for entry into a country. It is not an illegal act in the sense that it cannot be determined as such before the adequate international and national agencies determine the actual legal status of the asylum seeker. Furthermore, there is no sustained reasonable and continuous threat to national security or public order that would justify the detention of an asylum-seeking minor upon entry into the country. In fact, the Refugee Convention expressly forbids this. There, it is stated that no penalties should be imposed when refugees enter the country illegally. Unfortunately, the article leaves room for exceptions. The article provides that asylum seekers should not be penalized when they are "coming directly from a territory where their life or freedom was threatened."[55] This is not always the case, as asylum seekers often travel through countries of transit before reaching their country of destination. However, the CRC underlines that States have obligations that apply to each and every child that comes into their jurisdiction or territory.[56] As such, this would not completely suspend their obligations as state parties to the Convention on the Rights of the Child and the Refugee Convention. They therefore cannot detain an unaccompanied minor solely for entering the country without documentation. Additionally, the CRC calls attention to the fact that unaccompanied asylum-seeking minors are routinely "denied access to asylum procedures or their asylum claims are not handled in an age and gender sensitive manner."[57] What should occur is that the principle of the best interests of the child should be applied in the decision-making process, and for there to be an understanding that it would not be in their best interests for them to be detained solely for entering the country.[58]

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[50] See also Katrien de Graeve, "Classed landscapes of care and belonging: Guardianships of unaccompanied minors" (2017) 30:1 J Ref Stud 71.

[51] See Ilse Derluyn & Marianne Vervliet, "The wellbeing of unaccompanied refugee minors" in David Ingleby et al, eds, *Health inequalities and risk factors among migrants and ethnic minorities,* vol 1 (Antwerpen/Apeldoorn: Garant, 2012) 95 at 95.

[52] EC, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection, [2013] OJ, L 180/96 at art 8(3)(c) [Directive 2013/33/EU].

[53] *Ibid* at 11(2).

[54] On issues of trust by asylum seekers in the Irish context see Muireann Ni Raghallaigh, "The causes of mistrust amongst asylum seekers and refugees: Insights from research with unaccompanied asylum-seeking minors living in the Republic of Ireland" (2013) 27:1 J Ref Stud 82.

[55] *Refugees Convention*, *supra* note 12.

[56] See *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC GC 2005/6, UNGAOR, 61st Sess, Supp No 41, UN Doc A/61/41 (2006) 15 at para 13 [*UNCRC Comment No 6*] (*UNCRC General Comment No 6* was adopted by the UNCRC at its Thirty-ninth session in 2005).

[57] *Ibid*, at paras 3–4.

[58] See *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160 art 6.

Unaccompanied asylum-seeking minors should only be detained in exceptional circumstances, i.e. when all alternatives have been exhausted or when there are real reasons including national security, health, or very limited other important reasons. The CRC argues that there ought to be "care not detention."[59] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that detention should be avoided before trial and limited to exceptional circumstances. However, this is not the case when it comes to unaccompanied refugee minors who are often deprived of liberty as an *a priori* measure that does not aim to punish or correct a crime but rather to punish the minors for merely entering the country and seeking asylum, which is not in accordance with international legal human rights instruments.[60] They should also be accommodated in appropriate conditions, taking care to consider privacy and separation from adults.[61] For female asylum-seeking minors, they must be given more security,[62] and if they are to be detained, they should be kept separately from male applicants unless they are family and, even in this case, only with the consent of the female minor.[63]

III. Dealing Humanely, Adequately, and in a Human Rights Friendly Manner With Unaccompanied Minors

To provide the best possible assistance to and support for unaccompanied asylum-seeking minors when they arrive at the country of reception, there must be a process that identifies them as such and determines whether they are entitled to refugee status or, if not to refugee status, then to another type of subsidiary protection.[64] There needs to be a determination of age,[65] using available documentation, and a medical examination.[66] These processes are however controversial, as they do not always accurately determine age.[67] However, age assessment should also take into consideration psychological maturity in addition to physical age.[68]

In *Aarabi v Greece* at the ECHR, the plaintiff refugee, a minor from Palestine who had grown up in Lebanon in a refugee camp, arrived in Europe. The minor was arrested and detained for illegal entry. However, as he was not correctly identified as a minor, Aarabi was sent to an adult detention facility in Thessaloniki, Greece and later transferred to another detention center on the Greek-Turkish border. While initially the Greek authorities decided to expel him, once he was correctly identified as an unaccompanied minor he was released

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[59] *UNCRC Comment No 6*, *supra* note 56 at para 63.

[60] See Ada Engebrigtsen, "The Child's - or the State's - Best Interests? An Examination of the Ways Immigration Officials Work with Unaccompanied Asylum Seeking Minors in Norway" (2003) 8:3 Child & Fam Soc Work 191.

[61] See Directive 2013/33/EU, *supra* note 52, art 11(2); *UNCRC Comment No 6*, *supra* note 56.

[62] See Elaine Chase, "Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK" (2013) 35:6 Sociology of Health and Illness at 858.

[63] See Directive 2013/33/EU, *supra* note 52, art 11(5).

[64] See *UNCRC Comment No 6*, *supra* note 56.

[65] See some of the issues involved in age assessment in Albert Aynsley-Green et al, "Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control" (2012) 102 Br Med Bull 17. See also Anders Hjern, Maria Brendler-Lindqvist & Marie Norredam, "Age assessment of young asylum seekers" (2012) 101:1 Acta Pædiatrica 4 at 4.

[66] See Andreas Schmeling et al, "Age estimation of unaccompanied minors: Part I General considerations" (2006) 159 Forensic Sci Int S 61.

[67] See Gregor Noll, "Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum" (2016) 28:2 Intl J Refugee L 234.

[68] See "Guidelines", *supra* note 28; *UNCRC Comment No 6*, *supra* note 56 at para 31(a).

and given accommodation by an NGO.[69] It was the failure to properly conduct an initial interview that resulted in the wrongful identification of the minor as an adult, thereby placing him in the various detention facilities.

A more rigorous and detailed process for the initial interview and a reciprocal sharing of data with the United Nations and other international agencies would without doubt help solidify the quality of these initial processes in correctly identifying minors. Other criteria that should be taken into account when dealing with unaccompanied minors include their maturity, physical and mental development, the limited conditions for the granting of asylum, and any specific vulnerability.[70] Moreover, the country of reception should consider not only the circumstances of the child in their country of origin, but the circumstances of family members and general unaccompanied child-specific risks,[71] such as increased vulnerability to threats like child recruitment into armed forces.

It is clear that such measures as the prompt registration of the child as an unaccompanied minor must be carried out at the earliest moment possible. Qualified personnel using a process that is age and gender appropriate should interview the minor in a language they can understand. Building a system of trust between the minor and the authorities of the country of reception reduces vulnerability. Nevertheless, authorities of the reception country do not necessarily defend or protect the interests of the child. There should therefore be legal counsel present in the initial interview to ensure the interests of the child are properly defended from the very beginning.[72] This is important, as it is often at this stage that a decision is taken that affects both the choices made and the quality of care given to the minor.[73] The human rights of the child may be negatively impacted if such assistance is not provided. In this regard, the ECHR has held that: "Children have specific needs that are related in particular to their age and lack of independence, but also their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents."[74] The interviewing process must record information such as the reasons for un-accompaniment, particular vulnerabilities, health issues, and whether there has been any domestic violence or human trafficking inflicted on the minor. This, and other relevant information, must be recorded to determine the protection needs of the child and to allow for the best care in the particular circumstances.[75] This should be done on a case-by-case basis.

As early as possible in the process, unaccompanied minors must be provided with identification documents. Efforts should also begin to trace family members. The CRC advises that a guardian or adviser should be appointed, as well as a legal representative[76] because the Committee has found that "states are required to create the underlying legal

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[69] *Aarabi v Greece*, No 397/66/09, [2015] ECHR 1.

[70] See "Guidelines", *supra* note 28 at 12.

[71] *Ibid* at 13.

[72] On such a need and for a proposal for this in the USA see Wendy Shea, "Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process" (2014) 18 UC Davis J Intl L & Pol'y 148 at 166–67.

[73] See generally Renos Papadopulos, *Therapeutic care for refugees: No place like home* (London: Routledge, 2018).

[74] See *Abdullahi Elmi and Aweys Abubakar v Malta*, No 25794/13 and No 28151/13 (22 November 2016) at para 103 [*Abdullahi*].

[75] See *UNCRC Comment No 6*, *supra* note 56 at para 31.

[76] *Ibid* at para 34.

framework and to take necessary measures to secure proper representation of an unaccompanied or separate child's best interests."[77] It is crucial that the guardian should be adequately informed and consulted on all matters relating to the child. For this to occur the guardian needs to have the authority to legally represent the child, but needs to have the necessary experience in childcare to carry out this role. These guardians must however not have conflicting interests. To ensure that this is the case, and the child is given the best representation, there must be monitoring and reviewing mechanisms.[78]

The ECHR case of *Rahimi v Greece*[79] illustrates the failures that can occur during entry into a country, and in complying with asylum procedures.[80] In this matter, the applicant was of Afghani origin and arrived in Greece at the age of fifteen.[81] He was placed in an adult detention facility for two days while waiting for a court order that would deport him. No legal or other type of support was provided to the unaccompanied minor after he was released. In fact, he was homeless for some days until he received assistance from a local NGO. At the European Court, the plaintiff alleged a denial of international protection, the absence of support, and issued a complaint about the conditions in the detention center. The Court held in favor of the plaintiff, finding that articles 3 and 13 of the *European* Convention on Human Rights had been violated, as he had not been provided with a guardian within a reasonable time. It was also found that besides a guardian being appointed no other action was taken to assist him and that he had been detained alongside adults. It was also held that there had been a violation of article 5(4) as the plaintiff was not able to contact a lawyer; the information brochure provided to him was not in a language he understood and he was not properly informed about the complaint procedure. The ECHR found that the conditions in the detention center were so poor that it undermined the human dignity of detainees,[82] and that it qualified as being degrading treatment that violated articles 3 and 13 of the European Convention. The Court also found a violation of article 5 (1) (f), as the Greek authorities could not justify the two days of detention.[83] It was also found that the order for detention had been given without considering the applicant's best interests. Further, it was found that no thought had been given to alternative measures to the detention.[84]

Where children are detained, it is essential that they are not only properly identified and supported, but that they are provided with proper documentation. Additionally, accurate and updated records that respect principles of confidentiality must be kept, and any movements and transfers must be recorded.[85] Indeed, the United Nations High Commissioner for Refugees (UNHCR) advises that the care and accommodation provided for unaccompanied minors should emphasize their best interests.[86]

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[77] *Ibid* at para 33.

[78] See Maria O'Sullivan, "The 'Best Interest' of Asylum-Seeker Children: Who's Guarding the Guardian?" (2013) 38:4 Alt LJ 224 at 225–26.

[79] *Rahimi v Greece*, No 8687/08 (5 April 2011) [*Rahimi*].

[80] See generally Victoria Galante, "Greece's Not-So-Warm Welcome to Unaccompanied Minors: Reforming EU Law to Prevent the Illegal Treatment of Migrant Children in Greece" (2014) 39:2 Brook J Intl L 745 (the author provides examples of Greek jurisprudence).

[81] The age of the plaintiff is not made clear in the case.

[82] See *Mohamad v Greece (just satisfaction)*, No 70586/11 (11 December 2014) at paras 56ff, 76 [*Mohamad*]. See also *Abdullahi*, *supra* note 74 at paras 99ff.

[83] See also *Bubullima v Greece*, No 41533/08, (28 October 2010) at paras 24ff.

[84] See *Rahimi*, *supra* note 79.

[85] See "United Nations: General Assembly resolution on UN rules for the protection of juveniles deprived of their liberty" (1991) 30:5 ILM 1390 at paras 18(a), 19, 21–6, 87(e).

[86] "Guidelines", *supra* note 28 at 1.

IV. The Principle of the Best Interests of the Child

Although the principle of the best interests of the child might seem simple at first glance, it is in fact one of the most complex concepts enshrined in the Declaration and the later Convention on the Rights of the Child.[87] Indeed, as Freeman points out, what is understood to be in the best interests of the child is not the same around the world.[88] Ultimately, the best interests of the child cannot deny its main goal: the wellbeing of children. Nevertheless, there is tension when deciding which values must be upheld as being in the best interests of the child, particularly when these appear to be conflictual.[89]

The very fact that the article reads that the child's best interests shall be "a primary consideration" and not "the primary consideration," limits the application of the principle. By including "all actions concerning children," the protection provided by the article goes beyond legal actions. The vagueness of the principle in itself is problematic. It fails to define what the best interests of the child might be and as such has left it open for interpretation, namely at country-levels.[90] However, the best interests of the child cannot be said to always be truly subjective - for instance, torture can never be in the best interest of the child.[91] The comments made by UNICEF show the concern that was held by the defenders of children's rights regarding the wording of the article – "by stating that the child's best interests shall be 'a primary consideration' this provision uses what amounts to a twofold consideration. The word 'primary' implies that other considerations, although not deemed primary, may nevertheless be taken into account" referring even to article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women which reads "[…] the interest of the children is the primordial consideration in all cases."[92] As an Australian High Court Judge has noted, "in the absence of legal rules or a hierarchy of value, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of power."[93] Nevertheless, it imposes an obligation on States and it can be used as a guiding principle with which to interpret the rest of the Convention. However, there are competing interests that a Court needs to balance.[94]

The principle of the best interests of the child is a rule of procedure that is the foundation for substantive rights, bridging all decisions concerning children.[95] What Zermatten calls the "control criterion," the principle is applied to ensure that the child is fully able to exercise their rights and that all obligations towards children are fulfilled in all

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[87] See generally Jason M Pobjoy, "The Best Interest of the Child Principle as an Independent Source of International Protection" (2015) 64:2 ICLQ 327 at 327.

[88] See Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child*, vol 3 (Leiden: Martinus Nijhoff Publishers, 2007) at 2–4.

[89] See Stephen Parker, "The Best Interests of the Child – Principles and Problems" (1994) 8:1 Intl JL Pol'y & Fam 26 at 30, 36.

[90] See Henry Ascher and Marita Eastmond, "In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden" (2011) 37:8 J Ethnic & Migr Stud 1185 at 1192.

[91] See Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18:4 Int J Child Rts 483 at 492.

[92] United Nations Commission on Human Rights, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, UN Doc E/CN. 4/1989/WG.1/CRP.1, (15 October 1988) at 13–14 <digitallibrary.un.org/record/765414?ln=en>.

[93] *Department of Health and Community Services v JWB and SMB (Marion's Case)*, [1992] HCA 15 (Brennan J's concurring opinion at para 14) at 344.

[94] See Ciara Smith, "The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?" (2015) 17:1 Eur J Migr & L 70 at 103.

[95] See Pobjoy, *supra* note 87 at 327, 344.

actions or decisions taken by the institutions in article 3.[96] On the other hand, the "solution criterion" allows it to also be the principle that helps decision-makers in making the most appropriate decisions for children, representing "the bridge between the theory and its practical exercise in the field."[97]

Paragraph 2 of article 3 partially clarifies the principle stating that: "state parties must ensure the necessary protection and care for all children in their territory irrespective of their nationality and status." This is of utmost importance in the case of refugees who are unaccompanied minors, as it provides safeguards to accessing to all types of care and protection that the country provides to other minors who are nationals. Thus, there cannot be discrimination towards foreign children or refugee children who did not have the documentation necessary to enter the country, which is often the case with unaccompanied asylum-seeking minors.

V. The Convention on the Rights of the Child and the Protection of Unaccompanied Asylum-Seeking Minors

Article 3 of the Convention on the Rights of the Child can be described as complementary to article 12 of the Convention, as it must be applied in all situations where article 3 issues are present.[98] No solution in the best interests of the child can be fully achieved in situations where the opinion and participation of the child are not considered. The article recognizes the right of a child to express their own views on matters concerning them. This should force decision-makers to take into consideration the particular situation of the child, their own viewpoint, and their best interest.

In a case before a court in The Hague, Netherlands, a minor asylum seeker who applied for asylum when she was sixteen years old was to be sent to Switzerland.[99] However, the minor appealed the transfer decision, claiming that she had no special relationship with her sister in Switzerland and that would not be in her best interests to be transferred there. Instead, she asked to remain in the Netherlands where she had a legal guardian and resided with another minor of the same nationality, in a foster family. She argued that this was better than the situation would be in Switzerland, where she would have to reside in worse conditions, in a reception center for adult refugees. The Hague Court found that she should only be sent to Switzerland if it was in the best interests of the child. The Court stated it was essential that the opinion of the child be heard. An important take away from this case is that the best interest of the child is not a linear value that will always align itself with traditional ideas of family reunification, and the opinion of the minor must be taken into account, especially where the age and maturity of the minor are such that it ought to be an important consideration.[100]

An essential article of the Convention for the protection of unaccompanied refugee minors arriving in Europe is article 22. This article guarantees the right to "appropriate protection and humanitarian assistance" under national and international law. While the article provides that the unaccompanied minor should be supported with the services given to those deprived of their family environment, as defined in article 20 of the Convention,

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[96] Zermatten, *supra* note 91 at 492–93.

[97] *Ibid* at 493.

[98] *Ibid* at 496–97.

[99] See Court of the Hague, The Hague, 23 December 2018, *Applicant v The State Secretary of Security and Justice*, AWB 16/3574 (Netherlands).

[100] *Ibid.*

the article fails to recognize the special needs of refugee children in terms of care.[101] Special protection is also provided for in article 39, which recognizes the need for children to be provided with reintegration efforts when they have been subjected to "neglect, exploitation, or abuse; torture or any other of cruel, inhuman or degrading treatment or punishment; or armed conflict" to promote "health, self-respect and dignity of the child."

Another important consideration in the treatment of minors and whether or not they should be detained is the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. This is "at the core of modern human rights law."[102] Torture was considered by the 1975 General Assembly to be an aggravated form of cruel, inhuman, or degrading treatment, whereas the ECHR claims that torture must be addressed separately so as to address the "special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[103] The definition of torture as defined in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is today widely accepted.[104] There, torture is defined as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes such as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing them or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The critical issue is that detention of children may at times fall within the definitions noted above.

Article 37 of the Convention on the Rights of the Child, regulating the deprivation of liberty of children, addresses a matter that has been described as the embodiment of the idea that "every social problem has a corresponding detention structure."[105] Dealing with the deprivation of liberty has seen the issue being incorporated in international human rights instruments since the Universal Declaration of Human Rights (UDHR). The *I*nternational Covenant on Civil and political Rights (ICCPR) elaborates on the UDHR by adding requirements of lawfulness, release on bail, habeas corpus, the introduction of a set of standards on conditions and treatment during deprivation of liberty, the separation of juveniles from adults at all stages, and the right to compensation for unlawful arrest or

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[101] See Andre Sourander, "Behavior Problems and Traumatic Events of Unaccompanied Refugee Minors" (1998) 22:7 Child Abuse & Neglect 719 at 725.

[102] See William Schabas & Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37:* P*rohibition of Torture, Death, Penalty, Life Imprisonment and Deprivation of Liberty*, vol 37 (Leiden: Martinus Nijhoff Publishers, 2007) at 12.

[103] See *Ireland v The United Kingdom* (1978), No 5310/71, 25 ECHR (Ser A) 1, 2 EHRR 25 at para 167.

[104] 10 December 1984, 1465 UNTS 85 art 1 (entered into force 26 June 1987). See also *Prosecutor v Miroslav Kvocka*, It-98-30/1-T, Final Judgment, (2 November 2001) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: *ICTR* <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf> (ad hoc criminal courts have approached the matter of torture differently by rejecting the need for it to be carried out by a "public official" as this it goes against the application of individual criminal responsibility found in international humanitarian law).

[105] Emilio Garcia Mendez, "Children and Juveniles in Detention" (United Nations Expert Group Meeting, *Children in Trouble – Children and Juveniles in Detention: Application of Human Rights Standards* delivered in Vienna, Austria 30th October to 4th November 1994).

detention. The CRC does however fail to address important matters like the right to liberty and security, right to information upon arrest, right to be brought before a judge or other competent officer and right to compensation. These omissions have in part been rectified by the CRC recommendations which refer to the Beijing Rules, Riyadh Guidelines, Juvenile Detention Legal Rules, Guidelines for Action on Children in the Criminal Justice System, the Standard Minimum Rules for the Treatment of Prisoners, Code of Conduct for Law Enforcement Officials, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Tokyo Rules and the Basic Principles for the Treatment of Prisoners.

The gaps in the UNCRC are not seen as problematic by Schabas and Sax, who maintain that the UNCRC aims to complement the ICCPR and the UDHR, and that the Convention simply does not deal with these rights directly.[106] However, the problem is that not all States Parties to the UNCRC are parties to the ICCPR. Not every country benefits from the rights in the ICCPR. Therefore, there is a failure to some degree to ensure the broadest protection for children in the sense of obligatory protection although it is to be found in the soft laws dealt with above. It is particularly the deprivation of liberty that needs adequate control and scrutiny. There are minimum standards of rights that must be assured if there is a deprivation of liberty, in the context of detention, in particular where it concerns children. As Schabas and Sax point out, there are several reasons given for the restriction of personal liberty of children such as, "public order and state security considerations, punishment, concerns of protection of others or even the child itself."[107] However, detention in any form has a fundamental impact on the development of the child: the normal social interaction, access to learning opportunities and freedom of choice are all taken away in detention. Therefore, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty provides that "juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural right to which they are entitled under national or international law, and which are compatible with the deprivation of liberty."[108] While the right to personal liberty is not referred to specifically in the UNCRC, it is contemplated in the UDHR. The obligation to respect the right of the child to personal liberty demands that States Parties refrain from interference in a person's liberty without the proper justification by international and national law. Article 37 (b) of the UNCRC requires that deprivation of liberty must meet certain criteria, such as lawfulness and non-arbitrariness. It must also comply with specific tests, such as being a measure of last resort and must only last for the shortest amount of time necessary.[109] Otherwise, the child's right to personal liberty will have been violated. Furthermore, a State Party has an obligation to protect the child from interference from private actors, such as child trafficking networks and other exploitative threats.[110] Additionally, the State Parties have an obligation to fulfil certain rights, which includes a requirement to realise a child's liberty through comprehensive positive action as is contained generally in General Comment No 5 on General Measures of Implementation of the UNCRC which provides that states need to take a multitude of

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[106] See Sourander, *supra* note 101 at 38, 42.

[107] *Ibid* at 34.

[108] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, annex, UNGAOR, 45th Sess, Supp No 49, UN Doc A/45/49 (1991) 204 at 206 (Rule 13 in the Annex).

[109] See Schabas, *supra* note 102 at 82.

[110] See *UNCRC*, *supra* note 35.

measures to give effect to the Convention.[111] One step that can assist is the training of professionals working with minors on non-violent methods of discipline and alternatives to institutionalisation. Training should also occur on standards against the deprivation of liberty of minors, registration of detained persons, monitoring mechanisms and effective internal complaint procedures to address and investigate violations of these standards.

When taking into account the four guiding principles identified by the UNCRC,[112] namely the realisation of rights for all children without discrimination, it is important to note this is particularly relevant for unaccompanied minors who are often deprived of their freedom due to their nationality, religion, gender or race. According to the principle of non-discrimination, these factors of identity should not affect their access to education or healthcare. Although unaccompanied minors have had their education disrupted even before they are detained, their placement in detention centres acts to further exacerbate this disruption. Nevertheless, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty provide that children should be provided with education and healthcare. The Rules also stipulate that any process to detain a child must first consider the impact that this will have on the child's development and future. Article 37 (b) of the UNCRC provides that deprivation of liberty only be used as a "measure of last resort" and "for the shortest appropriate period of time." As Schabas and Sax state, unaccompanied minors are particularly vulnerable to the environment of detention as "frequent contact by police and security organs certainly does not create a setting for 'appropriate protection and humanitarian assistance'" as demanded by article 22 of the UNCRC. Moreover, taking into account rule 17(1) of the Beijing Rules that states: "[d]eprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response," an act like the unlawful entry into a country cannot justify the administrative detention of children seeking asylum.[113] This has been supported by the UNHCR since 1988.[114] The Human Rights Committee has found that delays in bringing a person before a judge "must not exceed a few days."[115] Article 37 (c) of the UNCRC calls for every child to be treated with respect and dignity while taking into consideration the special needs of a person their age.[116] The fact that this provision highlights the importance of an age-sensitive approach is essential when dealing with the rights of minors, as the needs, both physical and psychological, of a toddler and a teenager differ enormously. As is stated in Beijing Rule 5.1, the juvenile justice system should "emphasize the well-being of the juvenile" and be proportionate to the circumstances of the offenders and the offense. Detention or the deprivation of liberty of unaccompanied asylum seeking minors, when argued as a preventative measure, violates the principle of proportionality. The best interests of the child principle, in the context of detention, tries to ensure that there is a child-oriented view embedded in any question regarding the possibility of detention.

When Article 40 (dealing with children alleged to have transgressed criminal law) of the UNCRC was adopted there was hope it would be the necessary catalyst to transform

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[111] *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, CRC GC 2003/5, UNGAOR, 59th Sess, Supp 41, UN Doc A/59/41 (2004) 114.

[112] See *General comment No 8: Article 9 (Right to liberty and security of persons)*, OHCOR–CCPR, 16th Sess, (30 June 1982), UN Doc HRI/GEN/1/Rev.9 (Vol I), (2008) 179 [*General Comment No 8*].

[113] Schabas, *supra* note 102 at 82.

[114] "Guidelines", *supra* note 28.

[115] *General Comment No 8*, *supra* note 112 at para 2.

[116] See generally Myres S McDougal, Harold D Lasswell & Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, 2 ed (Oxford: Oxford University Press, 2018 at 367 (Section about the issues concerning dignity).

child justice systems from a punitive approach to one more aligned with the best interests of the child.[117] This has not been the case.[118] Importantly, this article enshrines the right of children to be "informed promptly and directly of the charges against him or her […] and to have legal or other appropriate assistance in the preparation and presentation of his or her defence." This, as will be discussed below, is not the case for many unaccompanied minors who are detained. It does not however address all the issues contained in the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules").[119] While progress concerning juvenile justice has occurred in some places with the creation of juvenile courts and juvenile detention facilities, this area of the justice system, on a global scale, still remains largely unchanged. While Van Bueren describes several States as attributing this to a lack of funds, it is clear the issue also stems from a wider disregard for human rights and different cultural understandings of children and their rights.[120] The ECHR has adopted an alternative approach in which it considers that articles of the Convention are binding insofar as they are present in European legislation.[121]

The main principle contained in both the Beijing Rules (Rule 5) and UNCRC article 40(1) is that the wellbeing of the child must be ensured in the administration of child criminal justice. This implies the protection of other rights, such as the assurance of contact with their family whenever possible. In the case of unaccompanied minors, this might simply not be feasible, but should always be the case when the child has family within the region. In such cases, considerable effort must be made by the authorities to contact the family. Article 40(1) also states that the child should be in an environment that promotes their sense of dignity and the respect for human rights. More importantly, it states that any treatment should take into consideration the age of the child and their reintegration. This is particularly relevant in the case of unaccompanied refugee minors. Detention can never be a positive force in the end goal of true rehabilitation or (re)integration. Thus, it should almost never be used for asylum-seekers unless there is a serious concern, such as one pertaining to national security.

The rights of the child also ensure that the child, as with others, is assured of the right to have their case determined by a "competent independent and impartial authority or judicial body."[122] The child is also entitled to the presence of legal or other appropriate assistance. While Van Bueren argues that it is not important that children are always granted formal legal assistance,[123] a United Nations Institute for Training and Research (UNITAR) study found that the right to counsel can be more important for children precisely because of the informality of juvenile proceedings.[124] Legal counsel is fundamental in every step of the asylum granting process for unaccompanied minors since it can be a preventative measure, as well as a remedial one, which ensures the rights of children and refugees.

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[117] See Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice*, vol 40 (Leiden: Martinus Nijhoff Publihsers, 2006) at paras 1–2.

[118] *Ibid* at para 50.

[119] GA Res 40/33, UNGAOR, 40th Sess, Supp No 53, UN Doc A/40/53 (1985) 206.

[120] Van Bueren, *supra* note 117 at paras 4, 11.

[121] See generally Council of Europe, European Commission for Democracy Through Law (Venice Commission), 57th Sess, *Opinion on the Implications of a Legally-Binding EU Charter of Fundamental Rights on Human Rights Protection in Europe*, Opinion No 256 (2003).

[122] *UNCRC*, *supra* note 35, art 40(2)(b)(iii).

[123] Van Bueren, *supra* note 117 at paras 4, 11.

[124] See Anna Mamalakis Pappas, "Law and the Status of the Child" (1981) 13:1/2 Colum HRLR xxv at liii.

In light of the above, it is argued that, although complex, the best interests of the child should be individualised and considered on a case-by-case basis. Even if some principles can be said to be generally in the best interest of the child, such as family reunification or child education, in reality, access to these situations can expose the minor to other dangers that would undermine that same interest. As we have seen, there are different principles and rights that come into play to ensure that the special conditions and needs of children are addressed in a proper manner, in a variety of settings.[125] One of these settings is detention, in which some rights of the child are inevitably violated, but others can be maintained even in conditions of deprivation of liberty.[126] As a guiding principle, the best interests of the child principle must be applied at all stages of child development and to all decisions, in that it should almost never be used to deny the child access to one of the rights enshrined in any of the international conventions that protect their rights. Though the principle is applicable to all situations regarding children, the truth is that there are situations which are not directly addressed by the Convention on the Rights of the Child or which are more easily interpreted by reading them alongside other advisory or binding legal documents as well as the opinions of experts.

VI. The European Position

The European Convention on Human Rights, drafted in 1950, fails to provide for any specific rights for children.[127] However, through domestic legislation, additional European legal documents and jurisprudence, the ECHR has accommodated within their decisions the issues that affect children. Indeed, the Treaty on the European Union, as well as the Charter for Fundamental Rights of the European Union, have set as a goal the promotion of the protection of the rights of the child. These documents provide for the best interest of the child as well as the right to asylum.[128] These rights are also emphasised in the European Social Charter, which provides for the right of children to seek protection and the right to social, legal and economic protection.[129] European States have also adopted legal documents related to the rights of the child. For example, the best interests of the child are protected in the European Convention on the Exercise of Children's Rights.[130] This Convention states that the judicial authority must take into account the best interests of the child in their decision-making process. Other protection for children is provided in other legal instruments, such as the Treaty on the Functioning of the European Union, which deals with measures to fight human trafficking and discrimination.[131]

The main European directive on the reception standards for refugees provides, in its very first paragraphs, an important commentary that should serve as the foundation for analysing how the rights of refugees are conceptualised by European governments. It states that a "common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of

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[125] See *Abdullahi*, *supra* note 74.

[126] See Lara Yoder Nafziger, "Protection or Persecution: The Detention of Unaccompanied Immigrant Children in the United States" (2006) 28:1 Hamline J Pub L & Pol'y 357 at 377–379.

[127] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) [ECHR].

[128] See EC, *Charter for Fundamental Rights of the European Union*, [2000] OJ, C 364/1 arts 18, 24.

[129] *European Social Charter (Revised)*, 3 May 1996, ETS 163 arts 7, 17 (entered into force 1 July 1999).

[130] *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160 art 6 (entered into force 1 July 2000).

[131] EC, *Consolidated Version of the Treaty on the Functioning of the European Union,* [2012] OJ C 326/47 arts 10, 79.

freedom, security and justice."[132] One of the objectives of that legal document is that "the harmonization of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception."[133] Unfortunately, refugees and asylum seekers are often seen as an issue that must be addressed as a border security problem, rather than a matter of upholding international human rights commitments.[134]

As far as detention is concerned, Member States also have a duty to uphold the standards of provision of healthcare, ensuring due diligence, proper and accurate records of detention and the possibility of a prompt judicial review of the lawfulness of the detention. The Directive also provides that a detainee is entitled to free legal assistance and representation while being informed, in a language they can understand, and told the reason for their detention.[135] The Directive aims to further protect the rights of detainees while they are in a detention facility, by ensuring the right to communicate with family, receive legal counsel, the right to access open-air spaces, and being properly notified of their obligations and rights.[136] Nevertheless, the Directive severely fails in the protection of the rights of asylum seekers concerning detention. While it provides them with some judicial guarantees, in some instances it allows for the detention of an asylum seeker who has not committed, or is not suspected, of having committed a crime.[137] The Directive allows for detention to verify or determine identity or nationality of a person.[138] It also allows for measures to be taken to determine elements for international protection, if the person is subject to a return procedure as contained in directive 2008/115/EC,[139] for matters of national security or public order and for determining which country is responsible for providing protection.[140] However, these exceptions are in conflict with several human rights provisions, which specifically state that asylum seekers must not be deprived of their liberty merely because of their status as an asylum seeker. Indeed, Member States have excused the deprivation of liberty of asylum seekers by claiming that it is a necessity for national security to have each candidate adequately assessed before allowing them to enter the country under conditions of non-deprivation of liberty.[141] However, the problem with permitting detention to take place legally whenever "national security or public order" is supposedly at issue, is that a large influx of asylum seekers, such as that which has occurred in Europe since 2015,[142] can easily became an argument for severely limiting the human rights of an entire group of people. This is not only a direct violation of human rights, but the rhetoric feeds a discriminatory, xenophobic, often Islamophobic narrative that is contrary to the principles contained in the various European human rights legal instruments.[143] Using the issues of refugees, migrants

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[132] Directive 2013/33/EU, *supra* note 52 at para 2.

[133] *Ibid* at para 12.

[134] As an example, refugee matters in Portugal are not handled by the Ministry of Foreign Affairs, which has a section dedicated to human rights, but rather by Serviços de Estrangeiros e Fronteiras (Foreign and Border Services).

[135] Directive 2013/33/EU, *supra* note 52, arts 9(4)-(6).

[136] *Ibid*, art 10.

[137] See e.g. *ibid*, art 8(3)(a).

[138] *Ibid*, art 8(3)(c).

[139] EC, *Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, [2008] OJ L 348/98.

[140] Directive 2013/33/EU, *supra* note 52, art 8(3).

[141] See Court of Justice of the European Union, Press Release, No 13/16 "EU law allows an asylum seeker to be detained when the protection of national security or public order so requires" (15 February 2016), online: *Ct J EU Press & Media* <www.curia.europa.eu>.

[142] "Migratory Map" (last visited 14 August 2019), online: *FRONTEX* <frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

[143] See e.g. "2016 Reports" (last visited 14 July 2019), online: *European Islamophobia Report* <www.islamophobiaeurope.com/reports/2016-reports/>.

and foreigners is today a rhetoric commonly used to promote anger and fear for domestic political ends.[144] Nowhere is this truer than what is happening in the USA today.[145]

It is interesting to note that other provisions of the Directive protect unaccompanied refugee minors because they are deemed vulnerable people and/or people with special needs.[146] They are seen to be holders of additional rights that necessitate additional care and protection. In fact, the directive underlines that the mental health of the vulnerable[147] or those with special needs should be of paramount concern.[148] This cannot be achieved by subjecting them to conditions of deprivation of liberty. In fact, it actively contributes to the worsening of the health of these minors. For this reason it is stated that asylum seekers who are minors should only be detained as a measure of last resort and for the shortest amount of time possible. However, there are viable alternatives to detention that allow for the appropriate monitoring of any minor, without potentially causing as much mental health damage as the current situations of deprivation of liberty.[149] Indeed, the Directive itself emphasises the need for efforts to be made in order to avoid detention, stating that minors seeking asylum "should never be detained in prison accommodation"[150] and "never with adults."[151] Supplementary measures are assured for female asylum seekers such as female-only quarters. Additionally, asylum-seeking minors also have the right to have their privacy and their data adequately protected when they are under detention.[152] Regarding education, the Directive, contrary to what most human rights legal documents provide, states that education may be postponed for up to three months.[153] However, the reality is that this time limit is usually not respected.[154]

Although part of the much-needed legislative foundation is already in place, there is a severe lack of proper application of the law and assurance that adequate mechanisms and services are in place for unaccompanied asylum-seeking minors. As we will see in the next section of this article, the failure of the application of the law occurs during different phases of the asylum seeking process. These failures to apply the law have the potential to seriously affect the human rights of asylum seekers and have a long-term impact on the safety and psychophysical health of the asylum seeker. Additionally, as the following sections will demonstrate, there are severe legal lacunae in the treatment and care of unaccompanied asylum seeking minors. One of the most serious and human rights-abusing practices is the deprivation of liberty of unaccompanied and separated refugee minors for no other reason than their condition.

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144 See e.g. Sarah Rogerson, "The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border" (2016) 61:5 Vill L Rev 843.

145 See Kari Hong, "Weaponizing Fear: The 20-Year Attack on Asylum" (2018) 22:2 Lewis & Clark L Rev 541.

146 See e.g. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No 13178/03, [2006] XI ECHR 267, 46 EHRR 23 at para 55 (The judgement is an example where vulnerability was cited as a crucial factor).

147 Directive 2013/33/EU, *supra* note 52, art 11(1).

148 *Ibid*, art 19.

149 See generally Kristina Touzenis, *Unaccompanied Minors: Rights and Protection* (Rome: XL Edizioni, 2006).

150 Directive 2013/33/EU, *supra* note 52, art 11(3).

151 *Ibid*, art 10(1).

152 *Ibid*, art 11.

153 *Ibid*, art 14(2).

154 See *Mohamad*, *supra* note 82 at paras 39–41.

VII. Refuting the Legal Basis for the Detention of Asylum Seeking Minors and Presenting Alternatives

Asylum seeking unaccompanied minors travel to their destinations without the support of a family system, often along perilous paths, suffering trauma during travel and after arrival. As noted throughout this article, a problematic aspect, which goes against the principles and rights contained in the Convention on the Rights of the Child, the Refugee Convention and numerous other legal instruments, is the practice of detaining asylum-seeking minors.[155] This is made worse by the fact that this detention is practiced not only as a pre-trial measure, but worse, it occurs when no accusations have been levelled against the minor whatsoever and their status has not been determined. These detention practices are, in theory, legally permitted if they are used as a last resort and for the shortest amount of time possible, particularly for reasons of national security or public safety.[156] However, the situations and conditions in which these minors are usually detained do not fit these criteria. A human rights based approach ought to be used to govern these issues.[157] In addition to not meeting these criteria, keeping children in detention is inhumane because of the effect of incarceration. It is also inhumane because the conditions in the detention centres are inhumane.[158] Individuals with special international protection, who are escaping their own home country, do not do so because they wish to, but because they are forced to by the problematic conditions in the places where they come from. They should not, however under almost all circumstances, be detained. What is more important is that detention cannot be the default position in handling the arrival of unaccompanied asylum-seeking minors. As will be discussed below, there are alternatives to detention that can uphold the rights of refugees and children while maintaining a certain level of vigilance over them.

The detention of asylum seekers must be used only as a "last resort."[159] The phrase "last resort" clearly implies that there is no viable option other than detention. However, the question must be asked: what exactly is a last resort? In the case of detention, the narrative presented is that a last resort is the only option for the preservation of public order and national security. However, in most countries, there are reception centres aimed at receiving those who are requesting asylum once they come into a country. On the other hand, detention at border centres, if only for a few days before transferring the asylum seeker, should not be called detention, nor should it be done under conditions of detention. The increase in the influx of asylum seekers must necessitate that the capacity for reception in situ, such as accommodation and officials working on their cases, is increased to ensure that the quality of services and help provided does not decrease. An increase in the influx of asylum seekers should never be accepted as a moral or legal excuse for decreasing human right protection in countries of reception. This is particularly true in the case of unaccompanied asylum seeking minors who are, by law, entitled to special care and protection once they arrive in a country of reception.[160] Conditions of detention, especially when in the same quarters as adults and them being susceptible to violence in those circumstances, are not synonymous with the special protection and care that they should be

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[155] See generally Jennifer Allsopp & Elaine Chase, "Best Interests, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Migrant and Refugee Minors Coming of Age in Europe" (2017) 45:2 J Ethnic & Migr Stud 293.

[156] See Jane Hughes & Fabrice Liebaut, eds, *Detention of Asylum Seekers in Europe: Analysis and Perspective* (The Hague: Kluwer Law International, 1998).

[157] See generally Suman Momin, "A Human Rights Based Approach to Refugees: A Look at the Syrian Refugee Crisis and the Responses from Germany and the United States" (2017) 9 Duke Forum for L & Soc Change 55.

[158] See Frieder Dünkel, "European Penology: The Rise and Fall of Prison Population Rates in Europe in Times of Migrant Crises and Terrorism" (2017) 14:6 Eur J Criminology 629 at 647.

[159] See Rafał Kostrzyński, "Detention Should be a Measure of Last Resort" (13 December 2012), online: *United Nations High Commissioner for Refugees: Central Europe* <www.unhcr.org/ceu/613-ennews2012detention-should-be-a-measure-of-last-resort-html.html>.

[160] Directive 2013/33/EU, *supra* note 52 at para 14.

afforded. Detention should not be considered a valid last resort, and, in fact, should not be even on the list of options for the reception of unaccompanied minors seeking asylum. There might be rare cases, as mentioned at the beginning of this article, related to national security or other exceptional circumstances, but such detention cases ought to be for real exceptional cases that really justify detention. In those cases detention ought to be determined by a court after an arrest pending a trial or another process.

Detention should not be the last resort option for almost all asylum-seekers or migrants. As will be discussed below, there are alternatives that can ensure reception of unaccompanied refugee minors that do not expose them to the same vulnerability and increased likelihood of human rights violations.[161] When detention is used, though it might be claimed that it is a last resort, it is clear other options are in fact available, as will be discussed later in this article. These options are simply not used either because they are more expensive, require more personnel or would, in the eyes of the government officials who make such decisions, be more dangerous. Sometimes, the political will of politicians or government officials to consider alternatives does not exist. Other times, detention is used to deter others from coming to the country, and, on other occasions, the political value of detention is seen to appease a political faction in the state. Of course, a great influx of asylum seekers should not be unsupervised, but it is crucial that, after an interview at the border and the prompt registration of their situation, asylum seekers should be given appropriate accommodation and education. Unaccompanied minors, in particular, should not be kept in detention while awaiting their asylum procedure to be finished or while they appeal a decision in a court of law. Any detention must be for the shortest amount of time possible.[162] The shortest amount of time is not an easily definable term. Its vagueness is deliberate. It is harder to pinpoint than the term "last resort." Nevertheless, there have been cases before national courts and the ECHR that show that detention lasts much longer than what can reasonably be considered the shortest amount of time.[163] To extend the period of detention of unaccompanied minors, when they are in a particularly vulnerable situation, when they have been separated from their families, who would be in a position to observe their best interests, even if there is a guardian and legal counsel, cannot be in the best interests of the child. Detention is sometimes extended while unaccompanied minors await appeals of their asylum request, or while the arrangements for them to be sent back to their countries are being organised. However, to extend it when it is unnecessary, or not a last resort, is a clear violation of the legal provisions that underline asylum systems.

Finally, it is essential to understand that currently detention is not always used as a last resort. It is not used for the shortest amount of time possible. Alternatives to detention do exist. It is important that these alternatives comply with the best interests of the child. Such alternatives should make efforts such as keeping siblings together and placing asylum seekers in an environment that is as accommodating as possible, considering their religious and cultural needs. The families or organisations that receive asylum seekers must be monitored by independent groups, to ensure that they are living up to their responsibilities and respecting the human rights they are duty-bound to deliver. With regard to the alternatives to detention, the most viable are those designed for short-term care and assistance arrangements. They can include fostering by a family or institution, although

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[161] See generally Ana Beduschi, "Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts" (2018) 36:1 BU ILJ 55 (It is argued that vulnerability ought to be a factor that courts considered when examining cases); Lourdes Peroni & Alexandra Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law" (2013) 11:4 Intl J Constitutional L 1056 at 1070 (the article explains the use of the concept).

[162] See *Mubilanzila Mayeka*, *supra* note 25 (the European Court of Human Rights supports the reasonability of time limits as well).

[163] See *Mohamad, supra* note 82 at 59.

expert agencies advise against this. It is argued that, although this is a better alternative to detention, it should be "discouraged" as its character as a more traditional and spontaneous form of care also means it might not provide unaccompanied minors with the assistance and care they require.[164] Van Bueren goes further in her statements and maintains that fostering, as an alternative to institutional punishment, "requires very careful State support and monitoring as the opportunities for abuse are well documented."[165] Likewise, institutional care is also seen as a last resort alternative to detention, since it cannot always provide the developmental care and support a child needs. However, it might be a valid temporary arrangement to keep a minor out of a detention facility. Community-based care has the advantage of being able to keep the children in their own community, and provides them with a more familiar, less institutionalised environment. All of these must be properly monitored and minors should only be placed in one of these situations once basic care and accommodation conditions are assured. As guardians who are assigned to unaccompanied minors are meant to care for them within the asylum procedure as well as being required to possess training and education on relevant judicial matters,[166] they are not necessarily in the best position to care for the same unaccompanied minors they are responsible for legally. In the particular situation of unaccompanied minors and their more vulnerable position, it is essential that they are taken in by people with enough training to identify such vulnerability in order to help the children or direct them to specialised personnel who can assist them in working through any trauma or other psychosocial issues.

Detention is almost never in the best interests of the child. In any case, the detention carried out in most countries does not abide by legal standards, as it is not executed as a last resort option, nor for the shortest amount of time possible. Alternative care and assistance measures which are more in line with the best interests of the child, such as community-based care, fostering or even institutional care, are better options which ensure, though not intrinsically, that human rights will be better observed and that the unaccompanied minor will have their vulnerable position accommodated for in the country of reception. The reality, however, is worse than that, with alternatives to detention centres sometimes taking the form of the infamous 'Jungle' in Calais and its deplorable conditions.[167] It is important to remember that simply not placing asylum seekers in detention is not enough; their rights and proper conditions must be secured and buttressed with sufficient support.

For the existing standards to be fulfilled, it is essential that professionals be involved in the handling and care of immigrants. International protection providers must be properly educated, with independent inspections made regularly. Steps stemming from positive obligations must be taken with the building of child-appropriate living, educational and recreational facilities and the increased employment of legal, educational and healthcare professionals that can provide the necessary elements for the safe development of the child, particularly in the case of unaccompanied minors. Lastly, the main legislative change that ought to occur is the commitment of States, be it at the international, regional or national level, to outlaw any form of detention of asylum-seeking minors, who must be kept with their family or, when unaccompanied, be provided with a safe environment and adequate legal advice.

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[164] Red Cross, *supra* note 5 at 62.

[165] Van Bueren, *supra* note 117 at para 50.

[166] See "Guidelines", *supra* note 28 at 1.

[167] See Sandri, Elisa, "'Volunteer Humanitarianism': volunteers and humanitarian aid in the Jungle refugee camp of Calais" (2018) 44:1 Journal of Ethnic and Migration Studies 65.

There are some useful processes that have been occurring to ensure that States deal better with migrants and refugees, in general, but have provisions that deal with children and issues concerning their detention.[168] These developments are culminating in 2018 with the finalisation of two Global Compacts: one on migration and one on refugees.

The United Nations Global Compact for Safe, Orderly and Regular Migration emerged as a result of General Assembly resolution 71/1 of 19 September 2016, titled the "New York Declaration for Refugees and Migrants" which decided to launch a process of intergovernmental negotiations.[169] This began a process that lead to the adoption of the Global Compact on migration.[170] The text was agreed to in July 2018. It was adopted at the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration that is to be held on 10 and 11 December 2018 in Marrakech, Morocco.[171] The Global Compact has various objectives, including Objective 13(c) that provides that States will: "Use immigration detention only as a measure of last resort and work towards alternatives."[172] Specifically, States commit to:

> ensure that any detention in the context of international migration follows due process, is non arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorized officials and is for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit or in proceedings of return, and regardless of the type of place where the detention occurs. We further commit to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.[173]

However, the Global Compact, as was noted by the General Assembly President, Miroslav Lajčák, when the text was adopted, seemingly to get State support, "is not legally binding. It does not dictate. It will not impose. And it fully respects the sovereignty of States."[174] Thus, while the Compact has been termed a "milestone,"[175] and the rhetoric by States is present to effect change and reform of the migration process, the question is to

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[168] See generally Volker Türk & Madeline Garlick, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees" (2016) 28:4 Intl J Refugee L 656 (the article explains the process leading to the Global Compact).

[169] See *New York Declaration for Refugees and Migrants*, GA Res 71/1, UNGAOR, 71st Sess, Supp No 49, UN Doc A/71/49 (Vol I) (2016) 1.

[170] See generally Thomas Gammeltoft-Hansen et al, "What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration" (2017), online (pdf): *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* <www.rwi.lu.se/publications/compact-migrants-rights-state-responsibilities-regarding-design-un-global-compact-safe-orderly-regular-migration/>.

[171] See Elspeth Guild "The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?" (2018) 30:4 Int J of Refugee L 661.

[172] *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, UNGAOR 73 Sess, Supp No 49, UN Doc A/73/49 (Vol I) 230 at 246.

[173] *Intergovernmental Conference to Adopt the Global Compact for Safe*, Draft outcome document of the Conference, UNGAOR, annex, 72nd Sess, UN Doc A/CONF.231/3 (2018) at 19–20.

[174] "'Historic moment' for people on the move, as UN agrees first-ever Global Compact on migration", *UN News* (13 July 2018), online: <news.un.org/en/story/2018/07/1014632>.

[175] Elspeth Guild, "The Global Compact as a Milestone in Global Governance of Migration" (2018) 18:3 Global Soc Pol'y at 325.

what extent the document will effect actual state practice. That remains to be seen. Already, a number of States have refused to be part of the Global Compact processes.[176]

The other Global Compact is the Global Compact on Refugees.[177] That Compact is also a part of the 2016 New York Declaration process.[178] The text of the Global Compact on Refugees, which is also non-binding, was released on 20 July 2018. This Compact was adopted by the General Assembly in December 2018.[179] It is problematic however that very little of that text addresses issues of detention, and very little of the text deals with children and detention.[180] The text in general, and that part of the text that addresses children specifically, addresses problems that States have, and how States ought to be supported to deal with problems, rather than from the perspective of children and how to protect them. Thus the text states, as far as refugee children in detention are concerned:

> In support of concerned countries, States and relevant stakeholders will contribute resources and expertise for the establishment of mechanisms for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures. Multi-stakeholder response teams could be established to facilitate this operationally. This will include the identification and referral of children, including unaccompanied and separated children, to best interests assessment and/or determination, together with appropriate care arrangements or other services. Identification and referral of victims of trafficking in persons and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs or victim support, is key; as is identification and referral of stateless persons and those at risk of statelessness, including to statelessness determination procedures. The development of non-custodial and community-based alternatives to detention, particularly for children, will also be supported.[181]

VIII. Conclusion

While it is impossible to say for certain how many migrant and asylum-seeking children have gone missing after they arrived in Europe, the lowest estimate, dealing with only some few countries, is that 10,000 cannot be found. The actual number is well above that.[182] Additionally, many children have gone missing in the Mediterranean Sea on their way to Europe.

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[176] See Jane McAdam, "Global Compact for Safe, Orderly and Regular Migration" (2019) Int Leg Materials 58:1 160.

[177] See BS Chimni, "Global Compact on Refugees: One Step Forward, Two Steps Back" (2018) 30:4 Intl J of Refugee L 630.

[178] Fatima Khan and Cecil Sackeyfio "What Promise Does the Global Compact on Refugees Hold for African Refugees?" (2018) 30:4 Int'l J of Refugee L 696.

[179] *Report of the United Nations High Commissioner for Refugees: Part II Global compact on refugees*, UNGAOR, 73rd Sess, Supp No 12, UN Doc A/73/12 (II) (2018) [*Global Compact on Refugees*].

[180] See e.g. Kevin Appleby, "Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees" (2017) 5:4 J Migr & Hum Sec 780 (the article details some of the issues in general that the Compact ought to have taken up).

[181] *Global Compact on Refugees*, *supra* note 179 at para 60.

[182] See Jeremy Sarkin "Reducing the Number of Children That Go Missing As a Result of Migration and Refugee Flows and Putting in Place the Means to Find Them" (2016) 2:1 IHRC J Hum Rts at 3.

The current systems used by States when dealing with unaccompanied minors are clearly failing to uphold international commitments to protect these children. Legal instruments already exist to protect unaccompanied asylum seeking minors, be it international conventions, regional instruments, or national legislation. The most important problem is that there is insufficient application of these standards. There is also an insufficient effort made by States to act positively when it comes to their responsibilities. Indeed, unaccompanied asylum seeking minors should not be detained generally. They should rather be given adequate accommodation, access to health and education, in addition to independent and informed legal counsel in a language they understand, from point of arrival in the country. Without positive steps being taken, merely eliminating detention does not ensure the fulfilment of the rights of unaccompanied asylum seeking minors.

Detention of these children infringes directly and indirectly on international, regional and national legislation. The practice targets one of the most vulnerable groups in the world. As we have seen in this article, when practised, such detention does not fall under the exceptions allowed for by the EU or by the UN. This is the case because such detention is not practised for the shortest time, nor as a last resort. Instead, detention of unaccompanied asylum seeking minors further victimises them and robs them of proper development in their best interests. It also makes them even more vulnerable to human trafficking, smuggling or enslavement.

Detention of minors can usually not be justified under the guise of security or best interest of the child. The alternatives to detention should not only be in line with article 3 of the Convention on the Rights of the Child, but should serve to make countries of reception safer by building a trusting relationship between national agents and asylum seekers. It would also make it easier to detect and stop smuggling and human trafficking. While detention and general lack of proper accommodation is used by states to deter asylum seekers and migrants from fleeing to their countries, the truth is that children do not always choose their destination and, when escaping from famine, war or persecution, the risk of poor conditions in European camps will seem like a safer option. The solution then, cannot lie in deterrence but rather in allowing for proper human corridors to lead asylum seekers to safe countries and in ensuring their rights and protection upon arrival in the countries of destination.

Thus, the detention of asylum seeking minors can almost never be in the best interest of the child, as it cannot provide for a stable and adequate environment for children in line with international guidelines. Moreover, it is not practiced as a last resort or for the shortest time possible, thus falling foul of European directives.

Only a universal and human rights-focused approach can ensure the adequate provision of resources and facilities in accordance with the rights and best interests of the unaccompanied asylum seeking minor. Hopefully, the two Global Compacts will assist in this regard. As noted, they are non-binding and to some extent, as far as the Refugees Compact is concerned, do not add protection for refugees. It is drafted very much for states and for the problems that states face. This is problematic because international law that is binding, dealing with refugees, is antiquated and obsolete.[183] Dramatic reform is needed to provide greater protection to those effected (and those who ought to be effected by them) by those

[183] See e.g. Jill I Goldenziel, "Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States" (2017) 35:1 BJIL 47.

laws.[184] However, States are responsible for deciding if and when to reform international law. In fact, this area of the law has been termed the "last bastion of sovereignty."[185] While that term was used in 2004, it is still true in many respects, although sovereignty of states on these issues is much more reduced, because of State membership in various institutions, or because of the operation of various international laws. In the present climate, however there is not a great deal of appetite for States to modify these international laws. In fact, any attempt to create change is likely to result in adverse effects rather than achieving results that assist people who are trying to escape the inhumane conditions in which they find themselves in many parts of the world.

[184] See generally Jaya Ramji-Nogales, "Moving Beyond the Refugee Law Paradigm" (2017) 111 AJIL Unbound 8; Jaya Ramji-Nogales, "Migration Emergencies" (2017) 68:3 Hastings LJ 609.

[185] Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67:4 Mod L Rev 588 at 588.